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October 17, 2000

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OCT 20 2000

FCC MAIL ROOM

Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
Room TW-B204
445 12th St. S.W.
Washington, D.C. 20554

Re: *In the Matter of Inquiry Concerning High-Speed Access to the Internet
Over Cable and Other Facilities*
GN Docket No. 00-185

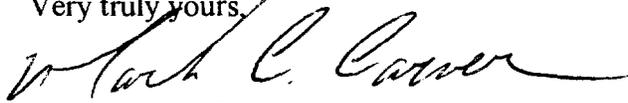
Dear Magalie Salas:

Please find the original and four duplicate copies of Comments on Behalf of the City of New Orleans. Please file these Comments into the record of this matter.

If you have any questions, please feel free to contact me at (504) 832-7204.

With kindest personal regards, I am

Very truly yours,



MARK C. CARVER

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Before the
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Washington, D.C. 20554

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In the Matter of)
)
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Access to the Internet Over)
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Comments on Behalf of the City of New Orleans

NOW COMES, the City of New Orleans, through undersigned counsel, who respectfully submits the following comments regarding the Federal Communications Commission's inquiry concerning high-speed access to the Internet over cable and other facilities.

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II. Introduction.

The Federal Communications Commission (“FCC”) is seeking comments on various issues regarding high-speed access to the Internet over cable and other facilities, the City of New Orleans has selected to address two issues raised within the Commission’s Notice of Inquiry. Specifically, the FCC has invited comments on (1) whether cable modem service and/or the cable modem platform is a cable service and (2) what affect will classifying cable modem service and/or the cable modem platform as a cable service have on franchise fees.¹

“Cable service “ is defined as “(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.”² The terms “or use” were added into the statute in 1996. The Commission has requested comments as to whether the addition of the words “or use” expanded the category of services such that cable modem service and/or the cable modem platform now fits within the definition of cable service. Furthermore, the Commission seeks comments on how classifying cable modem service and/or cable modem platform as a “cable service” will affect a local franchising authority’s ability to charge a franchise fee on revenues derived from the cable operator’s cable modem service and/or cable modem platform.

¹ Notice of Inquiry, FCC 00-355, paragraphs 17 and 18.

² 42 U.S.C. §522(6).

III. Summary of Argument.

The City of New Orleans (hereinafter "CNO") contends that cable modem service is a "cable service" as defined in 47 U.S.C. § 522(6) and that local franchising authorities may charge a franchise fee of no more than five percent of the cable operator's gross revenues, including any revenues derived from a cable operator's cable modem service and/or cable modem platform.

IV. The Purpose of the 1996 Amendment.

As stated above, the 1996 amendment to 47 U.S.C. § 522(6)(b) added the words "or use" into the definition of "cable service." The Senate Conference Committee report states that the purpose of the amendment was to "reflect the evolution of cable to include interactive services, such as game channels and information services made available to subscribers by the cable operator as well as enhanced services."³ With this being the purpose, local franchising authorities, cable operators and scholars have now been asking themselves whether or not the Internet is an interactive service and/or enhanced service.

Clearly, the 1996 amendment which added "or use" was meant to include interactive and enhanced services into the definition of cable service.⁴ More important,

³ S. Conf. Rep. No. 230, 104th Cong., 2d Ses. 1, 169 (1996).

⁴ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998.

“the 1996 amended definition of cable service is probably broad enough to encompass most Internet service.”⁵

V. Franchise Fees.

“Issues that hinge on the crucial definitional question [of cable service] include whether cable companies must pay franchise fees on revenues derived from providing Internet services.” *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(d)*, 36 F.Supp.2d 430, 432-430 (D. Mass, 1999). CNO contends cable modem service and/or the cable modem platform is a cable service and that cable operators must pay franchise fees on revenues derived from the cable modem services. Furthermore, several others share this view, to-wit:

- “A cable operator offering Internet as a cable service would be subject to franchising fees.”⁶
- “Internet as a cable service is subject to franchising fees.”⁷

⁵ Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][a].

⁶ Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

⁷ Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

- One of the purposes of the revised definition of cable services was to enlarge the base of revenues upon which the cities could assess and receive franchise fees.⁸
- The revised definition of cable services would affect local franchising authorities' revenues from cable franchise fees. This strengthens the ability of local governments to collect fees for the use of public right-of-way. This will result in additional revenues flowing to the cities in the form of franchise fees.⁹
- "The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base than that which is defined by the cable operator."¹⁰

⁸ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

⁹ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

¹⁰ McQuilline, Eugene, *The Law of Municipal Corporations*, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

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- “If Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement.”¹¹
 - The National Cable Television Association ("NCTA") has advocated that cable Internet-based services are not telecommunications services, and that the revenues gained through such services should be subject to the cable franchise fees authorized under section 622 of the Act.¹²

According to Congress, the 1996 amendment would now affect franchise fees because the definition of cable services has been expanded to include interactive services.¹³ Commenting on how the revised definition of cable services would affect local franchising authorities' revenues from cable franchise fees, Representative Dingell stated on the House floor immediately prior to the passage of the 1996 Act that “[t]his conference agreement strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term ‘cable service’ has been expanded to include

¹¹ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 92.

¹² *Communications Daily*, Oct. 9, 1997. (*Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 93.)

¹³ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 85.

game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees.”¹⁴

47 U.S.C. 542(b) provides that, for any twelve-month period, “the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services.” Consistent with other changes recognizing the expansion of service offerings by cable operators, the 1996 Act amended prior section 542(b) by inserting “to provide cable services” immediately before the period of the end of the first sentence, thus limiting the scope of the services on which cable operators must pay franchise fees with respect to any cable system to cable services only.

“Under revised section [542(b)], if Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement. [Again], this interpretation is supported by the floor statements of Representative Dingell, indicating that one of the purposes of the revised definition of cable services under section 602(6) was to enlarge the base of revenues upon which the cities could assess and receive franchise fees. The view that changed the definition of “cable services” was intended to expand the base upon which franchise fees may be assessed is reflected by McQuillin's

¹⁴ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

treatise on the law of municipal corporations, in the section dealing with compensation for the use of public rights-of-way by cable franchisees.”¹⁵

“The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base than that which is defined by the cable operator.”¹⁶

VI. The Internet Tax Freedom Act.

The Internet Tax Freedom Act also suggests that Congress intended to include cable modem service as a “cable service” thereby subjecting cable modem service to franchise fees.

In 1998 Congress passed the “Internet Tax Freedom Act”.¹⁷ The Act placed a moratorium on taxes whereby no state or political subdivision shall impose a tax on Internet access and electronic commerce until October 21, 2001. The statute further states that such moratorium on taxes “does not include any franchise fee or similar fee imposed by a State or local franchising authority pursuant to the Communications Act of 1934 (47

¹⁵ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, pp. 92-93.

¹⁶ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p.93, *quoting* McQuilline, Eugene, *The Law of Municipal Corporations*, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

¹⁷ 47 U.S.C. 1101

U.S.C. 542, 573) and any other fee related to obligations or telecommunications carriers under the Communication Act of 1934 (47 U.S.C. 151 et seq).”¹⁸

Again, 47 U.S.C. 542 states in pertinent part that a cable operator shall pay a franchise fee on the cable operator's gross revenues from the operation of the cable system to provide cable services.

Congress obviously believed that Internet access and electronic commerce provided by a cable modem service and/or a cable modem platform fell within the definition of “cable service” and that is why Congress specifically had to exclude franchise fees from the Internet Tax Freedom Act. If cable modem service is not “a cable service”, then there would have been no need for Congress to refer to 47 U.S.C. 542 in the Act.

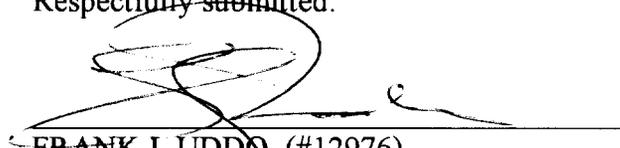
In other words, in the in the Internet Tax Freedom Act, Congress realized that a local franchising authority could charge a cable operator a franchise fee on its cable modem services; Therefore, Congress preserved the local franchising authority’s right to collect such a fee and excluded the franchise fee from the moratorium. Obviously, Congress intended that a cable internet-based service is a cable service subject to franchise fees.

¹⁸ 47 U.S.C. 1104(8)(B). (emphasis added).

VII. Conclusion.

The City of New Orleans respectfully requests that FCC should hold that cable modem service and/or cable modem platform is a "cable service" as defined in 42 U.S.C. §522(6). Furthermore, the City of New Orleans respectfully requests that FCC should find that pursuant to 47 U.S.C. 542, cable operators must pay franchise fees on revenues derived from providing Internet services.

Respectfully submitted:



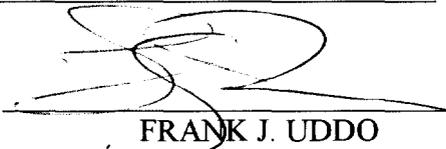
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VIII. Certificate of Service

I hereby certify that the above and foregoing was this day served upon the following by depositing same into the US Mail, postage prepaid and properly addressed.

Signed in Metairie, Louisiana, October 17 2000.


FRANK J. UDDO

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