

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

In the Matter of the Petition of The United)
Power Line Council For a Declaratory)
Ruling Regarding the Classification of)
Broadband Over Power Lines Internet) WC Docket No. 06-10
Access Service As An Information)
Service)
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**COMMENTS OF THE
NEW JERSEY DIVISION OF THE RATEPAYER ADVOCATE**

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On the Comments:

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Date: February 10, 2006

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I. INTRODUCTION

The United Power Line Council (“Petitioner”) filed with the Federal Communications Commission (“FCC” or “Commission”) the above referenced petition for declaratory ruling on December 23, 2005. The FCC issued a Public Notice on January 11, 2006 asking for comments and reply comments from the public.¹ Petitioner seeks a declaratory ruling that Broadband over Power Line (“BPL”)–enabled Internet access service is an information service as defined in the Communications Act of 1934, as amended (“Act”). The Petitioner claims that a ruling is required in order to (1) remove any uncertainty about the classification of BPL-enabled Internet access service and whether it is subject to regulation under Title I or Title II of the Act, (2) provide the same level of regulatory clarity to the nascent BPL industry that now exist for cable modem and Digital Subscriber Lines

^{1/} See Public Notice dated January 11, 2006, DA 06-49 wherein comments are due on February 10, 2006 and reply comments on February 27, 2006.

“DSL”), and (3) take action based upon the existing record and declare BPL an information service in order to promote the growth of BPL and broadband access to all Americans.²

A. INTEREST OF THE RATEPAYER ADVOCATE IN THE INSTANT PROCEEDING.

The Ratepayer Advocate is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Ratepayer Advocate participates actively in relevant Federal and state administrative and judicial proceedings. The above captioned proceeding is germane to the Ratepayer Advocate’s continued participation and interest in implementation of the Telecommunications Act of 1996 and broadband deployment.³ The New Jersey Legislature has declared that it is the policy of the State to provide diversity in the supply of telecommunications services, and it has found that competition will “promote efficiency, reduce regulatory delay, and foster productivity and innovation” and will “produce a wider selection of services at competitive market-based prices.”⁴ BPL offers great promise to consumers, as well as offering to all consumers the prospect of having affordable access to broadband technology.

However, the promotion of broadband is a shared objective with concurrent jurisdiction between states and the Federal Government. Energy regulation is split between the Federal Energy Regulatory Commission (“FERC”) at the wholesale level and the province of state commissions on the intrastate level. Electric utilities are subject both to federal and state regulation. BPL is offered

^{2/} Petition at 1, 2, 10, 12.

^{3/} Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (“1996 Act”). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1934, as amended by the 1996 Act, will be referred to as “the 1996 Act,” or “the Act,” and all citations to the 1996 Act will be to the 1996 Act as it is codified in the United States Code.

^{4/} *N.J.S.A.* 48:2-21.16(a)(4) and 48:2-21.16(b)(1) and (3).

over the intrastate infrastructure that is subject to state regulation. Broadband, including BPL, irrespective of how it is classified (whether as a telecommunications or information service) is not subject to the exclusive jurisdiction of the FCC. State commissions have concurrent jurisdiction to promote and regulate broadband. BPL is an evolving technology that is offered in isolated markets and not ubiquitously offered on a national scale to the extent DSL and cable modem are now offered. As a result, this Petition is simply premature and dismissal is appropriate.

B. PETITIONER HAS NO EMPIRICAL SUPPORT AS TO WHY BPL CLASSIFICATION IS NEEDED OR REQUIRED AT THIS TIME AND OTHERWISE REQUIRED IN FURTHERANCE OF THE PUBLIC INTEREST.

The Petitioner simply has failed to provide any support let alone empirical support to show that BPL deployment is hindered at this time by the lack of classification as an information service. There is no evidence presented that investment and deployment of BPL is adversely affected in any way by the so called regulatory uncertainty proffered by the Petitioner. Petitioner's request for a declaratory ruling that BPL is an interstate information service seems calculated and designed to limit the role of state commissions in terms of implementing a comprehensive and coherent framework for broadband deployment. Although Petitioner acknowledges that BPL relies upon the electric distribution infrastructure (that is an electric intrastate structure that is subject to the exclusive jurisdiction of state commissions as opposed to FERC), Petitioner still seek to redefine BPL as an interstate information service and place jurisdiction over BPL beyond the reach of state commissions or even other Federal agencies. The Ratepayer Advocate submits that such a request is contrary to the public interest and otherwise inconsistent with the role of federal government and states under the U.S. Constitution. Additionally, the Petitioner's request ignores completely the

consumer protection issues implicit in classifying BPL as an interstate information service. The FCC has an ongoing proceeding in which broadband consumer protection issues, such as protection of consumer information, slamming, truth-in-billing, network outage reporting, discontinuance of service, rate averaging, and jurisdiction of federal and state authorities are under review.⁵ The nascent nature of the BPL industry makes any classification premature and unwarranted.

II. CONCLUSION

The Ratepayer Advocate respectfully submits that the FCC should reject the Petition as being premature and lacking in any empirical support. Petitioner seeks a national finding for BPL while the technology is its infancy and before there is even wide spread deployment. While the FCC did find cable modem and DSL to be information services, such determinations were made only after national deployment was a fact and not a mere hope. This alone justifies a more cautious approach, and the FCC should defer any decision to a later time. Furthermore, any determination, concerning what is the appropriate classification of BPL, should be undertaken pursuant to rulemaking. Rulemaking affords a higher level of due process and a more fully developed record. As a result, the FCC should simply reject the Petition.

Respectfully submitted,

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^{5/} See *In The Matter of Consumer Protection in the Broadband Era*, WC Docket No. 05-271