

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of

Framework for Broadband Internet Service

GN Docket No. 10-127

**COMMENTS OF  
THE STATE OF HAWAII**

Clyde S. Sonobe  
Administrator  
Cable Television Division  
Department of Commerce  
and Consumer Affairs  
STATE OF HAWAII  
335 Merchant Street  
Honolulu, Hawaii 96813

Bruce A. Olcott  
Herbert E. Marks  
Squire, Sanders & Dempsey, L.L.P.  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20004  
(202) 626-6600

Its Attorneys

July 15, 2010

## SUMMARY

The State respectfully requests that the Commission, in determining the appropriate legal framework for regulating broadband Internet service, make certain that it retains authority to enforce certain universal service provisions on broadband Internet access services. These universal service requirements, particularly the rate integration and geographic averaging requirements of Section 254(g), have been critical in making communications services available in Hawaii at comparable functionality and prices to services available in the continental United States.

The requirements of Section 254(g) are vital to ensure that communication service rates remain reasonable and that competition remains robust in the State of Hawaii. The Commission has repeatedly reaffirmed the importance of its rate integration and geographic averaging policies, which significantly pre-date their 1996 codification by Congress in Section 254(g) of the Communications Act. The public interest warrants the continued application of Section 254(g) to broadband Internet access services. Indeed, it would be singularly inappropriate if the Commission were to permit discrimination with respect to Internet Protocol-based digital services that it would not permit with respect to analog services.

The State recognizes that the Commission's proposed "third way" would allow the Commission to retain such authority. The State, however, limits its comments to a request that the Commission seek to retain its authority to impose rate integration and geographic averaging policies when reviewing the evidentiary record established by this proceeding.

## TABLE OF CONTENTS

I.	BACKGROUND .....	2
II.	DISCUSSION.....	5
A.	Enforcement of Section 254(g) is Vital to Ensure That Communication Service Rates Remain Reasonable and to Ensure That Competition Remains Robust, Policies Which Have Been Repeatedly Supported by the Commission.....	6
B.	The Public Interest Warrants Commission Action to Continue to Apply Section 254(g) to Broadband Internet Access Services.....	8
III.	CONCLUSION.....	11

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of  Framework for Broadband Internet Service
--

GN Docket No. 10-127

**COMMENTS OF  
THE STATE OF HAWAII**

The State of Hawaii (the “State”), by its attorneys and pursuant to Section 1.415 of the Federal Communications Commission’s (“FCC” or “Commission”) rules, 47 C.F.R. § 1.415, hereby comments on the Notice of Inquiry (“NOI”) in the above captioned proceeding.<sup>1</sup>

Pursuant to its NOI, the Commission seeks comment on the legal framework for regulating broadband Internet service, including whether changes should be made to the status of the carrier transit function of broadband Internet access services and the legal and practical consequences of reclassifying Internet connectivity.<sup>2</sup> The State limits its comments to expressing support for ensuring that the Commission retains its authority to impose rate integration and geographic averaging policies on broadband Internet services regardless of whether they are reclassified.<sup>3</sup> The State acknowledges that the Commission’s proposed “third way” is one mechanism that would enable the FCC to retain its authority to impose Section

---

<sup>1</sup> These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

<sup>2</sup> See *In the Matter of Framework for Broadband Internet Service*, Notice of Inquiry, FCC 10-114, ¶ 2 (2010) (“*NOI*”).

<sup>3</sup> See 47 U.S.C. § 254(g).

254(g) requirements over broadband Internet based services.<sup>4</sup> To the extent that other parties suggest alternative proposals to the Commission’s “third way,” however, the State would be willing to explore such options.

## **I. BACKGROUND**

In 2005, the Commission issued a Report and Order and Notice of Proposed Rulemaking (“*2005 Order and NPRM*”) classifying broadband Internet access services as “information services,” rather than a combination of “information services” and “telecommunications services.”<sup>5</sup> Even though telecommunications transit services are embedded within Internet access services, the Commission then concluded that reclassification was appropriate because broadband carriers made the two services available to consumers as a single, integrated service.<sup>6</sup> The Commission’s classification was upheld by the Supreme Court’s ruling in *NCTA v. Brand X*.<sup>7</sup> As a result, broadband Internet access services were removed from the extensive body of regulatory powers held by the Commission over telecommunications services under Title II of the Communications Act and placed entirely under Title I of the Communications Act, which provides the Commission limited “ancillary” regulatory jurisdiction.

---

<sup>4</sup> The underlying policy mandates of Section 254(g) clearly could be imposed consistent with the Commission’s new regulatory approach, and are certainly equally worthy of enforcement. *See NOI*, ¶¶ 2, 78.

<sup>5</sup> *See, e.g., In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, CC Docket No. 02-33 (2005) (“*2005 Order and NPRM*”).

<sup>6</sup> *Id.* ¶ 11.

<sup>7</sup> *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 545 U.S. 967 (2005) (“*NCTA v. Brand X*”).

A basic assumption underlying the Commission's decision to classify broadband Internet access services entirely as information services was that the Commission would be able to employ its ancillary jurisdiction to enforce certain long standing policies regarding nondiscrimination, consumer protect and universal service, including the Commission's rate integration and geographic averaging policies.<sup>8</sup> These regulations were codified in Title II of the Communications Act, but were believed to be enforceable on broadband providers through the Commission's ancillary authority.

In fact, the Commission expressly stated in its *2005 Order and NPRM* that each of the predicates for ancillary jurisdiction "are likely satisfied for any *consumer protection*, network reliability, or national security obligation that we may subsequently decide to impose on wireline broadband Internet access service providers," and that its classification of broadband Internet access services is not meant to jeopardize the policies of Section 254(g).<sup>9</sup> The State filed comments and reply comments with the Commission in support of its position to retain authority

---

<sup>8</sup> Section 254(g) directs the Commission to adopt geographic averaging rules "to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas . . . be no higher than the rates charged by each such provider to its subscribers in urban areas" and to adopt rate integration rules to "require that a provider of interstate interexchange telecommunications services . . . provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." *See* 47 U.S.C. § 254(g).

<sup>9</sup> *See 2005 Order and NPRM*, ¶¶ 109, 157 (*emphasis added*).

to enforce the Section 254(g) requirements.<sup>10</sup> Few commenting parties directly opposed this approach.<sup>11</sup>

Before the conclusion of the 2005 proceeding, the U.S. Court of Appeals for the D.C. Circuit in *Comcast v. FCC* placed in significant doubt the FCC's assumed authority to impose universal service requirements on broadband Internet access services.<sup>12</sup> In that case, the Commission had found that Comcast was violating FCC policies of ensuring that broadband networks are "widely deployed, open, affordable, and accessible to all consumers" when it degraded its customers' lawful use of peer-to-peer file sharing programs.<sup>13</sup> The court concluded that the Commission lacked statutory authority under its Title I "ancillary jurisdiction" to regulate and stop the broadband service provider's network management practices. The court noted that the Commission's reliance on policy for authority was misplaced because statements of policy, by themselves, do not create "statutorily mandated responsibilities."<sup>14</sup>

---

<sup>10</sup> See *Comments of the State of Hawaii In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, (filed Jan. 17, 2006); *Reply Comments of the State of Hawaii In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, (filed March 1, 2006). Cf. *AT&T Comments* at 14-18.

<sup>11</sup> Most of the parties that filed comments opposing the application of Section 254(g) to broadband Internet access services raised arguments that challenged the underlying basis for Section 254(g), rather than whether rate integration and geographic averaging should or could be applied to broadband Internet access services. See *Verizon Comments* at 23-24; *US Telecom Comments* at 6; *NCTA Comments* at 15; *Time Warner Comments* at 12-13; *BellSouth Comments* at 23-24. Cf. *AT&T Comments* at 14-18.

<sup>12</sup> *Comcast Corp. v. Federal Communications Commission*, 2010 US App. LEXIS 7039 (D.C. Cir. April 6, 2010) ("*Comcast v. FCC*").

<sup>13</sup> *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, CC Docket No. 02-33 (2005).

<sup>14</sup> *Comcast v. FCC*, 2010 US App. LEXIS at \*3.

The Commission has now proposed in its *NOI* a “third-way” to regulating broadband Internet connectivity services, which would separate the Internet computing portion and the transit portion of a broadband Internet access service. The former would be treated as an information service and the latter would be classified as a telecommunications service. Broadband Internet connectivity would be regulated under Title II of the Communications Act, but the Commission would only apply six core provisions, including the universal service obligations of Section 254.<sup>15</sup>

## **II. DISCUSSION**

In so far as the Commission seeks comment on whether it can continue to enforce core public interest requirements involving such issues as nondiscrimination, consumer protection and universal service on broadband Internet access services,<sup>16</sup> the State strongly urges the Commission to continue to retain the authority to do so, whether through the “third way” or some other means. Particularly, the State requests that the Commission regulate broadband Internet access services in such a manner that would enable it to continue to sanction broadband service providers for disregarding the rate integration and geographic averaging requirements of Section 254(g) with respect to interexchange prices and service offerings involving Hawaii.

---

<sup>15</sup> See *NOI*, ¶ 68. The fundamental element of this approach was specifically endorsed by three members of the United States Supreme Court in *NCTA v. Brand X*. Writing in dissent in the *Brand X* decision, Justice Scalia, joined by Justices Souter and Ginsburg, concluded that the “computing functionality” and the broadband transmission component of retail Internet access service must be acknowledged as “two separate things.” *NCTA v. Brand X*, 545 U.S. at 1008. The majority of the Justices adopted a slightly different stance, concluding that it is within the administrative expertise of the FCC to determine whether the computing function and the transit function of Internet access services should be treated as separate or integrated components.

<sup>16</sup> See *NOI*, ¶ 78.

The Commission's authority to enforce these policies, particularly Section 254(g), over modern communications services has unique relevance to the State of Hawaii, and the State's interest in the continued enforcement of the rate integration and geographic averaging rules are extensive and well documented before the Commission.<sup>17</sup> Section 254(g) is a type of universal service obligation that requires interexchange service providers to employ the same rate structure for long distance communications services involving Hawaii that are employed in the continental United States. Section 254(g) also requires the geographic averaging of rates for urban and rural points. The State has enjoyed access to relatively robust and competitively priced communications services largely as a result of Commission enforcement of Section 254(g).

The State urges the Commission to make certain that it retains authority to enforce the Section 254(g) requirements over broadband Internet services regardless of the mechanism it decides to use to regulate them. Enforcement of this provision has been and will continue to be critical in making available in Hawaii modern communications services that are generally comparable to the services available in the continental United States with respect to prices and availability. Moreover, it is supported by FCC precedent and public interest policies.

**A. Enforcement of Section 254(g) is Vital to Ensure That Communication Service Rates Remain Reasonable and to Ensure That Competition Remains Robust**

The rate integration and geographic averaging policies that were developed by the Commission has had a substantial impact on the prices for communications services involving

---

<sup>17</sup> See, e.g., *Comments of the State of Hawaii In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, (filed Jan. 17, 2006); *Reply Comments of the State of Hawaii In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, (filed March 1, 2006); *Opposition of the State of Hawaii In re Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, WC Docket No. 06-11 (filed June 5, 2006).

Hawaii. Prior to the adoption of the Commission’s policies, there was a pattern of discrimination as to the quality and price of services to and from the State. The State of Hawaii was a target for discrimination because it is an insular location about two thousand miles removed from the nearest Mainland state. Interstate long distance calls between the Mainland and Hawaii were treated as international in nature and were often three times as expensive as calls of similar geographic distance on the Mainland. The Commission’s rate integration and geographic averaging policies prohibited such practices and, as a result, prices for communications services involving the State of Hawaii are now comparable to those in the continental United States.

Recognizing these benefits, the Commission has repeatedly reaffirmed the importance of the rate integration and geographic averaging requirements as codified in Section 254(g), and the need to protect their underlying public interest benefits.<sup>18</sup> Most recently, in 2007, the Commission reiterated that “geographic rate averaging benefits rural areas by providing access to a nationwide telecommunications network at rates that do not reflect the disproportionate burdens that may be associated with recovery of common line costs in rural areas.”<sup>19</sup> It also “ensures that rural customers will share in lower prices resulting from nationwide interexchange competition.”<sup>20</sup>

---

<sup>18</sup> See, e.g., 2005 Order and NPRM, ¶ 157 (noting that “the policies underlying section 254(g) remain important”).

<sup>19</sup> *In re Petition of Core Communications, Inc. for Forbearance from Sections 251(g) and 254(g) of the Communications Act and Implementing Rules*, Memorandum Opinion and Order, WC Docket No. 06-11, ¶ 5 (2007) (“Core Order”) (citing *Policies and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934 as Amended*, 11 FCC Rcd 9564, 9588 (1996) (“Section 254(g) Implementation Order”)).

<sup>20</sup> *Core Order*, ¶ 5.

The Commission has also repeatedly noted the importance of rate integration given the special and complex needs of the State of Hawaii as an “off shore” point.<sup>21</sup> The Commission has emphasized that its policy of “integrating ‘offshore points’ such as Hawaii and Alaska into the Mainland’s interstate interexchange rate structure fosters the economic and social integration of these locales and brings the benefits of growing competition to the entire nation.”<sup>22</sup> It ensures that all American citizens benefit from modern and affordable communications systems.

A compelling need still exists for the Commission to continue to preserve the underlying policies and benefits that Section 254(g) was intended to promote. Accordingly, the Commission should take steps to retain its authority to enforce the Section 254(g) requirements on all types of interstate interexchange service providers, including those providing services using broadband Internet-based technologies.

**B. The Public Interest Warrants Commission Action to Continue to Apply Section 254(g) to Broadband Internet Access Services**

The public interest goals of Section 254(g) continue to be important as broadband technologies provide consumers with a potential alternative for traditional switched communications services. Broadband service providers are increasingly able to offer consumers a variety of interstate voice and data communications services. It would seriously undermine the underlying policies of Section 254(g) if broadband service providers were able to evade the geographic averaging and rate integration requirements, possibly by employing discriminatory

---

<sup>21</sup> *See id.* ¶ 18 n.73 (discussing Core Communications, Inc.’s failure to address how forbearance from Section 254(g) would affect regions such as Hawaii.)

<sup>22</sup> *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4724 (2005) (citing *Section 254(g) Implementation Order*, 11 FCC Rcd at 9588).

and burdensome rate structures in high cost and non-contiguous regions of the country. Put another way, it would permit providers to discriminate based on the technology selected.

Both Congress and the Commission have repeatedly considered the potential economic impact of maintaining rate integration and geographic averaging requirements. Congress has concluded that the substantial public interest benefits that result from Section 254(g) outweigh any potential for economic distortion,<sup>23</sup> and clearly intended for rate integration and geographic averaging to be enforced regardless of the technologies that are employed by carriers to provide services to consumers.

The Commission has also repeatedly rejected arguments that the Section 254(g) requirements may place competitive pressure on nationwide carriers to refrain from providing service to rural and high cost areas.<sup>24</sup> Nationwide carriers enjoy significant economies of scale that are not enjoyed fully by regional carriers. The same holds true for nationwide broadband service providers. These economies more than offset the additional costs that exist in averaging costs between low cost and high cost areas.

Some parties may argue that the rate integration requirements of Section 254(g) are no longer needed because the market for broadband Internet access services may be competitive in

---

<sup>23</sup> S.R. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995).

<sup>24</sup> See *MAG Second Order*, 16 FCC Rcd at 19654 (stating that the Commission is not persuaded by AT&T's argument that interexchange carriers face significant pressures to geographically deaverage toll rates in the face of competition from regional carriers that originate service in areas with lower access charges); *Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended; AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934, 939 (1997) (rejecting AT&T's request for a waiver of the geographic averaging requirement in order to match Bell Atlantic's rates in the New York/New Jersey corridor); *Section 254(g) Implementation Order*, 11 FCC Rcd at 9582-83 (rejecting arguments that competition from low-cost regional local exchange carriers justifies broad forbearance from the geographic averaging requirements of Section 254(g) for nationwide interexchange carriers).

some regions and because there is a trend toward flat rate pricing for many communications services. The Commission has repeatedly concluded, however, that increased competition will not necessarily protect consumers in high cost areas from unaffordable rates.<sup>25</sup> As the Commission recently observed “[c]ompetition may bring long distance rates closer to cost, but section 254(g) was intended to make rates equally affordable to all consumers.”<sup>26</sup> The Commission added that, based on a consumer impact analysis commissioned by the State’s Department of Commerce and Consumer Affairs, failure to retain the rate integration requirements of Section 254(g) “may result in significant pricing disparities and high interstate toll rates for consumers” in Hawaii.<sup>27</sup>

Moreover, the Commission has previously recognized that Congress deemed Section 254(g) to be necessary regardless of the level of competition that exists or the expected growth in competition in the communications industry.<sup>28</sup> Congress concluded that, as competition continued to grow for communications services, the need for Section 254(g) would *increase*, rather than diminish. The Senate Commerce Committee explained:

The Committee intends this provision to ensure that *competition* in telecommunications services does not come at the cost of higher rates for consumers in rural and remote areas.<sup>29</sup>

---

<sup>25</sup> See *Core Order*, ¶ 18.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> See *Section 254(g) Implementation Order*, 11 FCC Rcd at 9583 (observing that “Congress knew at the time the 1996 Act was passed that all interexchange carriers were nondominant and we find that Congress would not have required us to adopt rules to implement geographic rate averaging if it had intended us to abandon this policy with respect to all interexchange carriers so soon after enactment”).

<sup>29</sup> S.R. Rep. No. 23, 104th Cong., 1st Sess. 30 (1995) (*emphasis added*).

A competitive market for broadband Internet access services therefore does not diminish Congress' goal of protecting the needs of consumers in rural and remote areas of the country.

The rate integration and geographic averaging requirements of Section 254(g) remain necessary to protect consumers by helping to ensure that all Americans have access to nationwide communications services at reasonable rates and terms regardless of their location. In fact, the Commission has emphasized that “public interest is served by promoting affordable telecommunications services for all Americans.”<sup>30</sup> The Commission should therefore promote the public interest by retaining authority to continue to enforce the intent of Congress and the underlying policies of Section 254(g) on broadband Internet access services. This should be achieved either through the adoption of the Chairman’s “third way” approach or by some other equally effective and reliable manner.

### **III. CONCLUSION**

For the reasons set forth above, the State respectfully requests that the Commission make certain that it retains authority to enforce the rate integration requirements of Section 254(g) on broadband Internet access services, either through the FCC’s “third way” proposal or by some other mechanism. Absent enforceable rate integration and geographic averaging requirements, the State may be unable to assure its residents, and those that communicate with points in the State, that they will continue to receive the benefits of communications services at prices and

---

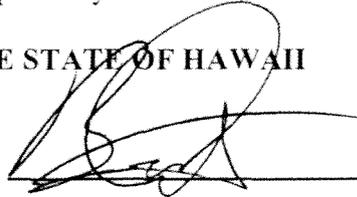
<sup>30</sup> *Core Order*, ¶ 20.

capabilities that are comparable to those available in the continental United States – and thereby assure the economic and social integration of the State and its people.

Respectfully submitted,

**THE STATE OF HAWAII**

By:



Clyde S. Sonobe  
Administrator  
Cable Television Division  
Department of Commerce  
and Consumer Affairs  
STATE OF HAWAII  
335 Merchant Street  
Honolulu, Hawaii 96813

Bruce A. Olcott  
Herbert E. Marks  
Squire, Sanders & Dempsey, L.L.P.  
1201 Pennsylvania Avenue, N.W.  
P.O. Box 407  
Washington, D.C. 20004  
(202) 626-6600

Its Attorneys

July 15, 2010