

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the matter of

Framework for Broadband
Internet Service

GN Docket No. 10-127

**REPLY COMMENTS
OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION
AND THE PEOPLE OF THE STATE OF CALIFORNIA**

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The California Public Utilities Commission and the People of the State of California (“CPUC” or “California”) respectfully submit these reply comments in response to the Opening Comments to the Federal Communications Commission’s (“FCC” or “Commission”) Notice of Inquiry (“NOI”) released June 17, 2010.¹

I. Need for Action

In its opening comments, California supported the FCC’s sense of urgency and stated that, for the purpose of ensuring that the Commission’s National Broadband Plan and any potential rules derived from that plan can be effectively implemented, it is of utmost importance for the FCC to clarify the legal status of the proposal set forth in the NOI.

To demonstrate the importance of universal broadband service to the economy of the United States both today and in the future, on July 16, 2010, one day after the opening comments were filed in this docket, the FCC issued a seminal report (Sixth Report issued under section 706 of the Telecommunications Act of 1996 (the “Act”), as amended,² hereinafter, (“Sixth Report”), which determined³ “that roughly 80 million American

¹ Notice of Inquiry, *In the Matter of the Framework for Broadband Internet Service*, GN Docket 10 127, rel. June 17, 2010.

² 47 U.S.C. § 1302(b) (2010). Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (the Act), as amended in relevant part by the Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (BDIA), is now codified in Title 47, Chapter 12 of the United States Code. *See* 47 U.S.C. § 1301 et seq. “We now refer to the reports required under section 706 of the Act as “broadband deployment reports” and have updated our references to prior reports accordingly.

³ 47 U.S.C. § 1302(b). As a one-time event, to take advantage of the Commission’s parallel effort to understand the state of broadband deployment when developing the National Broadband Plan, this year’s inquiry was conducted in conjunction with the National Broadband Plan proceeding. *See* FCC, OMNIBUS BROADBAND INITIATIVE (OBI), CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN, GN Docket

adults ... do not subscribe to broadband at home,⁴ and approximately 14 to 24 million Americans remain without broadband access capable of meeting the requirements set forth in section 706.”⁵ Based on these facts, the report concludes that “broadband deployment to *all* Americans is not reasonable and timely.”⁶ While actions over the past few years in California have resulted in access and adoption rates that are better than the national numbers, California still has almost 9 million adults that do not subscribe to broadband at home, and approximately 1.2 million Californians do not even have access to broadband.⁷

No. 09-51 (2010) (NATIONAL BROADBAND PLAN); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, as Amended by the Broadband Data Improvement Act; A National Broadband Plan for Our Future*, GN Docket Nos. 09-51, 09-137, Notice of Inquiry, 24 FCC Rcd 10505, 10513, para. 14 (2009) (*Sixth Broadband Deployment NOI*); *A National Broadband Plan for Our Future*, GN Docket No. 09-51, Notice of Inquiry, 24 FCC Rcd 4342 (2009) (*National Broadband Plan NOI*), subsequent Public Notices omitted; *see also* 47 U.S.C. § 1305(k) (2) (“The national Broadband Plan required by this section shall seek to ensure that all people of the United States have access to broadband capability . . .”). As a consequence, much of the analysis we rely on in this report is summarized in the National Broadband Plan and documents released in support thereof. To avoid unnecessary duplication, some of our findings and analyses from the Plan are adopted by reference.

⁴ *See* NATIONAL BROADBAND PLAN, at 167 (relying on the *2010 Broadband Consumer Survey* and stating that “[w]hile 65% of Americans use broadband at home, the other 35% (roughly 80 million adults) do not”); JOHN HARRIGAN, OBI, BROADBAND ADOPTION AND USE IN AMERICA 3 (OBI Working Paper Series No. 1, Feb. 2010) (2010 BROADBAND CONSUMER SURVEY), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-296442A1.pdf. We note that the *2010 Broadband Consumer Survey* counted home broadband users as “those who said they used any one of the following technologies to access the internet from home: cable modem, a DSL-enabled phone line, fixed wireless, satellite, a mobile broadband wireless connection for your computer or cell phone, fiber optic, [or] T-1” without reference to the download or upload speed of their connection. *Id.* at 3. If the broadband speed benchmark used in this report had been used in the survey, it is likely that a larger number of Americans would have been reported as not having broadband.

⁵ *Id.*

⁶ *Id.*

⁷ *See Just the Facts, California’s Digital Divide*, August 2010, Public Policy Institute of California, *available at* http://www.pplic.org/content/pubs/jtf/JTF_DigitalDivideJTF.pdf.

The Sixth Report emphasizes the national importance for the FCC to move quickly to implement the National Broadband Plan by accelerating deployment of advanced telecommunications capability and by removing barriers to infrastructure investment and by promoting competition in the telecommunications market. Some of the parties commenting on the NOI share the FCC's vision in this regard. For example, Google recognizes that Broadband is essential to provide a "solid foundation to meet a broad range of challenges, including economic, social, and civic concerns. At the same time, broadband networks have a unique role as essential and scarce resources, deployed by relatively few providers, and utilizing valuable government-granted rights and advantages."⁸

II. The Role of the States

In their Opening Comments, Time Warner and the other Connectivity Carriers expressed shared concerns that states would regulate the Internet with zeal through onerous regulations and the imposition of state taxes.⁹

Further, these companies imply that if any state were to impose any legal responsibilities on the carriers, there would be a major decrease in investment in broadband connectivity technologies in that state. In our view, such statements ignore the realities of business. Business entities invest in markets where money is to be made in a state, and will do so even if they must comply with state and local regulations. As

⁸.See, Google Opening Comments, p. 2.

⁹ See, Cablevision Opening Comments, pp. 21-25.

we move toward a world in which most commerce is conducted on the Internet, carriers would be taking a great financial risk to decrease investment in a state like California, which has the 7th largest economy in the world. These companies will all have to keep pace with technological developments or they will lose out to their hungrier competitors, all of whom will be looking to come up with the next great idea. Hence, the veiled threat of the Connectivity Carriers (AT&T, Comcast, Time Warner – to name a few) that any amount of state regulation would pose a serious disincentive to investment should not be taken seriously.

Specifically, AT&T directs its concerns towards possible state action on consumer protection, or exercise of local and police powers, as well as how universal broadband service is going to be paid for in low-income and high-cost areas. However, all of these issues are legitimate, historical concerns of state and local governments. Some states, like California, which have their own Universal Service Program for low-income and high-cost customers, are legitimately concerned that these programs will not be able to be extended to broadband customers unless a sustainable source of funding is found. Funding from Plain old Telephone Service (POTS) is decreasing as customers “cut the cord” or switch to DSL or cable voice service. Since one of the main tenets of the National Broadband Plan is the expansion of Universal Service, this is a legitimate concern at both the federal and state levels.¹⁰

¹⁰ National Broadband Plan. Sec. 8.3.

AT&T conveniently ignores the fact that historically federal and state mechanisms have contributed equally toward meeting the universal service goals set forth in the Act. California believes that without equal federal and state contributions toward broadband networks, the FCC will fail to meet the modest universal service goals set forth in the National Broadband Plan. Indeed, the FCC needs to expand the successful partnership it has had with the states for the past 70 years to include states in the Broadband Framework.

As for consumer protection, the FCC has referred to the Third Way as an approach to be modeled after the FCC's wireless regime, in which the States already do have jurisdiction over terms and conditions of service.¹¹ Congress left State regulatory authority over terms and conditions of service for wireless customers in place, because in this very large country, with 238 million adults over 16 that are not institutionalized, the state regulatory bodies are where customers can go to seek resolution of consumer complaints. The FCC is simply not staffed adequately to cope with the day-to-day complaints of millions of people in 50 states, far flung from Washington, D.C. Further the traditional concerns of consumer protection – false advertising claims, false billings,

¹¹ Recently, the CPUC filed comments at the FCC in support of a lawsuit brought under the California consumer protection laws to regulate terms and conditions of service of a wireless company. See CPUC Comments, Petition for Declaratory Ruling Regarding Interpretation of Section 332(c)(3)(A) of the Communications Act of 1934, As Amended, As Applied to Fees Charged for Late Payments, WTB Docket 10-42, May 7, 2010.

usurious disconnect and late fees, among other things – are best addressed at the local and state level.¹²

Secondly, a State role need not be viewed as the “negation” of forbearance relief, as Time Warner casts it. To the contrary, the role of the States, properly understood, is a complement to the FCC’s authority under federal law, not its contradiction or subversion. A long history of case law and FCC decisions show this to be the case.

Thirdly, if the FCC were to determine that broadband internet connectivity service is a telecommunications service, and consequently, the FCC could properly carry out its statutory obligations under the Act with regard to such service (including the enforcement of universal service and consumer protection and public safety rules), the States should attend to those obligations that the Act places within their purview. It would be anomalous if the proposed reclassification were implemented only at the federal level with respect to these public interest obligations while their relevance to state policy was simultaneously denied.

III. Legal Authority

As indicated in its Opening Comments, the CPUC stated that “[a]fter reviewing all of the comments, relevant case law, including the recently-decided *Comcast* decision . . .

¹² See, e.g., Comments of Montgomery County, Maryland, at p. 14, which note: “The Commission does not have authority to preempt control over state and local rights-of-way . . . In the recent winter snow storms, Montgomery County spent a record \$60 million removing snow, which in part facilitated the ability of public utility electric and telephone providers, cable service providers, and Internet access service providers to reach and repair facilities and to restore service. Reclassification . . . should not affect the exercise of state or local authority over any provider using the public rights-of-way to provide any type of service.”

and applicable FCC regulations relevant to this seminal jurisdictional question,” it agreed “with the Court in *Comcast* that the FCC’s reliance on Title I as a source of jurisdictional authority for broadband Internet service is not securely linked to an express delegation of regulatory authority.”¹³ It remains the view of the CPUC that the continued reliance on Title I as a legal framework for broadband Internet service is legally precarious, especially given the significant limitations imposed by the *Comcast* decision on the FCC. As such, California agrees with Google that no party has advanced any credible legal theories using the FCC’s Title I authority that would provide the FCC “with sufficient and predictable authority to carry out its legitimate duties, while also surviving judicial scrutiny.”¹⁴

The *Comcast* decision all but eliminated the FCC’s reliance of Title I as a legal justification for implementation of the National Broadband Plan and any other rules or regulations pertaining to the Internet. It is ironic, indeed hypocritical, that the very company (*i.e.*, Comcast) that pursued the litigation that invalidated the FCC’s use of Title I as sufficient legal authority for regulating broadband Internet service is now promoting its use of Title I as the proper course of legal action that has the least legal pitfalls.¹⁵ In

¹³ See, Opening Comments of CPUC, p. 5, quoting an earlier filing by the CPUC in the Open Internet proceeding, Comments on Public Notice GN No. 09-191, WC 07 07-52.

¹⁴ See, Opening Comments of Google, p. 3, footnote 10. In its Opening Comments, at p. ii (Executive Summary) Comcast states: “[a]s one of the largest broadband Internet service providers, Comcast ... believe[s] that the best way to achieve the Commission’s important goals is for it to . . . maintain its current classification of broadband Internet services .

¹⁵ In its Opening Comments, at p. ii (Executive Summary) , Comcast states: “[a]s one of the largest broadband Internet service providers, Comcast ... believe[s] that the best way to achieve the Commission’s important goals is for it to . . . maintain its current classification of broadband Internet services as ‘information services’ and maintain its current regulatory approach to broadband Internet

point of fact, however, “the Comcast Plan,” which is generally supported by the carriers, would give the FCC the least amount of authority to act. Comcast’s awareness of its double game in this regard is demonstrated by its statement that “[t]o the extent Title I proves insufficient to protect the open Internet, the Broadband Internet Technical Advisory Group and other industry and government collaborative efforts *can maintain a watchful eye* while the Commission seeks any needed authority from Congress.”¹⁶ (Emphasis added.) If the Comcast Plan were adopted, the FCC would be left with little opportunity to fulfill its duties to implement the National Broadband Plan and to establish and enforce any other rules governing the Internet. Further, resolution of consumer protection issues would under the Comcast Plan have to wait for Congressional action while the FCC was hamstrung to act. Effectuated consumers would be left unprotected by lawfully constituted authorities, and consumer protection would depend on voluntary compliance by industry participants.

In contrast, Google states “that prior to the *Comcast* case it would have favored the retention of Title I to support the FCC jurisdiction, however, in their estimation the *Comcast* case changes the legal landscape and re-opens fundamental questions about the FCC’s jurisdiction over broadband Internet services.”¹⁷ Google notes, “[w]elcome or not, the *Comcast* decision means that ancillary authority – a doctrine of agency authority first recognized in a 1968 Supreme Court decision – is not a reliable tool for FCC

services.” *Accord*, Opening Comments of Time Warner, Cablevision and AT&T.

¹⁶ See, Comcast Opening Comments, p. 3.

¹⁷ See, Google Opening Comments, p. 2.

oversight going forward.”¹⁸ Google then finds that a limited oversight role for government is needed because “broadband networks have a unique role as essential and scarce resources, deployed by relatively few providers, and utilizing valuable government-granted rights and advantages.”¹⁹

Similarly, in its Opening Comments, the CPUC stated that it “adhere[s] to its ... position that the FCC use of Title II authority is legally supportable.”²⁰ Further, the CPUC stated that “it is vital that the Commission ... position itself be on sound legal ground.”²¹

In support of the Third Way, Google finds that the Third Way framework described in the NOI “presents the most predictable, effective, and tailored approach of those under consideration In particular, the Third Way will promote legal certainty and regulatory predictability to spur investment, ensure that the Commission can fulfill the tremendous promise of the *National Broadband Plan*, and make it possible for the Commission to protect and serve all broadband users, including through meaningful enforcement. By using targeted forbearance, the Third Way essentially will allow the Commission to restore the prior *status quo* by establishing a solid legal foundation to

¹⁸ *Id.*, p.2-3.

¹⁹ *Id.*, p. 6.

²⁰ *See*, CPUC Opening Comments, p. 6-7.

²¹ *Id.*

stimulate investment throughout the Internet space, thereby providing the greatest benefits to the largest number of stakeholders.”²²

Similarly, XO states “the proposed Third Way is the most sustainable approach, and best promotes regulatory and legal predictability.”²³ XO expresses a concern shared by California that if the FCC continues to use Title 1 as its jurisdictional authority, “the “case-by-case nature of Title I ancillary jurisdiction will engender delay and uncertainty, regardless of the success of any FCC legal justifications. Reliance on Title I therefore would create unnecessary and counter-productive instability, chilling investment and innovation by all broadband stakeholders.”²⁴

In contrast, XO asserts that “the facts and circumstances of today’s broadband market make clear that the Commission must, consistent with its legal duty to adjust its regulatory oversight as changes occur, assert its authority to classify the transmission component of broadband access as a telecommunications service.”²⁵ Further, XO notes that “the broadband market remains a firmly entrenched duopoly, and as a technical matter and from a consumer perspective Internet connectivity can be and is severable from information services that may be offered with broadband transmission.”²⁶ The

²² See, Google Opening Comments, p. 3.

²³ See, XO Opening Comments, p.3 .

²⁴ *Id.*, p. iii, Executive Summary.

²⁵ *Id.*, p. 9.

²⁶ *Id.*, p. 10.

CPUC agrees that the FCC must consider the concerns XO has expressed in evaluating the viability of the Third Way.

IV. Definition of “Broadband Internet connectivity services”

In its opening comments, the cpuc pointed out that it is important that the term “broadband internet connectivity services” that emerges from this noi be clearly defined.²⁷ in the noi, the commission describes this service as one that “allows users to communicate with others who have internet connections, send and receive content, and run applications online.”²⁸ in their opening comments, the parties differ as to whether it is possible to separate connectivity and applications in such a manner that this term can be clearly and reasonably defined.

Parties that support the FCC’s definition find that “Internet Connectivity is as a technical matter severable and ... from a consumer perspective Internet connectivity can be and is severable from information services that may be offered with broadband transmission.”²⁹ Other parties agreeing with XO found that “[r]ecord evidence reflecting market changes and the de-integration of the transmission and information components broadband Internet service will fully support an express decision to classify broadband Internet access as telecommunications.”³⁰ Similarly, the Center for Democracy states “the facts of today’s marketplace strongly support classifying Internet connectivity as a

²⁷ See, CPUC Opening Comments, p. 9.

²⁸ See, *Id.*, p. 9, citing NOI, p. 1, footnote 1.

²⁹ See, XO Opening Comments, p. 3.

³⁰ See, CCIA Opening Comments, p 3.

telecommunications service. Consumers purchase Internet access service for the ability it offers to connect to the Internet, which in turn gives them a gateway to independent content and services of all kinds. There is thus no need for Internet users to rely on their access provider for information service functions such as email, newsgroups, web page hosting, or content aggregation. Other functions that an access provider may perform are best viewed as “adjunct to- basic” services that merely support the efficient operation of the connectivity function.”³¹

In contrast, Time Warner and Comcast assert that such a definition is not relevant because circumstances have not changed. The only relevant term is the all encompassing, term “information services” which includes both connectivity and application services. However, the newly issued “Broadband Deployment Report” “departs from previous broadband deployment reports, which held that even though certain groups of Americans were not receiving timely access to broadband, broadband deployment “overall” was reasonable and timely.”³² Instead, the FCC Report finds that it

³¹ See, Center for Democracy Opening Comments, p. 1.

³² See, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 15 FCC Rcd 20913, 20918, 20995–21003, paras. 8, 217–43 (2000) (*2000 Second Broadband Deployment Report*) (concluding that “[o]verall, deployment of [broadband] to residential customers is reasonable and timely” although certain categories of Americans—including low-income consumers, those living in sparsely populated or rural areas, minority consumers, Indians, persons with disabilities and those living in the U.S. territories—are vulnerable to not having timely access to broadband); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2405, para. 16 (1999) (*1999 First Broadband Deployment Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*,

is “appropriate to now to require the use of 4 Mbps as the broadband speed benchmark for download to the customer and 1 Mbps *actual* upload speed from the customer. In past reports, the FCC has used the earlier definition of broadband as 200 kbps or better in both directions, it is now referencing *actual* download speeds, not those advertised.”³³

The CPUC remains agnostic as to how the FCC should classify broadband Internet connectivity service, although we have expressed our view that the FCC has legal authority to pursue the Third Way. Nonetheless, we cite these comments to underscore the vital need for the FCC to come to a conclusion and move forward.

V. Changes of circumstances

In its Opening Comments, the CPUC agrees with XO when it states that “the broadband market remains a firmly entrenched duopoly... and as a technical matter and from a consumer perspective Internet connectivity can be and is severable from information services that may be offered with broadband transmission.” XO goes on to say that “[f]ar from decreasing the incentives of companies to invest, the Third Way strikes a balance that will encourage investment by network companies such as XO,

CC Docket No. 98-146, Report, 17 FCC Rcd 2844, 2845, para. 1 (2002) (*2002 Third Broadband Deployment Report*); *Availability of Advanced Telecommunications Capability in the United States*, GN Docket No. 04-54, Report, 19 FCC Rcd 20540, 20547 (2004) (*2004 Fourth Broadband Deployment Report*); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45, Report, 23 FCC Rcd 9615, 9616, para. 1 (2008) (*2008 Fifth Broadband Deployment Report*).

³³ *Id.*, p. 4.

content and applications companies, and all other participants in the broadband ecosystem.”³⁴

As to other changes in circumstance, other parties found that “[r]ecord evidence reflecting market changes and the de-integration of the transmission and information components broadband Internet service will fully support an express decision to classify broadband Internet access as telecommunications.”³⁵ Similarly the Center for Democracy states “the facts of today’s marketplace strongly support classifying Internet connectivity as a telecommunications service. Consumers purchase Internet access service for the ability it offers to connect to the Internet, which in turn gives them a gateway to independent content and services of all kinds. There is thus no need for Internet users to rely on their access provider for information service functions such as email, newsgroups, web page hosting, or content aggregation. Other functions that an access provider may perform are best viewed as ‘adjunct to- basic’ services that merely support the efficient operation of the connectivity function.”³⁶

In contrast, Time Warner defends the status quo by stating “[t]he information service classification is as valid today as it was a decade ago. Indeed, there has been no material change in the factual particulars of how Internet technology works and how it is provided—or in the capabilities that broadband Internet access providers offer

³⁴ See, XO Opening Comments, p.11.

³⁵ See, CCIA Opening Comments, p. 3.

³⁶ See, Center for Democracy Opening Comments, p. 1

subscribers—over the last decade, let alone during the three years since the Commission last classified a form of broadband Internet access service.”³⁷ Time Warner holds to the position that since it can offer both connectivity and applications, separation is not necessary. However, Time Warner’s assertions are counterfactual to the reality in today’s marketplace, because they rely on an outdated construct of the relation of an internet connectivity company and an application company to customers, as Center for Democracy and Technology points out at length.³⁸

The “nascent” service the Commission looked at a decade ago has changed to become the predominant communication service that consumers rely on for business and recreation. The technology used by the providers has and will continue to evolve to meet the growing demands of the public, and those changes have made it even easier to separate Internet connectivity. While one company can, as a practical matter, offer both services, it is also obvious to any user of the Internet that these two services can be separated. Customers can purchase Internet connectivity service from one company, and applications from one or more other companies.

VI. Forbearance - Specific Issues

A. Pole Attachments: State of the Law

In its opening comments, Clearwire argues that should the FCC reclassify broadband access service to Title II, the FCC should immediately preempt the states from

³⁷ See, Time-Warner Opening Comments, p. iii, Executive Summary.

³⁸ Center for Democracy and Technology Opening Comments, pp. 7-13.

any regulation of access service, including, especially, regulations having to do with pole attachments. At the same time, Clearwire is adamant that the FCC should not forbear from certain sections of the Act, specifically Sections 224 (pole attachments) and Section 253 (competitive entry). Clearwire wants those designated as providers of telecommunications services to have all the advantages accorded telecommunications providers under the terms of Title II, including especially access to pole attachments at just and reasonable rates, the requirement of Section 224(b)(1).³⁹

³⁹ Of particular relevance are subsections 224(b) (1) and 224(c) of the Act.

Subsection 224(b) (1) provides, in pertinent part, that "Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions...."

Sec. 224(c) provides: (c)(1) Nothing in this section shall be construed to apply to, or to give the Commission jurisdiction with respect to rates, terms, and conditions, or access to poles, ducts, conduits, and rights-of-way as provided in subsection (f), for pole attachments in any case where such matters are regulated by a State.

(2) Each State which regulates the rates, terms, and conditions for pole attachments shall certify to the Commission that--

(A) it regulates such rates, terms, and conditions; and

(B) in so regulating such rates, terms, and conditions, the State has the authority to consider and does consider the interests of the subscribers of the services offered via such attachments, as well as the interests of the consumers of the utility services.

(3) For purposes of this subsection, a State shall not be considered to regulate the rates, terms, and conditions for pole attachments--

(A) unless the State has issued and made effective rules and regulations implementing the State's regulatory authority over pole attachments; and

B) with respect to any individual matter, unless the State takes final action on a complaint regarding such matter--

(i) within 180 days after the complaint is filed with the State, or

(ii) within the applicable period prescribed for such final action in such rules and regulations of the State, if the prescribed period does not extend beyond 360 days after the filing of such complaint.

What Clearwire does not acknowledge is that as of May 2010, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Idaho, Illinois, Kentucky, Louisiana, Maine, Massachusetts, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Utah, Vermont, Washington have certified to the FCC pursuant to Section 224(c) that they regulate pole attachments.⁴⁰ Specifically in California, in D.98-10-058, as modified by D.00-04-061, the CPUC certified to the FCC that it regulated the rates, terms, and conditions of access to poles, conduits, ducts, and Rights of Way in conformance with §§ 224(c)(2) and (3) of the Communications Act, as amended.⁴¹

Section 224 expressly includes a role for the states with respect to pole attachments. If Section 224 is not to be forborne from, the states certifying that they regulate pole attachments under the terms of Section 224 will necessarily retain their authority and jurisdiction with respect to pole attachment rates, terms and conditions, and access to poles, ducts, conduits, and rights-of-way. Thus, given the explicit terms of the statute, and contrary to the position advocated by Clearwire, the FCC is in no position to preempt the States regarding pole attachments, irrespective of any reclassification of broadband Internet access service to Title II.

Clearwire's position respecting Section 253 is equally problematic. In that section of the Act, states are preempted from prohibiting entry.⁴² If Section 253 is not to be

⁴⁰ See, http://fjallfoss.fcc.gov/edocs_public/attachmatch/DA-10-893A1.pdf .

⁴¹ Order Instituting Rulemaking on the Commission's Own Motion into Competition for Local Exchange Service (1998) 82 CPUC 2d 510, 531, modified by 6 CPUC 3d 1.

⁴² The relevant subsections of Section 253 read as follows:

forborne from under reclassification of broadband access service, as Clearwire argues, then the remaining role of the states under Section 253 cannot also be preempted. The FCC should therefore give no weight to Clearwire's proposal to preempt State authority, because that proposal is self-contradictory and is at odds with the statutory basis of FCC authority.

The foregoing pole attachment discussion highlights the fact that the Commission needs to look carefully at all provisions of the Act that it plans to forebear from in order to ensure that forbearance does not result in unintended consequences and does not violate the existing rights of the States under federal law.⁴³

In conclusion, California encourages the FCC to act swiftly and decisively to resolve the legal uncertainty caused by the *Comcast Decision*.

“(a) No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

“(b) Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

“(c) Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.”

Finally, subsection 253(d) provides that states may be preempted only on a case by case basis where a particular statute, regulation, or legal requirement" is inconsistent with the terms of the section and then preempted only to "the extent necessary to correct such violation or inconsistency."

⁴³ For example, *see*, Hawaii’s Opening Comments regarding Section 254(g).

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