

CABLE ACCESS NOI
VIEWS OF NCTA

- **Cable Modem Service Classification.** If the FCC decides cable modem service is an information service, then should clarify in particular that it is (1) an interstate (2) information service (3) provided over a cable system. Transmission of cable modem service via a cable system is the “via telecommunications” component of the service.
- **No Forced Access.** Cable modem service is not a “telecommunications service,” nor does it include a telecommunications service. Cable operators are therefore not subject to "forced access" requirements. If the Commission decides to issue a further NPRM on forced access rather than resolving the issue in the Classification Order, it should specifically hold that there is currently no forced access requirement. This is the central question of the NOI, and failure to provide a clear answer as to current requirements will cause continued uncertainty in the marketplace and in the courts.
- **Nationwide Applicability of FCC Decision.** The Commission should state explicitly that the Classification Order and any proceedings flowing from it apply nationwide. In order to address recent decisions in the Ninth Circuit suggesting that cable modem service may have a telecommunications service component, and to ensure that there is a coherent uniform nationwide policy on cable modem service, the Commission should explicitly forbear from applying Title II access-like obligations on cable operators. This forbearance is only because of the suggestion in the Ninth Circuit decisions; as a national policy matter determined by the federal agency, this service is not a telecommunications service but an information service.
- **No Retroactive Refund Liability.** There should be no retroactive refund liability for previously-collected franchise fees on cable modem service. Retroactive liability would be unjust in light of the uncertainty over classification that prevailed prior to the FCC decision and the good faith belief of cable operators, uncontradicted by the Commission, that the service should be classified as a cable service. It would also be unfair to local franchising authorities (LFAs) who acted in good faith to have to return fees collected under the previous uncertain conditions.
- **No Additional Franchise or Fee Going Forward.** The classification of cable modem service as an information service does not justify the imposition of an additional local franchise or any fee in connection with the provision of that service. Cable modem service does not impose any additional burdens on rights-of-way or costs on municipalities, and it is provided over a cable system for which a franchise has already been granted. See 47 U.S.C. § 541(a)(2) (“any franchise shall be construed to authorize the construction of a cable system over

public rights-of-way,” without limitation on the services to be provided) (emphasis added); *id.* § 544(a) (franchising authorities “may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI]”); *id.* § 544(b)(1) (franchising authority may not “establish requirements for . . . information services”). See *also* H. REP. 98-934, 98th Cong., 2d Sess. 44 (1984) (“[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose. . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.”) This view is also consistent with Section 706, where Congress encouraged broadband deployment, a viewpoint most recently emphasized in the U.S. Supreme Court’s Gulf Power decision.

- **No Local Regulation of Interstate Information Services Permitted.** Local regulation would be inconsistent with the interstate nature of cable modem service. (See *Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd. 9151 (2001)(Internet access is an interstate service). As an interstate – indeed global—medium, cable modem service is regulated if at all at the federal, not state or local level. Congress has long reserved jurisdiction for interstate noncable services offered by cable operators to the federal government. The imposition of state or local requirements on the provision of cable modem service also would not comport with the longstanding federal policy of leaving information services unregulated to the greatest extent possible. See, e.g., *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers* 11 FCC Rcd 21354, ¶ 282 (1996)
- **No Local Regulation of the Internet; No Discriminatory Regulation of Cable Modem Service.** LFA franchise and fee requirements would be inconsistent with Congress’s directive to avoid regulation of the Internet, see 47 U.S.C. § 230(b)(1), (2); would serve as a disincentive to the deployment of cable modem service; and would place cable modem service providers at a competitive disadvantage vis-à-vis competing Internet services, none of whom pay a local franchise fee or are required to obtain an additional local franchise to offer Internet access service.
- **No Additional Regulatory Requirements Should Be Imposed.** Classifying cable modem service as an information service should not result in the imposition of any regulatory burdens associated with the provision of a cable service, such as public, educational and government (“PEG”) access or customer service obligations. See 47 U.S.C. § 544(b)(1) (barring the establishment of “requirements for . . . information services”).

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