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

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In the Matter of	)	
	)	
Inquiry Concerning High-Speed	)	GEN Docket No. 00-185
Access to the Internet Over	)	
Cable and Other Facilities	)	

REPLY COMMENTS OF THE CALIFORNIA CABLE TELEVISION ASSOCIATION

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January 10, 2001

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The California Cable Television Association ("CCTA") files these reply comments in the Federal Communications Commission's ("Commission") Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities ("NOI") to advise the Commission of the impact of the forced access debate on California operators, regulators and customers. CCTA is a trade association representing cable television operators that serve over 6.5 million cable television subscribers, cable programmers, and cable technology providers.

INTRODUCTION AND SUMMARY

Cable operators have been offering broadband Internet access in California since 1996. The largest cable Internet service provider, @Home, is headquartered in Redwood City, California, and much of the technology necessary to provide cable modem service comes from California companies. Broadband deployment has had a significant impact on California's economy. Thus, technology industry leaders in California strongly advocate against greater broadband regulation.

Despite the Commission's clearly articulated policy of "vigilant restraint," numerous local governments and the State have sought to impose forced access requirements on cable operators in California. For over two years, CCTA has represented its members on forced access issues before the California Legislature, the State Board of Equalization ("SBOE"), the California Public Utilities Commission ("CPUC"), and in over a dozen communities throughout the State.

The Ninth Circuit's statement in the Portland case that cable modem service is not a cable service[1] has caused substantial confusion among local franchising authorities ("LFAs") and cable operators in California. Prior to Portland, for instance, many California cable television operators treated cable modem service as a cable service and paid franchise fees to local governments based on cable modem service revenues. The Portland decision has complicated the debate over fundamental questions of whether and to what extent LFAs and state authorities may regulate the provision of cable modem service consistent with the limitations in the Communications Act of 1934. As demonstrated by the comments filed by Los Angeles and Marin County, and by the State and local regulatory initiatives detailed below, if these questions are not resolved all manner of local cable regulation will be made more complicated and burdensome, to the detriment of consumers and competition.

CCTA agrees with NCTA and others that cable modem service is a cable service,[2] and does not repeat those arguments here. Rather, CCTA submits these Reply Comments to illustrate the confusion that has arisen before and after the Portland decision, and to

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[1] AT&T v. City of Portland, 216 F.3d 871, 876-877 (9th Cir. 2000).

request that the Commission issue a clear decision (1) that local governments have no authority to impose forced access requirements; and (2) that local governments can collect franchise fees only if cable modem service is a cable service. This proceeding is the best means of ending the chaos and local debates over these issues.[3]

I. The Extended And Burdensome Controversy In California Over Local Forced Access Can Only Be Resolved By A National Policy Prohibiting Local Governments From Imposing Government-Mandated Access Requirements.

CCTA strongly supports the Commission's policy of "vigilant restraint" in response to demands for government-mandated access to cable systems for unaffiliated ISPs. As the Commission's reports on broadband deployment and the initial comments in this proceeding demonstrate, that policy has been an unqualified success. Under it, cable operators and others have invested billions of dollars to deploy new high-speed facilities and services throughout California and the rest of the country. The comments support CCTA's belief that government-mandated access to those facilities for unaffiliated ISPs is unnecessary.[4]

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[2] See NCTA at 6-8; AT&T at 12-19; City of Los Angeles at 11-16; Comcast at 16-18; NATOA at 6-13; National League of Cities, et al. at 4-12; Marin Telecommunications Agency at 3, 5-6.

[3] See Remarks of William E. Kennard, Chairman, Federal Communications Commission, before the National Cable Television Association, Chicago, Illinois, June 15, 1999 ("There are 30,000 local franchising authorities in the United States. If each and every one of them decided on their own technical standards for two-way communications on the cable infrastructure, there would be chaos. . . . The market would [then] be rocked with uncertainty: investment would be stymied. Consumers would be hurt.").

[4] See NCTA at 39-67; AEA at 5-12; AT&T at 36-66; Cablevision at 4-14; Charter at 3-9; Comcast at 36-40; Commercial Internet Exchange Association at 9; Competition Policy Institute at 3-8; Cox at 5-21; Excite@Home at 14; Metricom at 5-6; Progress and Freedom Foundation at 5-12; RCN at 9; Satellite Broadcasting and Communications Association, et al. at 2-4; Starband at 15-16; Utilicom at 7-10.

Despite the Commission's consistent articulation of this policy, CCTA and the cable operators it represents have had to engage in a constant stream of proceedings over the past two years in which LFAs have attempted to impose forced access and other requirements on cable modem service. To bring these proceedings to a close and to preclude future similar efforts, CCTA respectfully urges the Commission to clarify that local forced access requirements are impermissible under the Communications Act.[5]

A. California Cable Operators Have Faced Numerous State and Local Efforts to Impose Forced Access or Otherwise Treat Cable Modem Service as a Telecommunications Service.

Notwithstanding the benefits of deregulatory policies by the Commission which have sparked deployment of broadband choices for consumers,[6] cable operators and their competitors have been at constant war since the end of 1998 over the issue of whether local government should impose government-mandated access on cable modem facilities.[7] As elsewhere, the issue arose first in the context of the AT&T/TCI system

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[5] CCTA agrees with NCTA, AT&T and others that forced access requirements, whether imposed nationally or locally, violate the Communications Act. See, e.g., NCTA at 18-26; AT&T at 7-25; Cablevision at 14-16; Comcast at 11-18; Cox at 26-41. Thus, an LFA's Title VI authority over cable modem service does not provide any legal basis for imposing forced access. See, e.g., NCTA Reply at Section I.A.4. (neither Section 613(d) nor 632 provides such authority).

[6] This has certainly been the case in Los Angeles County, where the Commission has expressly recognized that "there is much evidence that Los Angeles County, in addition to having a multitude of high-speed service providers, has an extremely competitive market for high-speed services." Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Second Report ¶¶ 125, 115-130 (rel. Aug. 21, 2000).

[7] This issue spilled over to the State Legislature in 1999 when GTE sponsored California State Senate Bill 1217 (Alarcon) (amended version April 21, 1999), which would have required franchise authorities to regulate access to cable plant. The bill did not make it out of the Assembly Utilities and Commerce Committee and eventually died with the end

transfers, and then spread indiscriminately as the proponents of forced access, chiefly California's incumbent local exchange carriers ("ILECs"), Pacific Bell and GTE, raised the issue in any plausible context.[8]

The overwhelming number of communities rejected regulating access to the cable plant only after several hearings. Some imposed access restrictions and are involved in litigation as a result.[9] Fresno, San Francisco, and Los Angeles engaged in full-blown administrative proceedings to examine whether to impose forced access on cable operators as a condition on franchise transfers and renewals. The different paths of these three cities illustrate the need for the Commission to clarify the limits on local authority in this area.

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of the legislative session. The Legislature, however, has held several hearings on the issue. Moreover, California is not the only state where forced access has been considered: in the last two years, over 20 states have considered (and rejected) regulating the cable plant in this fashion. See, e.g., S.B. 2264 (Fla.); H.B. 2704 (Kan.); S.B. 667 (Mich.); S.B. 2133 (Minn.); H. 3393 (Tex.).

[8] For example, in 1999, Comcast went to its local regulators in Sacramento to request a variance from the City's universal service ordinance. That ordinance requires that cable services must be made available throughout the operator's service area. Comcast proposed to initiate cable modem service on a node-by-node basis under a plan that would insure that there would be no discrimination on the basis of the ethnic makeup or income level of any neighborhood. The plan had previously been approved for the deployment of digital cable service. Forced access proponents turned consideration of this matter into a question of whether any cable broadband deployment should take place absent nondiscriminatory access. This delayed the deployment of broadband services in Sacramento, California.

[9] See The MediaOne Group, Inc. MediaOne of Los Angeles, Inc. and AT&T Corp. v. Culver City, California, Case No. 00-00559 MMM (AJWx); MediaOne Group, Inc. MediaOne of Fresno, Inc. and AT&T Corp. v. Madera County, California, Case No. 99-6787 OWW DLB.

1. The Fresno Experience.

In Fresno, a report by the City concluded that it should not impose "government mandated 'open access'" because it would be bad legal, economic, and public policy.[10] The Fresno Report also concluded that forced access regulation would not necessarily protect consumers or result in "open access" in the near term. In its conclusion, the Report recognized, in much the same way that the Broward County decision acknowledges, the leverage being exerted by the ILECs to use local regulation to stall cable broadband deployment:

> It has been argued that the push to require "open access" for cable company Internet service is a tactic by the telephone company, not to help the consumer, but to slow down the cable company's deployment, so that the telephone company can play catch up with its DSL implementation, and stave off competition for local telephone service (competition which would undoubtedly benefit the citizens of Fresno).
>
> It is difficult not to accept this argument, because, logically, and all other things being equal, it would seem to be to the competitive advantage of the telephone company to have the cable company with only one ISP. That is, if "open access" is a consumer benefit, then the consumers would choose the telephone company DSL, so that he or she would have a choice of ISPs, rather than choose the cable company with only one ISP.
>
> **Conclusion:** The City should not insert itself into the middle of a competitive battle between two giant corporations for market share."[11]

This positive outcome for cable operators, however, was obtained only after numerous lengthy, burdensome, and time-consuming filings by various parties, and two full days of administrative hearings on the forced access issue.

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[10] City of Fresno City Manager's Office, "Report to Council on AT&T/Media One Merger – Open Access," at 2 (May 11, 2000).

[11] Id. at 6-7; see also Comcast Cablevision of Broward County v. Broward County, No. 99-6934-CIV, slip op., at 22 (S.D. Fla. Nov. 8, 2000) (stating that the Broward County forced access "ordinance was adopted at the behest of a telephone company seeking to eliminate or hamper a competitor").

2. The San Francisco Experience.

In San Francisco, the Department of Telecommunications and Information Services issued a 70-page report after over a dozen parties devoted significant time and resources to preparing two rounds of filings and attending several public hearings.[12] Notwithstanding the Commission's clearly articulated policy of vigilant restraint, the Report and subsequent considerations by the Board of Supervisors proposed a forced access plan to take place over a number of years.[13] Although San Francisco abandoned such efforts when the Ninth Circuit blocked similar regulation in the Portland decision, without a clear articulation of LFA authority from the Commission, some LFAs will persist in imposing forced access, cable operators will be forced to litigate the issue repeatedly throughout the country, and the result will be "incoherent, disjointed" regulation.[14]

3. The Los Angeles Experience.

In January 1999, the Los Angeles City Council referred consideration of the City's forced access policy to its Information Technology Agency ("ITA"). ITA issued a report in which it made ten recommendations, including that the City "not order cable

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[12] City and County of San Francisco Department of Telecommunications and Information Services, "Open Access Report," January 14, 2000.

[13] San Francisco City & County Resolution No. 00-020, January 26, 2000.

[14] See Remarks of Michael K. Powell, Commissioner, Federal Communications Commission, before the Federal Communications Bar Association (Chicago Chapter), Chicago, Illinois, June 15, 1999 ("whatever the answer to the question of mandated cable access is, I am skeptical that answer can be developed in hundreds of different ways by state and local franchise authorities. If ... we see a contagion of different approaches proliferate throughout the country we will end up with an incoherent, disjointed policy melange that seems sure to impede the development of advanced services, in any form, for our citizens").

operators to open their cable modem platforms to unaffiliated [ISPs.]"[15] Other recommendations included encouraging operators to adopt rapid deployment of Internet services, requiring universal access to cable modem service in the franchises where it is offered, preserving "click through" capability (which permits cable modem subscribers to reach any Internet content without having to view the content of the operator's affiliated ISP), and requiring payment of franchise fees on all revenues generated from cable modem services. Despite political attacks made on ITA's report, these recommendations were confirmed later by ITA.[16]

Immediately prior to the Portland decision and contrary to the ITA Report, the Information Technology and Government Services Committee of the City Council passed a resolution supporting the imposition of nondiscriminatory access to the cable modem platform as part of the cable franchise renewal process.[17] Most recently, on November 21, 2000, the City Council passed a Resolution empowering the City Attorney to urge the federal government to adopt a forced access regime as set forth in the Resolution.[18]

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[15] City of Los Angeles Information Technology Agency, "Broadband Access Report -- Recommendations on a Policy and Implementation Plan for Open, Nondiscriminatory Access to Cable Architecture by Internet Access Providers," June 1999.

[16] City of Los Angeles, Inter-department Correspondence to Honorable Mark Ridley-Thomas, Chair, Information Technology and General Services Committee from John D. Hwang, General Manager, Information Technology Agency, PPE-379-99, July 12, 1999. See "Internet Access Feud Leads Third Panelist to Quit," Los Angeles Times, at B-1, June 19, 1999.

[17] City of Los Angeles, Recommendation of IT&GS "To Require All Cable Franchises Open Access to ISPs," June 24, 2000.

[18] City of Los Angeles, Substitute Motion/Resolution by City Councilman Alex Padilla, Recommendation of IT&GS "To Require All Cable Franchises Open Access to ISPs," November 21, 2000.

B. Only An Unambiguous Statement of The Law From The Commission Can Resolve The Existing Confusion Over The Regulatory Role Of Local Authorities

It is incumbent upon the Commission to stop the regulatory bleeding on the issue of the extent of municipal jurisdiction over cable modem service before the forced access hemorrhage infects other aspects of broadband policy. Without a clear articulation of the limits of municipal jurisdiction over cable modem service, some cities will take advantage of the confusion not only to impose forced access requirements, but also to attempt to expand their jurisdiction over cable modem service generally. In California, the CPUC has jurisdiction over telephone companies and services; municipal authority over telephone companies and their facilities is limited by the Constitution and Public Utilities Code.[19] Similarly, Title VI, as interpreted by the Commission and the courts, limits municipal authority over cable.[20] As a result, California cities have been looking for a "hook" to extend their limited communications jurisdiction.

The Ninth Circuit's statement in Portland that the cable modem service facilities in that case may be telecommunications facilities has provided cities with such an opportunity. Indeed, Marin County asks the Commission to "clarify" this authority in its Comments when it asks for the right to franchise cable modem service separately from cable service even if cable modem service is defined as a telecommunications service.[21] The Commission should reject such requests by municipalities. As demonstrated in the

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[19] Cal. Const. XII, Sec. 3; Cal. Pub. Util. Code § 7901.

[20] See, e.g., 47 U.S.C. § 521(1)-(3); MediaOne Group, Inc. v. County of Henrico, 97 F. Supp. 2d 712, 714 (E.D. Va. 2000); see also NCTA Reply Comments (filed Jan. 10, 2000) at Section I.A.4.

[21] See Marin Telecommunications Agency at 7-8.

initial comments, ceding such authority to local government is contrary to the Act and the Commission's policy of encouraging broadband deployment and competition.[22]

The lack of a clear statement of the legal limits of LFA authority gives cable's competitors the ability to continue to use the local regulatory process to hamper cable's ability to compete in the broadband marketplace.[23] The ILECs, in particular, are likely to continue this behavior, since they are not regulated at the local level and have no fear of repercussions. Today's fight over forced access could very well explode into a plethora of local fights over customer service or technical standards underwritten by cable's competitors without any real nexus with a community's "cable-related needs."[24] In the increasingly competitive environment for broadband services, competitors should not be able to leverage the local regulatory process.[25]

Restricting local purview over cable modem service is consistent with all three court cases that invalidated forced access ordinances.[26] Los Angeles' attempt to twist the Broward decision into a justification for mandating access to the cable plant to protect the First Amendment rights of ISPs reflects a conscious attempt by a regulator to curtail the First Amendment rights of the operator it regulates.[27] No one questions the First

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[22] See, e.g., Comcast at 40-42; Utilicom at 14.

[23] See Broward County at 22.

[24] See 47 U.S.C. § 546; see also Marin Telecommunications Agency at 4.

[25] See supra, n.23.

[26] See Broward County, No. 99-6934-CIV, slip op.; Henrico, 97 F. Supp. 2d 712; Portland, 216 F.3d 871.

[27] City of Los Angeles at 4-7. In the context of renewal, one wonders whether such statements violate the Los Angeles operators' due process and Title VI rights in that context. 47 U.S.C. § 546(e)(1).

Amendment rights of ISPs.[28] But cable operators redesigned their "press" by dedicating bandwidth for Internet access and deploying the technology necessary to provide customers with access on the shared network, and they provide "speech" by adding content to the customer's Internet experience. It is the operators' First Amendment rights at stake when government mandates access.[29]

Congress directed the Commission to take action to "accelerate deployment" of advanced telecommunications capability by "removing barriers" to investment and "promoting competition."[30] In furtherance of these goals, the Commission should act to prevent local governments from imposing unwarranted and unlawful forced access regulation on cable operators.

II. A Clear Articulation Of The Legal Classification Of Cable Modem Service Is Necessary To Resolve The Franchise Fee And Tax Issues That Have Arisen In The Confusion.

The Portland decision also has created uncertainty as to the franchise fee and tax obligations of cable television operators offering cable modem service. Clarifying the regulatory status of cable modem service would resolve the question of whether revenues from the provision of that service are properly included in the revenue base on which cable operators should calculate franchise fees.

The problem arises from the fact that the Portland decision held that "cable service" as that term is defined in 47 U.S.C. § 522(6), does not include cable modem

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[28] Cf. Consumers Union, Consumer Federation of America, Center for Media Education and Media Access Project at 3-11 (citing Reno v. ACLU, 521 U.S. 844 (1997)).

[29] For a full discussion of the First Amendment implications of forced access requirements, see AT&T at 11-12; Cox at 47-50; NCTA at 38-39.

[30] Pub. Law No. 104-104, § 706(a); see also Portland, 216 F.3d at 879-80 (deferring to the Commission on matters of communications policy); NCTA at 35-36.

service. Prior to Portland, cable operators treated cable modem service as a cable service and paid franchise fees on gross revenues derived from the service.[31] Federal law, however, makes it clear that franchise fees can only be imposed on cable services.[32] Thus, in the Ninth Circuit, it is questionable whether franchise authorities can continue to impose, and operators can continue to collect or pay, franchise fees on cable modem service.

The Portland holding may also trigger a provision of the California Internet Tax Freedom Act, which bars imposition of franchise fees on cable modem service under the circumstances currently existing in the Ninth Circuit. It states:

> A cable television franchise fee may not be imposed on Online Computer Services or Internet access delivered over a cable television system if the Federal Communications Commission, by issuing a final order, or a court of competent jurisdiction, by rendering a judgment enforceable in California, finds that those are not cable services as defined in Section 522(6) of Title 47 of the United States Code and are, therefore, not subject to a franchise fee. However, if that final order or judgment is overturned or modified by further administrative, legislative, or judicial action, that action shall control. The operation of this subdivision may be suspended by contract between a cable television franchising authority and a cable television operator.[33]

Thus, both operators and franchise authorities find themselves caught in the middle. Because cable operators may not pass through excessive franchise fees to subscribers, the Portland decision suggests that LFAs may not require, and cable operators may not pass through to subscribers, franchise fees on cable modem service.

Continuing to collect franchise fees from subscribers and to pay franchise fees to LFAs in the face of the Portland holding that cable modem service is not a cable service

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[31] See Marin Telecommunications Agency at 6.

[32] See 47 U.S.C. § 542(b).

[33] Cal. Rev. & Tax. Code § 65004(c).

exposes operators and LFAs to the risk of litigation. Subscribers may file suit seeking a refund of unlawful franchise fees.[34] If a court held that the collection of such fees is unlawful, subscribers might be entitled to a refund. That might require the LFA to refund fees to cable operators so they could be returned to consumers, something that LFAs have not indicated they would do.[35] Litigation of these issues would be time-consuming and expensive for the LFA as well as the cable operator.

The willingness of cable operators to continue paying franchise fees as long as cable modem service is a cable service is reflected in the NOI comments.[36] Some cable operators have felt it necessary, however, to stop collecting franchise fees from subscribers and paying franchise fees to franchise authorities given the Portland decision.[37]

Franchise authorities have had various responses. Citing the Portland case, Kern County chose to "waive fees that are due on gross receipts" from cable modem service

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[34] See Cal. Govt. Code § 53066(c) (limiting franchise fees to five percent of gross revenues); Cal Govt. Code § 53732 (prohibiting local government from imposing taxes beyond local authority); and Cal. Bus. & Prof. Code § 17200 (prohibiting illegal, deceptive, or unfair business practices). The Commission already has had to intervene to limit state consumer class action jurisdiction in the context of tier buy-through. See Petition for Order to Show Cause Against Cox Communications, Inc. For Violations of the Tier Buy-Through Provisions of the Cable Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order, 14 FCC Rcd 11716 (1999).

[35] Regardless of remedies under California law, there is a question as to whether LFAs could be compelled to refund franchise fees given their immunity under federal law. See 47 U.S.C. § 555a.

[36] See, e.g., AT&T at 30-32; NCTA at 6 n.4.

[37] See "AT&T seeks waiver of franchise fees on cable modem service," Communications Daily (Jan. 3, 2001) at 3.

for two years.[38] Los Angeles County, as opposed to the City of Los Angeles, revised its monthly franchise fee statement so that operators could indicate whether they were paying franchise fees on cable modem service.[39] Los Angeles County also intends to establish a separate trust for fees paid by cable operators in case the fees need to be credited to the operator. Likewise, Los Angeles County put operators that choose not to pay franchise fees on notice that it reserves the right to require such payment should it be finally determined that the County is entitled to franchise fees.

The City of Los Angeles is considering alternative means to classify cable modem service to find a revenue substitute for franchise fees. The City Attorney has stated that franchise fees "seem to be prohibited" under the Portland case.[40] Responding to the City Attorney's opinion that the City consider imposing the utility users tax on cable modem service,[41] the City Council passed a motion directing the Chief Legislative Analyst to examine that option.[42] The City's utility user tax applies to telephone service and is levied at a rate of ten percent of a subscriber's bill.[43] The City has two choices if it wants to use the utility user tax as a substitute for the franchise fee. First, it could reclassify

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[38] Letter to Julie McGovern, General Manager, Cox Cable Bakersfield, Inc. from Kern County Administrative Office, General Services Division re: Waiver of Internet Fees, Aug. 10, 2000.

[39] Letter to Rob Moel, Time Warner, from Pastor Herrera, Jr., Director, County of Los Angeles, Department of Consumer Affairs, Re: Franchise Fees on Cable Broadband Service, Aug. 9, 2000.

[40] Letter to Information Technology & Government Services Committee, City of Los Angeles, California, from Edward J. Perez, Assistant City Attorney of Los Angeles, California, Re: Jurisdiction Over Internet Open Access, Oct. 27, 2000, at 6.

[41] See id. at 7.

[42] City of Los Angeles, Motion presented by City Councilman Nick Pacheco, "Recommendations to Institute Utility Users Tax as Revenue Alternative," Nov. 21, 2000.

cable modem service as telephone service, an action which goes far beyond the statement in Portland that cable modem service is not a cable service or even the suggestion by the Ninth Circuit that it may be a telecommunication service.[44] Or, the City could seek to expand its utility user tax to cover cable modem service, which would require a vote of the people.[45]

As the Ninth Circuit was considering the Portland case, the SBOE was in the process of drafting a new manual on state assessment. Under California law, regulated telephone companies are subject to assessment by the SBOE.[46] Cable companies are subject to local assessment under a different set of rules.[47] Based on the regulatory classification issues aired in Portland, SBOE staff erroneously interpreted cable modem service as "telephone service," and drafted a footnote to the manual suggesting that offering cable modem service might make a cable operator subject to central assessment.[48] This might shift cable operators' property tax from local to central

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[43] Los Angeles Municipal Code § 21.1.3(a).

[44] Regardless of whether cable modem service is classified as cable, information, or telecommunications service, cable modem service is not the equivalent of "telephone service" as defined in Los Angeles' utility user tax. See Telephone, Electricity, and Gas Users Tax, § 21.1.3 ("telephone communications service" includes "services for intrastate, interstate or international calls, services for mobile cellular telephone communication when the owner or lessee of the telephone has a billing address in the City, and using any teletypewriter exchange services in the City of Los Angeles").

[45] Cal. Const. XIIIA, Sec. 4.

[46] Cal. Const. XIII, Sec. 19.

[47] Cox Cable v. County of San Diego, 185 Cal. App. 3d 368, 377 (1986).

[48] The original footnote as drafted read:

> As an emerging issue in this regard, some cable television companies are beginning to offer cable broadband data transmissions for internet services. One federal court (9th Circuit U.S. Court of Appeals) has recently held that data transmission for internet services are classified as regulated telecommunications or "telephone services" under the Federal Communications Act, not "cable

assessment, which would not only have ramifications for cable operators' tax burden, but also for State and local government. When apprised of the state of flux of the regulatory classification issue and the Commission's NOI, the SBOE amended the final version of the footnote to read:

> An emerging issue in this regard is the regulatory classification of high speed Internet access services. In a Notice of Inquiry involving cable modem service, the FCC noted, "Service providers are deploying a variety of networks that rely on different network architectures and transmission paths, including copper wire, cable, terrestrial wireless radio spectrum, satellite radio spectrum, or a combination of these and other media, to provide high-speed services." (Gen Docket No. 00-185, "Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities," par.7). As regulatory issues concerning these services are resolved by the FCC, there may be jurisdictional concerns for the Board to consider, to the extent that the FCC or the CPUC regulate Internet access services as telephone services. For continuing developments on the subject, see www.fcc.gov.[49]

Thus, the regulatory classification issues at stake in the NOI have a real impact on cable operators' taxes and fees. The extent to which the Commission puts in place a uniform federal structure to deal with franchise fee and other tax-related issues will encourage the deployment of broadband networks and services consonant with its obligations under Section 706. In that vein, the Commission should clarify that LFAs can only impose franchise fees on revenues derived from cable modem service if the service is classified as a cable service.

> services." (AT&T Corporation v. City of Portland (2000) 216 F.3d 871.) If such internet services are subject to regulation by the FCC or required a CPCN from the CPUC, then the company providing them would come with the Board's assessment jurisdiction.

First draft footnote, "Assessors' Handbook Section 541 a.k.a. State Assessment Changes Resulting from August 22, 2000 Interested Parties Meeting."

[49] California Board of Equalization Assessors Handbook 541, "State Assessment Manual," November 2000.

III. Technology Industry Leaders in California Strongly Advocate Against Forced Access Regulation

Even if forced access requirements were permissible at the national or local level, there is no policy basis for imposing such a burden on cable operators. In fact, the reverse is true. The best way for the Commission to "encourage" broadband deployment is to refrain from imposing burdensome regulation on this nascent industry.

California's leading technology companies recognize the detrimental effect that government-mandated access regulation could have on broadband deployment, and thus strongly advocate against forced access. Technology leaders in California have submitted letters to the Commission emphasizing this point.[50] Recently, at the 2000 Western Cable Show, which is sponsored by CCTA, Cisco Chairman John Chambers reiterated this position, emphasizing that "competition would drive a lot more bandwidth requirements and a lot more load ... if they let the business compete, the majority of households in America will get the connections." Chambers concluded that forced access regulation was further inappropriate because "you don't apply Old World regulations to this New World."

Cable operators are demonstrating their commitment to market-based solutions for ISP access to their facilities.[51] If the California experience teaches anything, it is that

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[50] See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, Ex Parte Presentation on behalf of John Doerr of Kleiner Perkins Caufild & Byers (filed Dec. 21, 1998) (containing a letter dated December 9, 1998 from California-based industry executives to Chairman William E. Kennard regarding the deployment of competitive broadband networks).

[51] See Annenberg Public Policy Center at 9; AT&T at 61-66; Charter at 7-9; Comcast at 37-38; Information Technology Council at 7; Excite@Home at 11-14; NCTA at 48-50; RCN at 9-10.

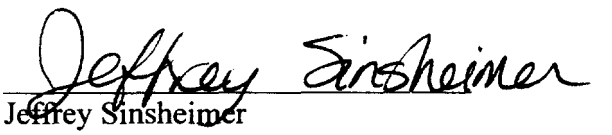
regulatory steps should only be taken as a last recourse lest they lead to unintended consequences that might harm broadband deployment. The Commission should heed that lesson and redress the confusion created by the Portland decision.

CONCLUSION

For the reasons stated above, the Commission should clarify that local governments have no authority to require cable operators to provide access to unaffiliated ISPs and that local governments can collect franchise fees only if cable modem service is a cable service.

Respectfully submitted,

CALIFORNIA CABLE TELEVISION ASSOCIATION



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January 10, 2001

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CERTIFICATE OF SERVICE

I, Margo Adams, hereby certify that on this 10th day of January, 2001, a copy of the foregoing Reply Comments of California Cable Television Association were served on the persons listed below via messenger:

Christopher Libertelli
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Margo Adams

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