

State of California

Public Utilities Commission
San Francisco

MEMORANDUM

Date : July 6, 2010

To : The Commission
(Meeting of July 8, 2010)

From : Gretchen Dumas
Public Utilities Counsel IV

Subject: Filing of Comments in Response to FCC's Notice of Inquiry on the Framework for Broadband Internet Service -- GN Docket No. 10-127

RECOMMENDATION: The Commission should submit comments in response to the Federal Communications Commission's ("FCC") *Notice of Inquiry* ("NOI") on the *Framework for Broadband Internet Service*.¹ California's interest in this proceeding derives from its statutory and constitutional role as a state consumer protection agency. Opening Comments are due July 15, 2010.

BACKGROUND: The FCC has initiated several rulemakings to implement the National Broadband Plan, released on March 16, 2010. Further, in its recent *Open Internet* Notice of Proposed Rulemaking ("NPRM"),² the FCC noted that it has considered the issue of Internet openness in many contexts and proceedings, including "a unanimous policy statement, a notice of inquiry on broadband industry practices, public comment on several petitions for rulemaking, [and] conditions associated with significant communications industry mergers."³

The FCC historically has relied for its jurisdictional authority over broadband services on Title I of the Telecommunications Act ("Title I"). However, on April 6, 2010, the Court of Appeals for the D.C. Circuit overturned the FCC's reliance on Title I in

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

² *In the Matter of Preserving the Open Internet*, GN Docket No. 09-191, WC 07-52.

³ *Id.* at ¶ 2.

connection with its 2008 Comcast Order.⁴ Specifically, the Court held that the “Commission has failed to make [the requisite] showing” that enforcement of the policies in its *Internet Policy Statement* was “reasonably ancillary to the . . . effective performance of its statutorily mandated responsibilities.”⁵ And in particular, the Court found that the FCC had failed to “link the cited policies to express delegations of regulatory authority.”⁶

Given the legal nexus between the Court’s holding on the 2008 Comcast Order and some elements of its broadband agenda, the FCC issued this NOI on June 17, 2010 requesting comments on the scope of the legal framework governing the FCC’s jurisdiction over Broadband Internet Service. In the NOI, the FCC set forth two legal frameworks for comment. First is Option I, the continued use of Title I, which was significantly limited by the *Comcast* decision. Regarding this option, in recent comments on the *Open Internet NPRM*, the CPUC stated “[a]fter reviewing all of the comments, relevant case law, including the recently-decided *Comcast* decision . . . and applicable FCC regulations relevant to this seminal jurisdictional question,” the CPUC “agrees 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.”⁷

The alternative approach the FCC proposes is to regulate “Broadband Internet Service” under Title II of the Telecommunications Act. The FCC then offers the parties two options – Option 2 and Option 3 – for how Title II regulation of Broadband Internet Service could be achieved. Under Option 2, the FCC would forbear from regulation on a case-by-case basis. Option 3 would have the FCC assert its jurisdiction over Broadband Internet Service but forbear as a general matter from rate regulation and a number of traditional regulatory requirements. In its recent comments the *Open Internet NPRM*, the CPUC addressed these options globally by stating that “[i]f the [FCC] were to assert its jurisdiction under Title II, it should do so in a very limited manner, so as to ensure continued growth and development of both technology and content.”⁸ The CPUC then suggested that the FCC could forbear from imposing many aspects of traditional common carrier regulation on Internet access providers. Section 160(a) of the 1934 Communications Act (“Act”), as amended, expressly

⁴ *Comcast v. FCC*, D.C. Circuit Appeal 08-1291 (available at <http://pacer.cadc.uscourts.gov/common/opinions/201004/08-1291-1238302.pdf>) (“Slip Opinion”), vacating the Commission’s Memorandum Opinion and Order in *Formal Complaint of Free Press and Public Knowledge Against Comcast Corporation for Secretly Degrading Peer-to-Peer Application*, 23 FCC Rcd. 13028 (2008), in which the FCC enforced its 2005 *Internet Policy Statement*.

⁵ Slip Opinion, at 3, quoting *Am. Library Ass’n v. FCC*, 406 F3d 689, 692 (D.C. Cir. 2005).

⁶ Slip Opinion, at 24.

⁷ See, CPUC Comments in GN No. 09-191, WC 07-52, at page 12 and 13.

⁸ See, CPUC Comments in GN No. 09-191, WC 07-52, at page 13.

authorizes the Commission to forbear from “applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets...”⁹ To do so, the FCC must make specified determinations as set forth in Sections 160(a)(1), (2), and (3) of the Act. The FCC has made such determinations on a number of occasions in other contexts and pertaining to other types of telecommunications services and service providers, and the FCC would be within its rights to make such a determination relative to Broadband Internet Service providers.

Thus the CPUC has already expressed support for the FCC’s proposed use of Title II authority to both regulate Broadband Internet Service and its forbearance from rate regulation and other aspects of that historical regulatory regime.

DISCUSSION: The transition from a circuit-switched world to an all IP-based world as envisioned in the FCC’s “Broadband Report”,¹⁰ and the FCC’s NOI raises numerous legal and policy issues regarding what sections of the Telecommunication Act are necessary to accomplish this agenda. These overarching legal and policy questions are the following:¹¹

- 1) what are the parts of the transport system that allow an end user to connect to the internet; in other words, what does the FCC envision would be included in its definition of Broadband Internet Service;
- 2) what sections of the Telecommunications Act should the FCC continue to enforce; and
- 3) what should be the States’ role in the regulatory scheme envisioned by the FCC?

The answers to these overarching legal and policy questions will help define what other policy issues need to be addressed and will impact how the various issues raised in the NOI matters will be resolved.

⁹ *Id.*

¹⁰ The FCC’s Broadband Report is available on line at FCC.GOV.

¹¹ See, NOI, at ¶ 1.

A. DEFINITION OF “BROADBAND INTERNET SERVICE”

In the NOI, the FCC states that “the term, ‘Broadband Internet Services,’ refers to the bundle of services that facilities-based providers sell to end users in the retail market. This bundle allows the end users to connect to the Internet.”¹²

The definition of the term “Broadband Internet Services” that emerges from the NOI will affect directly the manner in which the FCC and the states exercise jurisdiction in an IP- enabled world. Thus, it is essential that this term be clearly defined now. And yet, this definition should be flexible enough to cover unforeseen technological in both the short- and long-term. Specifically, the FCC’s definition should focus on ensuring that consumers are able to connect to the Internet regardless of the technology employed for access, and that providers cannot unreasonably limit customer access to content enabled by that connection.

Finally, the NOI states that Voice over Internet Protocol (“VOIP”) is not within its scope. However, the answer to the question of how Broadband Internet Services are defined will directly affect how the FCC ultimately decides VoIP should be regulated.

B. FORBEARANCE - SPECIFIC ISSUES

The NOI raises many questions about how the FCC and the states will regulate telecommunications carriers in an IP-enabled world. Therefore, the following points are not meant to be a complete list of the issues related to the various sections of the Act that need to be addressed. Rather, this list addresses the most important of these issues that staff has identified to date.

1. Section 254 – Universal Service; Section 255 – Disabilities¹³

Currently Section 254 (b)(2) of the Act requires the FCC to base policies for the preservation and advancement of universal service on the principle, among others, that “[a]ccess to advanced telecommunications and information services should be provided in all regions of the Nation.”¹⁴ As the CPUC has stated in numerous prior

¹² NOI, at ¶ 1.

¹³ Section 214(e) of the Act provides the framework for determining which carriers are eligible to participate in universal support programs, and Section 251(a) (2) of the Act directs telecommunications carriers not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to Section 251(a) (2) and Section 225, which establishes the telecommunications relay service programs.

¹⁴ 47 U.S.C. 254(b) (2).

comments to the FCC,¹⁵ many states have their own universal service programs and many of these programs provide support for services beyond what the current federal universal service programs provide. For example, California has a Deaf and Disabled Telecommunications Program that provides qualified disabled individuals with equipment on a loan basis to enable their access to the Public Switched Telephone Network (“PSTN”).

If the FCC were to forbear from enforcing Section 254, such forbearance could conceivably have the effect of preempting state jurisdiction over IP services, and take away state jurisdiction to establish and continue already existing state universal service programs to support Broadband deployment. On the other hand, if the FCC and the states continue to have jurisdiction over Universal Service and Disability programs that promote Broadband deployment, the FCC should acknowledge that both it and the states have jurisdiction to set forth the best method for determining contributions from IP services to both federal and state funds and the best ways to collect funding for state and federal USF mechanisms for “Broadband Internet Services.”

2. Privacy – Section 222

We support the FCC’s proposal not to grant forbearance from Sec. 222 of the Communications Act. This section requires telecommunications carriers to protect the confidentiality of customer information obtained by virtue of the carrier’s provision of a telecommunications service. Section 222 and related FCC regulations mandate how the carrier may use, disclose and permit access to customer proprietary information, to ensure that the carrier may utilize the information as necessary to provide service but at the same time ensure maximum privacy protection of the customer’s information. Given California’s Constitutional right to privacy, it is important that California support the FCC’s position on this key privacy section of the Act.

3. Interconnection – Section 251

In comments in the FCC’s *IP Network* proceeding, the CPUC stated that “the entrance of IP-enabled voice and data providers into the communications market implicates many issues pertaining to interconnection. Changes to the current interconnection rules are necessary to ensure continued interconnection and a level playing field among all facilities-based providers.”¹⁶

¹⁵ See, e.g., *In the matter of Comment Sought on Transition from Circuit-Switched Network to all-IP Network* – NBP Public Notice #25, GN Docket Nos. 09-47, 09-51, 09-137, CPUC’s December 18, 2009 Comments at pages 4-5.

¹⁶ *In the matter of Comment Sought on Transition from Circuit-Switched Network to all-IP Network* – NBP Public Notice #25, GN Docket Nos. 09-47, 09-51, 09-137, CPUC’s December 18, 2009 Comments at pages 4-5.

Moreover, in those Comments, the CPUC raised a number of questions relating to interconnection which cannot be effectively addressed if the FCC should forbear from applying Section 251 to the provision of Broadband Internet Services. “Some of the questions that the FCC should consider going forward are the following:

Should some or all of the general duties required of telecommunications carriers by Section 251(a) and (c) of the Act be expanded to include all facilities based providers of IP-based services? Should any or all facilities-based IP enabled providers be required to provide resale and unbundled elements similar to LEC requirements under Section 251(b)? Should the Sec. 251(f) (1) exemption for certain rural carriers be eliminated? Should this be a matter to be determined at the state level as currently provided? Should States retain their role in the interconnection regime established in Sections 251 and 252 of the Act? Should IP service providers seeking interconnection in a state be subject to the arbitration authority of States to resolve their interconnection disputes or should such disputes migrate to the types of arrangements that characterize an IP communications world (e.g., peering agreements, etc.) and not be subject to State arbitration under the Act?”¹⁷

4. Emergency Services

i. Loss of Separately Powered PSTN Communications Network

In its *IP Network* comments, the CPUC also raised a concern regarding the transition to an IP-based world – specifically that the loss of a separately powered communications system could impede a customer’s access to emergency services. Some of the issues the CPUC raised in that proceeding were as follows: “Should there be a requirement that IP-voice providers provide back-up power at the customer premise? How would such a requirement be enforced? Alternatively, would education of customers be adequate to address this issue? Who should be required to educate the customer? Should the states be allowed to require back-up power if there is no federal mandate, and be allowed to set the duration for back-up power to meet each State’s individual, unique circumstances? Should there also be comparable back-up power requirements on the facility provider side -- so that not only the end-user customer is assured of back-up power but so too the service and application providers using the foundational broadband facility?”¹⁸ Clearly, the FCC and the states must

¹⁷ *Id.*, at pages 7-8.

¹⁸ *Id.*, at pages 8-9.

address these important questions. Thus, as it pursues its “Third Way” option, the FCC should not use forbearance on any sections related to these issues in connection with Broadband Internet Service.

ii. E-911

In its *IP Network* comments, the CPUC stated that “[t]he California designated entity to implement 9-1-1 has a central role in ensuring that all residents have reliable and free access to 911. Currently, the California PUC has jurisdiction to regulate rates of 9-1-1 data base intrastate access services.” If state jurisdiction over IP is pre-empted because the FCC chose to forbear from statutes that bear on this state authority, then the following question arises: “Who should establish and enforce E 9-1-1 reliability standards for IP-based service providers? Issues the FCC should consider when deciding to forbear are: Should states continue to have the authority to require tariffs and establish rate levels for the transport, switching and delivery of E9-1-1 voice and data to the Public Switched Answering Points (PSAPs) in an all-IP-based world? In the event that states do not have jurisdiction over IP services or providers, should states continue to regulate the rates, access and use of 9-1-1 data bases that contain confidential, unpublished information?”¹⁹ Given the importance of emergency services, the FCC should not forbear from regulation in this area in connection with Broadband Internet Service.

5. Service Quality and Consumer Protection

Service quality and consumer protection is obviously an important matter for customers of communications providers. Currently, states have jurisdiction over the quality of voice service provided by LECs, and the “terms and conditions” of wireless service. Given the FCC vision that the “Third Way” would be similar to the current regulation of wireless service, it is important that the FCC and the States have authority over “terms and conditions” of service for Broadband Internet Service.

6. Sections 201 and 202

The FCC is correct that Sections 201-202 are important tools for the FCC to use to provide the FCC with direct statutory authority to protect consumers and promote fair play.²⁰ Section 201 prohibits just and unreasonable charges and Section 202 prohibits unreasonable discrimination. Since the FCC is modeling the “Third Way” on its regulation of the wireless industry, it should be noted here that the FCC rejected the wireless industries’ forbearance request with regard to these sections. Rather, the FCC

¹⁹ *Id.*, at pages 9-10.

²⁰ NOI, at ¶ 76.

“found that in a competitive market those provisions are critical to protecting consumers.”²¹

8. Sections 208 and 209

In ¶¶ 77 and 78 of the NOI, the FCC seeks comment on whether or not it should forbear from Sections 208 and 209 of the Act and the associated enforcement regime. These sections deal with the FCC’s authority to hear complaints and impose fines. Because these sections serve as an important tool for the FCC to use as it battles against unlawful practices, these sections should be retained as part of FCC active oversight over Broadband Internet Service.

C. ROLE OF THE STATES

In the comments above, in relation to the discussion of specific sections of the Act, the current role and the necessity for an ongoing role for the CPUC is addressed. As a more general comment, while “cooperative federalism” has been an important concept in refining the working relationship between the federal and state governments, there are areas of regulation that the states should either share with the FCC or retain because of the longstanding expertise of the states in a given area. A good example of this is enforcing compliance with consumer protection laws.

Finally, given the importance and urgency of the need to implement the National Broadband Plan, it is important that the FCC build a complete legal and evidentiary record to confirm the agency’s oversight authority under Title II. The FCC’s Option 3 proposal to invoke Title II, also known as the “Third Way.” corresponds most closely with the CPUC’s prior positions. The Third Way offers the quickest path to resolution of jurisdictional authority and will allow the FCC and state regulators to move forward more quickly to effectuate the National Broadband Agenda. In this regard, however, the CPUC should caution that the FCC must support its proposed jurisdictional move with evidence that a modified policy is needed as a result of fast and ubiquitous changes that have occurred in the broadband market.

For example, in 2002, when the FCC determined in its *Cable Modem Declaratory Ruling*²² that Broadband Internet Service should be categorized as an information service, it did so premised on the assumption that competition for broadband services would increase significantly in the years ahead. However, eight years later, in 2010,

²¹ See PCIA Forbearance Order, 13 FCC Rcd at 16865, para. 15.B. “[S]ections 201 and 202 lie at the heart of consumer protection under the Act. Congress recognized that the core nature of sections 201 and 202 when it excluded them from the scope of the Commission’s forbearance authority under section 332(C) (1) (A), 16868, para. 23.”

²² 17 FCC Rcd at 4804, (2002), ¶ 10.

the Broadband market still is still controlled by the carrier that controls the local loop to almost all current and potential Broadband customers. In most parts of the country, Broadband service is provided by the Incumbent Local Exchange Carriers (ILEC) and/or the relevant Cable operator. Indeed, in 78% of the nation's geographic area, customers can choose between only one cable operator and one ILEC, while in 13% of the nation, only one provider offers Broadband service. This duopoly control of local Broadband access makes some regulation of ILEC Broadband Internet Services (and ultimately both downstream and upstream markets) essential to the universal deployment of Broadband Internet Services.

Since the FCC determined in 2002 that Broadband Internet Service was to be regulated as an information service, potential competitors have been unable to gain access to the advanced network components needed to provide competing services. Further, experience has shown that, absent competitive pressures, incumbent LECs will not rush to invest in and offer new broadband technologies to underserved areas.²³

CONCLUSION: For the above reasons, staff recommends that the CPUC file comments in this docket consistent with the foregoing recommendations.

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²³ See, *The Transition to IP Telecom: Evolution, Not Revolution*, Presentation to California Public Utilities Commission by Dr. Lee S. Selwyn, June 16, 2010, (available on CPUC website, at cpuc.ca.gov).