

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of :
:
Framework for Broadband Internet Service : **GN Docket No. 10-127**

**COMMENTS
SUBMITTED ON BEHALF OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

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INTRODUCTION AND SUMMARY

On June 17, 2010, the Federal Communications Commission (FCC) issued a Notice of Inquiry (NOI) in the above captioned proceeding. The FCC’s NOI examines issues relating to the classification of broadband service under the Telecommunications Act of 1996 (Act) and its jurisdictional authority regarding broadband itself. First, the FCC seeks comment on whether keeping the classification of “information services” under Title I of the Act and exercising its ancillary jurisdiction provides the FCC with the legal authority needed to accomplish goals relating to broadband services. Second, the FCC seeks comment on whether the application of all Title II provisions from the Act should be applied in order to reclassify broadband services as telecommunications services. Finally, the FCC seeks comment on the impact of classifying broadband under a new approach that it calls the “Third Way.” Specifically, the FCC’s “Third Way” approach recommends that: (1) internet information services remain generally

unregulated, and (2) that internet connectivity service which is offered as part of wired broadband internet service (and only this connectivity services) should be classified as a telecommunications service, while further suggesting that forbearance under Section 10 of the Act from applying all provisions of Title II other than the sections needed to implement universal service, competition, small business opportunities, and consumer protections. The FCC further questions what role the State commissions should play in any newly-designed regulatory scheme. The Public Utilities Commission of Ohio (Ohio Commission) hereby submits its comments and recommendations.

DISCUSSION

Like the FCC, the Ohio Commission continues to be vitally interested in promoting the diversity and growth of the telecommunications industry. The Ohio Commission feels it is important to explore any opportunities or ideas that will lead to additional options for consumers. As such, the National Broadband Plan (NBP) provides a unique opportunity for the Ohio Commission to help promote the expansion of broadband services to consumers. Nonetheless, as the Ohio Commission recognizes in these comments, there are a variety of potential concerns regarding the expansion of broadband service unless the classification issues mentioned in the NOI are resolved. In considering an appropriate regulatory framework for broadband based services, the Ohio Commission advocates that a cooperative federal-state approach with shared responsibility be used during this process.

The Ohio Commission strongly believes the states should have a strong consumer-focused role under any new regulatory framework that the FCC adopts. In particular, this broadband regulatory framework should ensure that States are able to: (1) preserve and advance

universal service ; (2) safeguard consumers against unfair and deceptive practices and maintain basic consumer protections such as truth-in-billing and reliable E9-1-1 service; (3) provide a local venue for investigation, alternative dispute resolution (ADR) and efficient resolution of both intercarrier disputes and consumer-to-company disputes; (4) adequately investigate and take enforcement actions where necessary for the protection, welfare and safety of the public; (5) properly inform consumers of their rights in cooperation with the FCC; and (6) ensure that the special needs of customers are met through programs such as Lifeline, Link-Up, and telecommunications relay services. Preserving the role of the states in these areas ensure a cooperative state-federal partnership that is necessary to best implement the goals and objectives of the NBP.

I. Title I-Unitary Information System

While legal arguments may be made to support maintaining the current classification of wired line Internet service as a unitary information service, the Ohio Commission believes that it will be difficult for the FCC to achieve its goals for broadband deployment and support through its Title I ancillary authority in wake of the *Comcast* decision.¹ Title I may allow the FCC to carry out a portion of its Congressional mandate to develop a plan to sure that every American has access to broadband capability;² however, this status quo approach will likely plague the FCC with litigation as its ancillary authority is constantly called into question. Any broadband

¹ *Comcast Corp. v. FCC*, 600 F.3d 642 (D.C. Cir. 2010) (*Comcast*).

² FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN at xi. (*National Broadband Plan*).

service provider that disagrees with an assertion of ancillary authority by the FCC can, and likely will, choose to litigate the issue citing *Comcast* as precedent.

The Ohio Commission agrees with AT&T's assessment that the FCC, in all probability, has the authority to provide Universal Service Fund (USF) support for broadband Internet service under its current classification of broadband service as a Title I information service by way of Sections 254 and 214 of the Telecommunications Act of 1996 (Act).³ Although keeping Title I's information service classification may allow the FCC to maintain jurisdiction with regard to Universal Service, the Ohio Commission recognizes that this is not clear and settled and will in all likelihood be met with subsequent time consuming litigation that will threaten the realization of Congress' overall goal to universally deploy and fund broadband service. Accordingly, the Ohio Commission is concerned with whether the FCC will ultimately be found to have the authority to shift funding from the Universal Service High-Cost Fund to the Connect America Fund (CAF) if it maintains the Title I classification. It is certainly debatable under Sections 214 and 254 whether USF support can be allocated for an information service. With this concern in mind, the Ohio Commission believes that a reclassification of broadband services is the most efficient and cleanest way for the FCC to achieve Congress's goals related to the NBP.⁴

II. Application of All Title II Provisions

The second approach to broadband classification set forth in the NOI involves classifying broadband service as a pure Title II telecommunications service without any forbearance of Title

³ *Framework for Broadband Internet Service*, GN Docket No. 10-127, Notice of Inquiry, at ¶ 30 (NOI).

⁴ *National Broadband Plan* at xi.

II requirements. However, before determining if all the provisions of Title II could or should apply, the FCC must first determine if the entire wired-line Internet service will be classified as a Title II telecommunications service or if only certain functions as defined by the FCC in the *Cable Modem Declaratory Ruling*⁵ will be classified in that manner. In the *Cable Modem Declaratory Ruling*, the FCC divided cable modem internet service into three distinct functions: internet connectivity, enhanced applications, operations and customer service.⁶ Internet connectivity refers to broadband service generally. In other words it is the connection, or “pipeline” over which one receives access to various broadband applications such as the Internet, video, and voice telephone service.⁷ Enhanced applications, then, are the various applications that are accessed through a subscriber’s broadband connection.⁸ Operations and customer service refers to a broadband provider’s network management and customer support including billing, complaint resolution and hardware installation.⁹ The Ohio Commission is of the opinion that only certain functions, such as the internet connectivity function, of the wired-line internet service should be classified as a Title II telecommunications service. The Ohio Commission recognizes that not all of the functions included in the original language may still need to be included and recommends that the FCC redefine which functions are included as part of the

⁵ *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002)(*Cable Modem Declaratory Ruling*).

⁶ *Id.* at 4809-11, ¶¶ 16-18.

⁷ *Id.* at 4808 -11, ¶ 17.

⁸ *Id.* 4811, ¶ 18.

⁹ *Id.* at 4811 -12, ¶ 19.

“internet connectivity service” function and suggests that the FCC draw guidance from the NECA DSL Access Service Tariff.

The Ohio Commission does not believe that all provisions of Title II should be applied to broadband service. Nonetheless, applying all of the provisions to just the internet connectivity service may not result in the overregulation of the service and/or decrease the innovation and/or investment in broadband that some speculate will happen. If “internet connectivity” is narrowly defined to only include the functions that “enable [broadband Internet service] subscribers to transmit data communications to and from the rest of the Internet,” providing the FCC the express authority to implement all Title II provisions would not be overregulation and should have no or only minimal impact on innovation and/or investment in broadband. However, the application of all Title II provisions to the entire wired-line internet service, which would include “internet connectivity” as well as “enhanced applications” and the operations and customer service function, may result in such overregulation and/or a decrease in innovation and/or investment in broadband. As such, if a pure Title II approach is selected, the Ohio Commission recommends that the FCC only apply the provisions of Title II to internet connectivity service and not the entire wired-line internet service. The Ohio Commission believes that the provisions that should apply must maintain duality between the FCC and State in regulating and promoting the advancement of broadband services nationally and locally. The Ohio Commission believes that there are some basic regulatory issues relating to Internet connectivity function of wired-line broadband service that should be addressed by the FCC (although not necessarily to the exclusion of any State role). Consistent with Congress’ design for shared responsibility under the Act, the Ohio Commission believes that there are also some basic regulatory issues that should be reserved for State commissions.

III. Title II with Forbearance: The Third-Way Approach

The third classification proposal set forth in the NOI involves classifying wired-line broadband Internet connectivity as a telecommunications service, but simultaneously forbearing from applying most requirements of Title II to that connectivity service.¹⁰ The FCC's "Third Way" reaffirms that Internet information services will remain generally unregulated and ensures that the Title II provisions needed to effectively implement the NBP will remain unaffected by forbearance.¹¹ The Ohio Commission recommended a similar approach to the FCC in its 2004 comments to the FCC pertaining to the classification of VOIP service.¹² Consistent with its 2004 approach, the Ohio Commission favors the FCC adopting a "light touch" or minimal oversight approach regarding the reclassification of broadband services as a telecommunications service¹³ and conceptually supports a "Third Way" type approach to the classification of broadband service. Nevertheless, the Ohio Commission cautions that if the FCC implements the "Third Way," or something like it, for regulatory oversight of broadband Internet and Internet connectivity services, the FCC must be careful to avoid prejudicing the States authority that is reserved under Section 253 of the Act "to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguards the rights of consumers."¹⁴

¹⁰ NOI at ¶ 67.

¹¹ *Id.* at ¶ 68.

¹² *In the Matter of IP Enabled Services*, Comments of the Public utilities Commission of Ohio, WC Docket No. 04-36, at 27, filed May 28, 2004 (Ohio Comments).

¹³ *Id.*

¹⁴ 47 U.S.C. § 253.

Should the FCC adopt the “Third Way” approach, the Ohio Commission strongly urges the FCC to avoid forbearing substantive Title II provisions that would result in preemption of State jurisdiction in certain areas. Specifically, the Ohio Commission strongly believes that any new regulatory framework should grant to the States a strong consumer-focused role, and in particular ensure that States are able to: (1) preserve and advance universal service ; (2) safeguard consumers against unfair and deceptive practices and maintain basic consumer protections such as truth-in-billing and reliable E9-1-1 service; (3) provide a local venue for investigation, alternative dispute resolution (ADR) and efficient resolution of both intercarrier disputes and consumer-to-company disputes; (4) adequately investigate and take enforcement actions where necessary for the protection, welfare and safety of the public; (5) properly inform consumers of their rights in cooperation with the FCC; and (6) ensure that the special needs of customers are met through programs such as Lifeline, Link-Up, and telecommunications relay services. Failure to provide for the States’ jurisdiction in these areas would minimize the States’ role and much needed influence in the advancement of broadband services as set forth in the NBP. These areas are intrinsically local in nature with the States undoubtedly being in the best position to promote the NBP’s objectives as they have the advantages of proximity, familiarity and relationships with stakeholders that the FCC does not have. Thus, if broadband service is reclassified under the “Third Way,” the Ohio Commission recommends a “light touch” with minimal oversight approach that involves state and federal cooperation. The Ohio Commission believes that a partnership between the FCC and the States may be the most efficient and effective regulatory scheme to ensure basic consumer safeguards without unduly restricting the deployment of wired-line broadband services.

IV. Amendment to the Act

Legal arguments may be made for and against each of the three regulatory frameworks recognized by the FCC in the NOI. While the Ohio Commission supports the FCC's "Third Way" proposal with the caveats set forth above, the Ohio Commission also believes that regardless of the framework ultimately adopted by the FCC, the FCC's authority to regulate this technology will be continually challenged by those who oppose the adopted classification, whatever it may be. As noted previously, if the Title I information service classification is maintained, the FCC may be challenged each time that it wishes to assert its ancillary authority with *Comcast* being cited as precedent. If a Title II reclassification is adopted, either with or without forbearance, the reclassification will most certainly be challenged in court by the first party with standing to do so. In essence, as a result of the FCC's prior classification of broadband service as an information service under Title I, the FCC has been placed in a no-win situation as it endeavors to carry out Congress' mandate to "ensure that every American has 'access to broadband capability'" through the implementation of the NBP.¹⁵ As such, the Ohio Commission believes that the only definitive means to address the broadband reclassification issue is through a Congressional amendment to the Act that clearly sets forth the role of both the FCC and the States with regard to the regulation of broadband service. Anything short, including each of the three approaches addressed in the NOI, will compromise the FCC's ability to carry out and realize the goals of the NBP.

¹⁵ *National Broadband Plan* at xi.

CONCLUSION

In closing, the Ohio Commission recognizes that all three approaches provide plausible means to address the broadband classification issue, but believes that this issue is best addressed by Congress.. In the absence of Congressional action on this matter, the Ohio Commission believes that the regulatory approach that would best promote the deployment of wired-line broadband service is the FCC's "Third Way" with the incorporation of a strong consumer-focused State role as detailed in these comments. This approach is consistent with the Ohio Commission's continued support of a "light touch" with minimal regulatory oversight approach and preserves a federal-state partnership that is consistent with Congress' design for shared responsibility under the 1996 Act.

Respectfully submitted,

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Summary: Comments submitted on behalf of the Public Utilities Commission of Ohio by John Jones to be filed in FCC Docket No. GN 10-127 (Framework for Broadband Internet Service) (filed at FCC 7-14-10) electronically filed by Kimberly L Keeton on behalf of Public Utilities Commission of Ohio