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December 14, 2014

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Washington, DC 20054

Via Electronic Filing

**Re: GN Docket No. 14-28, *Protecting and Promoting the Open Internet*
GN Docket No. 10-127, *Framework for Broadband Internet Service***

Dear Ms. Dortch,

As the Commission continues its work to restore the proper framework for broadband, returning to the law and to the original deregulatory Title II blueprint Congress adopted in 1996, industry representatives and consultants continue their disingenuous effort to portray common carriage as a threat to American consumers. The latest examples of this effort come in a letter from the National Cable and Telecommunications Association (“NCTA”)¹ and a policy brief – issued, perhaps coincidentally, just one day earlier – by the Progressive Policy Institute (“PPI”).²

Both speculate that Title II reclassification might lead – with heavy emphasis on the conditional nature of the claim – to new taxes on broadband. This “could” come about, supposedly, because treating broadband Internet access as a telecommunications service under 47 U.S.C. § 153(53) might arguably open up broadband to state and local telecom taxes.³ NCTA offered no predictions on the aggregate amount of such supposed new tax liability, while PPI said that the state and local total “could reach” \$15 billion.⁴

There is no basis in reality for these fear-mongering claims. Congress’s reauthorization of the Internet Tax Freedom Act (“ITFA”) precludes any new state or local taxes for broadband Internet access, no matter how the Commission defines and classifies it, just as the existing ITFA precluded such taxes before that reauthorization. The federal and state universal fund considerations that NCTA and PPI casually toss into the equation are, likewise, readily precluded by Commission action, and neither an automatic outcome of, nor dependent on, reclassification.

Plain and simple, returning to Title II will not create any new taxes for broadband users.

¹ Letter to Jonathan Sallet, General Counsel, FCC, from James Assey, National Cable & Telecommunications Association, GN Docket Nos. 14-28, 10-127 (filed Dec. 2, 2014) (“NCTA Letter”).

² Robert Litan & Hal Singer, “Outdated Regulations Will Make Broadband Consumers Pay More for Broadband,” Progressive Policy Institute Policy Brief (Dec. 2014) (“PPI Brief”).

³ See, e.g., NCTA Letter at 1.

⁴ See PPI Brief at 3.

In our preliminary response to the PPI Brief, Free Press explained that the supposed increase in taxes “would be exactly zero”⁵ on attainment of three conditions: (1) Congress extends the ITFA; (2) the Commission decides logically, following precedent on this subject, to affirm that broadband Internet access is an interstate telecommunications service; and (3) the Commission declines to include broadband in the revenue base for the federal universal service fund (“USF”) at this time.

The first condition has now been met, with the extension of the ITFA. There was a fundamental misreading of that Act in the initial exchanges on this topic, and in the case of PPI and NCTA a near total failure to consider this tax moratorium properly.⁶ But that tax provision has for at least the past decade precluded the exact same kind of taxes recently conjured out of thin air by PPI and NCTA. With Congress’s extension of that moratorium, the ITFA continues to preclude them. Title II reclassification will not and could not create any new state and local taxes, or increase the amount of any such state and local taxes, that may be imposed on broadband providers or passed through to broadband customers.

Broadband providers and consumers are also doubly protected from new taxes by the definition of the type of telecom services that are subject to tax in various state tax codes, as detailed in our new analysis below. The federal moratorium in the ITFA makes less relevant the questions that NCTA raised regarding individual states’ laws. We discuss nevertheless many statutes cited by NCTA, and show that the story of pending tax doom is pure fiction. The truth is that when examined, many of the state statutes NCTA cites actually make it clear that Internet access services would not be subject to taxes and fees no matter how the Commission classifies mass market broadband access; while in other states, taxes apply specifically to intrastate or toll telephone services, not to interstate telecommunications services like broadband.

The second condition outlined above, affirming the interstate character of broadband Internet access, is the only path the Commission realistically can take on that question – thus precluding further any sort of assessment or state universal service fund contribution requirements for intrastate services. And the federal universal service fund issues undoubtedly will be decided in a separate proceeding, but the key point there is that increases or decreases in USF expenditures are not tied to Title II either.

The cable lobby and consultants may attempt to scare the Commission with tall tales of consumer harms that could arise, in the form of new state taxes, if the Commission properly implements the Communications Act and reclassifies. However, “could” arise is not the same as “would” arise. And in this case, “could” definitively turns out to be “could not and would not.”

⁵ Matt Wood, “Claims That Real Net Neutrality Would Result in New Internet Tax Skew the Math and Confuse the Law,” Free Press Blog, Dec. 2, 2014, <http://www.freepress.net/blog/2014/12/02/claims-real-net-neutrality-would-result-new-internet-tax-skew-math-and-confuse-law> (“Free Press Blog”).

⁶ See PPI Brief at 4 (suggesting falsely that “it would take state or local legislative action to repeal the state and local charges” with no reference to the ITFA); see also Hal Singer, “Flaws in Free Press’s Alternative Estimate of New State and Local Fees Attributable to Reclassification,” Dec. 3, 2014 (“Singer Blog”) (finally acknowledging the existence of the ITFA, yet perpetuating a misinterpretation that the moratorium does not currently apply to broadband Internet access no matter how the FCC classifies such services under Title I or Title II).

We submit this letter in order to calm the fears that these claims have irresponsibly stirred. However, we note that determining the proper regulatory classification of broadband is not a multiple choice policy question for the Commission, but simply a matter of implementing the statute based on the observable facts of how the service functions. Taxes and their application, on the other hand, are the exclusive concern of the states and Congress, not this Commission.

The Communications Act clearly contemplates and mandates that broadband Internet access is a telecommunications service, and that is how the Commission should treat it. There is no possibility the Commission could rightfully alter its interpretation of its own authorizing statute in a misguided attempt to usurp Congress's role or dictate state tax policy to the duly elected legislatures of the several states. Yet there also is no need for the Commission to contemplate such an outlandish gesture as purporting to alter federal and state tax law, because Congress in the reauthorized ITFA speaks on this topic unambiguously.

The Internet Tax Freedom Act Precludes State and Local Taxation of Internet Access, No Matter Whether Internet Access Is Classified as a Title II Telecommunications Service.

Curiously absent from both the NCTA Letter and the PPI Brief is a full discussion of the Internet Tax Freedom Act, which includes a moratorium on state or local "Taxes on Internet access."⁷ NCTA and PPI thus appear to have barely considered the moratorium at all, but if they did they misread it. Ignoring or omitting any reference whatsoever to the tax legislation at the crux of this debate is an odd choice to say the least, and one that destroys any credibility of the parties making this claim about new taxes; but the meaning of the ITFA is clear, and it clearly precludes state and local taxes on Internet access no matter whether the FCC classifies it as a telecommunications service.

The ITFA defines Internet access as "(A) . . . service that enables users to connect to the Internet to access content, information, or other services offered over the Internet"⁸ and that "includes the purchase, use or sale of telecommunications by a provider of a service described in subparagraph (A) to the extent such telecommunications are purchased, used or sold (i) to provide such service; or (ii) to otherwise enable users to access content, information or other services offered over the Internet."⁹

Lest there be any doubt about that definition, or the application of this provision and the general moratorium to Internet access even when classified as telecommunications, the definitions in the ITFA go on to reference the Communications Act's own definitions of telecommunications and telecom service.¹⁰ The plain text of the ITFA resolves all doubt in this matter, and it shows that PPI's and NCTA's state tax claims are plainly wrong.

⁷ The ITFA is set out as a note to Section 151 in the Communications Act. *See* 47 U.S.C. § 151, note. References to the ITFA herein are to the sections enumerated in that note. The moratorium text quoted above appears at Sec. 1101(a)(1).

⁸ 47 U.S.C. § 151, note Sec. 1105(5)(A).

⁹ *Id.*, Sec. 1105(5)(B) (emphases added).

¹⁰ *See id.*, Sec. 1105(9).

Furthermore, when extending the ITFA in 2004 (or rather, the predecessor enactment called the Internet Tax Non-Discrimination Act), Congress made perfectly clear that the moratorium protects Internet access from state and local tax – no matter if or how the Commission classifies such access as information or telecom service. In the legislative history for that reauthorization, the Senate Commerce Committee report on the bill noted:

the Committee believes that the current definition of Internet access under the Act requires clarification to ensure that States and localities do not attempt to circumvent the moratorium on Internet access taxes by taxing individual components of access such as telecommunications services used to provide Internet access. To date, some States have interpreted narrowly the definition of Internet access under the ITFA in order to impose taxes on certain types of Internet access or components thereof. For example, certain States tax the transmission component of digital subscriber line (DSL) Internet access.¹¹

This Committee report showed full cognizance of the issues surrounding the Commission’s classification decisions, along with an unmistakable intent both to leave that interpretation of the Communications Act to the FCC while prohibiting state taxation of Internet access either way. Once again, it is worth quoting these passages at length.

The modified definition of Internet access would clarify that all transmission components of Internet access, regardless of the regulatory treatment of the underlying platform, are covered under the ITFA’s Internet tax moratorium For example, the FCC has determined that the transmission component of cable modem service constitutes “telecommunications” (as defined in the Communications Act of 1934, as amended . . .) not offered separately from the Internet access and is thus not a “telecommunications service” (as defined in the 1934 Act). By contrast, the FCC currently classifies the transmission component of Internet access via DSL as a “telecommunications service” (as defined in the 1934 Act). By modifying the definition of Internet access, the Committee seeks to clarify that, under the ITFA, neither Internet access nor the transmission component of Internet access is subject to taxation.¹²

This is an open and shut case, and there can be no claim that Congress left any doubt. Internet access, whether the Commission treats it as a Title II telecom service or leaves the current (and flawed) Title I classification in place, is exempt from state and local tax thanks to the ITFA. That is true going forward, due to reauthorization of the ITFA, and it was true last week when NCTA and PPI made their mistaken claims prior to the ITFA’s renewal. It has been true since at least 2004, when Congress recognized and rectified the possibility of disparate state tax treatment for DSL and cable modem service.

¹¹ Report of the Senate Committee on Commerce, Science, and Transportation, “Internet Tax Non-Discrimination Act of 2003,” S. 150, S. Rep. No. 108-155, at 2 (Sept. 29, 2003) (emphasis added).

¹² *Id.* at 3 (emphasis added) (likewise specifying that “the Committee neither condones nor rejects the FCC’s decisions regarding the regulatory classification of any services” and that it did not intend with the moratorium “to affect in any way existing laws, regulations, policies, or regulatory decisions by the FCC or any other agency”).

In the discussion following publication of the PPI Brief, one its authors suggested that “Free Press admits that the ITFA as currently written would not prevent these new taxes if broadband were reclassified.”¹³ Not so, and we made no such admission. Our preliminary analysis merely said: “If Congress wants to renew this special exemption, making sure it applies to Internet access after the FCC reclassifies is a very easy legislative fix.”¹⁴ Our language was perhaps imprecise; there was no legislative “fix” required other than the reauthorization of the ITFA that has now passed the House and Senate. But no matter what other advocates may imagine or charge Free Press with admitting, it matters not: the law is clear, and ITFA as written precludes such state and local taxes no matter how the FCC classifies Internet access.

Broadband Access Services Are Interstate Telecommunications Services.

Next, it is important to note the differences between taxes and fees applied to intrastate telecommunications services and those applied to interstate telecommunications services. Historically, the Commission has considered Internet access as a service that involves “a substantial portion of Internet traffic. . . accessing interstate or foreign websites.”¹⁵ As Verizon has noted, “broadband Internet access (and other IP-enabled) services are multi-faceted, any-distance services that cannot practicably be separated into intrastate and interstate parts.”¹⁶

Indeed, consider precisely the nature of the “points specified by the user” where the user transmits the information of its choosing. One point is where the user is located. In the case of wireline broadband, this is the location where the service is deployed; in the case of wireless, it is the location of the nearest access point to the user, be it a cellular tower, femtocell, picocell, or Wi-Fi access point, which could be near the user’s billing address or instead in any U.S. state, territory or even international location. The other point of the users’ choosing is the IP address of the website, application or other Internet endpoint with which the end-user chooses to communicate. Given how Internet content is hosted and served, in most cases this endpoint with which the user communicates will be located in another state. This is likely the case even if the user is sending and receiving communications with someone located in the same state, as the destination point for both users is not the other person’s physical location, but the information service (*e.g.*, an e-mail server) that intermediates the communications.

Thus, based on Commission precedent and the observable nature of broadband-facilitated communications, broadband access is properly classified as an interstate telecommunications service. This means that states will not apply to broadband any taxes or fees, including any state universal service fund assessments or contributions, that apply solely to intrastate telecommunications services.

¹³ Singer Blog, at Claim 6.

¹⁴ Free Press Blog.

¹⁵ *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd 3689, ¶ 18 (1999).

¹⁶ *See* Comments of Verizon and Verizon Wireless, GN Docket No. 10-127, at 107 (filed July 15, 2010). Verizon rightly pointed out that not only is the interstate designation correct from an analytical perspective, it is also consistent with the Commission’s authority to preempt inconsistent state regulation. *See id.* at 109-110.

Moreover, as the ITFA does, some state laws specifically exclude Internet access from telecommunications services taxes, regardless of the federal classification of these services as information or telecommunications services.

The States Cited by NCTA Exempt Internet Access Services, or Only Assess Taxes on Intrastate Telecommunications, Telephone, or Telegraph Services.

In its letter,¹⁷ NCTA excerpts numerous state statutes in an attempt to suggest that proper Commission classification of broadband Internet access as a telecommunications service would trigger new taxes. However, NCTA fails to cite the most relevant portions of many of these laws, portions that clearly indicate they do not apply to Internet access service no matter how it is classified by the Commission. NCTA also fails to note when taxes only apply to intrastate telecom services, not interstate telecom services such as broadband access.

For example, NCTA argues that in Utah, “all property of public utilities, including those [sic] of telephone and telegraph corporations, must be assessed annually by the State Tax Commission.”¹⁸ But that doesn’t tell the full story. The Utah property tax act refers to definitions in the state public utilities code, which defines a “telephone corporation” as “any corporation or person . . . who owns, controls, operates, manages, or resells a public telecommunications service . . .” However, this term “does not mean a corporation, partnership, or firm providing: (i) intrastate telephone service offered by a provider of cellular, personal communication systems (PCS), or other commercial mobile radio service as defined in 47 U.S.C. Sec. 332 that has been issued a covering license by the Federal Communications Commission; (ii) Internet service; or (iii) resold intrastate toll service.”¹⁹

Thus, in NCTA’s very first example, we see that the state specifically excludes Internet access services from its definition of a taxable public utility or service, not to mention excluding CMRS services. Indeed, in the information sheet Utah releases to help companies understand its sales tax statute, the first page clearly states that the definition of telecommunications services subject to sales tax excludes Internet access services.²⁰

Similarly, Louisiana – the second state cited by NCTA in which property taxes supposedly could apply – also does not in reality apply any such taxes to interstate telecommunications services or Internet access services. The Louisiana statute cited by NCTA defines “Public service properties” as “the immovable, major movable, and other movable

¹⁷ Curiously, the NCTA Letter dated December 2 indicates that the filing relates to a meeting that took place “on October 29, 2014.” NCTA Letter at 1. There appears to be no earlier submission in the docket for this meeting. It is difficult to understand how this comports with the Commission rule requiring *ex parte* notifications to be filed within two business days after a meeting – not two months later. See 47 C.F.R. § 1.1206(b)(2)(iii).

¹⁸ NCTA Letter at 2.

¹⁹ Utah Code Ann. § 54-2-1(28) (emphasis added).

²⁰ Utah Sales Tax Information for Telecommunications Service Providers, *available at* <http://www.tax.utah.gov/forms/pubs/pub-62.pdf> (last visited Dec. 12, 2014).

property owned or used but not otherwise assessed in this state in the operations of each . . . telegraph company [or] telephone company”²¹

Louisiana in turn defines a telegraph company as “a company primarily engaged in the business of transmitting telegraph messages within, through, into, or from this state”; and telephone company as “a company primarily engaged in the business of transmitting telephone messages within, through, into, or from this state,” specifying that the latter includes only wireline telephony and excludes mobile services.²² No matter how the Commission chooses to classify broadband Internet access, it cannot somehow transform that service into a telephone messaging service. Moreover, the Louisiana sales tax code and rules also specifically define telecommunications service as not including electronic information service or “Internet access service.”²³

After providing these two examples of state property taxes that apparently would not apply in reality to broadband Internet access service should the Commission reclassify, NCTA moves to supposed transaction-based taxes and fees. First on NCTA’s list is Florida, and its general sales tax of 7.5 percent. The Florida statute cited by NCTA says “every person who engages in the business of selling communications services at retail in this state is exercising a taxable privilege.”²⁴ That statute defines “communications services” however, as “the transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals, including cable services, to a point, or between or among points” but clearly states that the term “does not include . . . Internet access service, electronic mail service, . . . or similar online computer services.”²⁵

Thus once again, the statute cited by NCTA explicitly excludes Internet access services. No matter how the Commission classifies broadband Internet access services, whether using the current information service designation or the proper telecommunications service designation, it remains an Internet access service – and thus not subject to the Florida communications services tax NCTA cites. The same is true for the South Carolina “relay service fee” cited by NCTA, which only applies to local exchange telephone services, not to any and all telecom services such as broadband Internet access services.²⁶

²¹ See La. Rev. Stat. Ann. § 47:1851(M).

²² *Id.* § 47:1851(P)-(Q) (“The term ‘telephone company’ shall not include any company that: (2) Primarily is engaged in the business of providing a service of radio communications between mobile and base stations, between mobile and land stations, or between two or more mobile stations, including but not limited to any cellular service, paging service, or other forms of mobile or portable communications service.”).

²³ See La. Admin. Code tit. 61, § 1134(D)(2)(f)(vii); see also La. Rev. Stat. Ann. § 47:301(29)(x)(vi).

²⁴ Fla. Stat. ch. 202.12.

²⁵ *Id.* ch. 202.11(1), (1)(h). For good measure, the Florida statute also references the ITFA definition of “Internet access” located in Sec. 1105(5) of the moratorium. See Fla. Stat. ch. 202.11(6).

²⁶ According to the statute cited by NCTA, South Carolina applies this fee to “local exchange telephone companies,” defined elsewhere in the South Carolina law as those providing “basic local exchange telephone service,” which is defined as “residential and single-line business customers, access to basic voice grade local service with touchtone, access to available emergency services and directory assistance, the capability to access interconnecting carriers, relay services, access to operator services, and one annual local directory listing (white pages or equivalent).” S.C. Code Ann. §§ 58-9-10, 58-9-2530.

Though one might think NCTA would find it a bit cynical to complain about its member companies' contributions to E-911 funds, its citation to the Texas statute appears to be just that. However, this too is another example of a state statute that only applies to intrastate telephony, and not Internet access or interstate telecommunications services.²⁷

This pattern of the actual statutes telling a far different story than the one NCTA intended to portray continues for other states cited in the trade association's letter. The District of Columbia only applies its taxes and fees to toll telephony. That would not include interstate broadband Internet access even if Internet access were defined as a Title II service, and so the DC Code does not contemplate including Internet access services in its definition of the toll telecommunications services that are subject to these taxes.²⁸

²⁷ “Except as otherwise provided by this subchapter, the commission may impose a 9-1-1 emergency service fee on each local exchange access line or equivalent local exchange access line. . . . The fee may also not be imposed on any line that the commission excluded from the definition of a local exchange access line or an equivalent local exchange access line pursuant to Section 771.063.” See Tex. Health & Safety Code Ann. § 771.001. The statute noted that “By October 1, 1999, the advisory commission shall adopt definitions of a local exchange access line and an equivalent local exchange access line that exclude a line from a telecommunications service provider to an Internet service provider for the Internet service provider's data modem lines used only to provide its Internet access service and that are not capable of transmitting voice messages.” See Tex. Health & Safety Code Ann. § 771.063. (emphasis added). The Texas rules also note again this fee applies to interconnected PSTN lines, not broadband: “The terms ‘local exchange access line’ or ‘equivalent local exchange access line’ mean the physical voice grade telecommunications connection or the cable or broadband transport facilities, or any combination of these facilities, owned, controlled, or relied upon by a service provider, between an end user customer’s premises and a service provider’s network that, when the digits 9-1-1 are dialed, provides the end user customer access to a public safety answering point through a permissible interconnection to the dedicated 9-1-1 network. (b) The terms ‘local exchange access line’ or ‘equivalent local exchange access line’ do not include coin-operated public telephone equipment, public telephone equipment operated by card reader, commercial mobile radio service that provides access to a paging or other one-way signaling service, a communication channel suitable only for data transmission, a line from a telecommunications service provider to an Internet service provider for the Internet service provider's data modem lines used only to provide its Internet access service and that are not capable of transmitting voice messages, a wireless roaming service or other nonvocal commercial mobile radio service, a private telecommunications system, or a wireless telecommunications connection subject to Texas Health and Safety Code §771.0711.” Tex. Admin. Code §255.4 (emphases added).

²⁸ See D.C. Code § 47.2501(b)(5)(A) (“The term ‘telecommunication company’ includes and is not limited to every person, as defined in § 47-2001(i), and lessee of a person who provides for the transmission or reception within the District of Columbia of any form of toll telecommunication service for a consideration. (B) The term ‘toll telecommunication service’ means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication; or the transmission or reception of any sound, vision, or speech communication that entitles a person, as defined in § 47-2001(i), upon the payment of a periodic charge, which is determined as a flat amount or upon the basis of total elapsed transmission time, to an unlimited number of communications to or from all or a substantial portion of the persons having telephone or radio telephone stations in a specified area that is outside the local telephone system area in which the station providing this service is located.”) (emphases added); see also *id.* § 47.3901(15) (“‘Toll telecommunication service’ means the transmission or reception of any sound, vision, or speech communication for which there is a toll charge that varies in amount with the distance or elapsed transmission time of each individual communication or the transmission or reception of any sound, vision, or speech communication that entitles a person, upon the payment of a periodic charge that is determined as a flat amount or upon the basis of a total elapsed transmission time, to an unlimited number of communications to or from all or a substantial portion of persons who have telephone or radiotelephone stations in a specified area outside the local telephone system area in which the station that provides the service is located.”).

The same is true for Missouri, in which the taxes described by NCTA specifically apply to intrastate telephonic or telegraphic services or the intrastate portion of mixed jurisdiction services.²⁹ Similarly, the Indiana public utility fee cited by NCTA specifically says that this fee “only shall include all intrastate operating revenue received by a public utility for the conveyance of telegraph or telephone messages.”³⁰

As explained above, many of these state law questions are made moot by a correct reading of the ITFA – which neither PPI nor NCTA attempted in earnest, much less got right. But the reauthorization of that federal moratorium, backed by a clear reading of several state statutes improperly cited by NCTA, show that there is no new state or local tax liability in play on the basis of the Commission’s reclassification decision.

Federal Universal Service Fund Increases and Implications Are Neither Automatic Under Title II, Nor Even Necessarily Tied to Reclassification.

While a full discussion of federal Universal Service Fund policies and laws is well beyond the scope of this letter, a few top-level points bear repeating.

As shown by the E-Rate vote taken on December 11, 2014, by the Commission, and by its actions (now upheld by the Tenth Circuit) over the past several years to create the Connect America Fund, increases in federal USF expenditures or outlays for broadband deployment are not dependent on treating residential broadband services as telecom services.

Second, when it comes to contributions that could be in order under Section 254(d), the Commission could decide to forbear from any such requirement because a cost-benefit analysis might show that the additional fees on broadband would depress overall broadband adoption among poor and elderly communities – which would go against the USF’s very mission.

Third, whether or not the Commission takes that step under Section 254(d), adding broadband into the universal service fund contribution base would not impact the fund’s overall size because that overall size is dictated by the expenditures mentioned above. If broadband revenues were assessed but the fund size stayed constant, consumers would pay on broadband but consequently pay less for other services like wireless and wired voice.

Fourth, the initial PPI Brief claimed that consumers would pay relatively more in the aggregate than they do now, while businesses would pay relatively less, but its authors still have offered no data we can assess to analyze PPI’s estimate on this shift in the burden.

²⁹ See Mo. Rev. Stat. § 143.441.1(1)(4) (subjecting corporations that own telephone or telegraph lines to tax); *id.* § 143.451(6) (“Income shall include revenue from each telephonic or telegraphic service rendered wholly within this state; from each service rendered for which the only facilities of such corporation used are those in this state; and from each service rendered over the facilities of such corporation in this state and in other state or states, such proportion of such revenue as the mileage involved in this state shall bear to the total mileage involved over the lines of said company in all states.”).

³⁰ See Ind. Code § 8-1-6-3 (“The term ‘public utility,’ as used in this chapter, shall mean and embrace every corporation, company, cooperative organization of any kind, individual, association of individuals, their lessees, trustees, or receivers appointed by any court whatsoever that on or after March 15, 1969, may own, operate, manage, or control any plant or equipment within the state for the conveyance of telegraph or telephone messages . . .”).

In sum, when it comes to federal Universal Service Fund implications, reclassification is neither necessary for any Commission plans to increase (or decrease) the size of the fund, nor would reclassification automatically entail contributions from residential broadband users. Assessing broadband could indeed change the apportionment of current USF contributions, but would not increase the overall size of the fund – nor necessarily increase the amount paid by consumers in the aggregate or on an individual basis.

The NCTA Letter and PPI Brief claims that reclassification could lead to new state and local taxes is thus entirely false, as shown above; while the PPI Brief’s claim that reclassification could lead to new federal USF fees that would be shifted to consumers is completely speculative at best.

The States and The Congress Make Tax Policy, The Commission Implements Communications Laws.

If the FCC does nothing more than stick with precedent and designate broadband as an interstate telecommunications service, the potential increase in new state taxes and fees from reclassification would be zero, and in absolutely no way as expansive as PPI and NCTA suggest. As Congress extends the ITFA, consumers will see no new taxes once the Commission properly classifies broadband Internet access under Title II.

PPI and NCTA chose to muddy the discussion through their misleading and incomplete analyses of potential state taxes applied to broadband. No matter what those tax consequences might have been, it is simply not the Commission’s job to fiddle with the definitions in the Communications Act so as to produce or avoid the imposition of state taxes. The Commission’s only job is to apply the law that Congress wrote for it, and to treat broadband like the telecom service it is. As luck would have it, Congress and the states have already spoken to this issue – precluding any need for the Commission to venture into tax issues in which it has no role.

Respectfully submitted,

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