NCTA
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

**DANIEL L. BRENNER** SENIOR VICE PRESIDENT, LAW & REGULATORY POLICY
1724 MASSACHUSETTS AVE N.W. WASHINGTON, D.C. 20036-1903
TEL: 202.775.3664 FAX: 202.775.3603

March 5, 2002

Mr. William Caton
Acting Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, D.C. 20554

**Re: Gen. Docket No. 00-185**

Dear Mr. Caton:

As you know, many cable operators have been paying franchise fees to local franchising authorities ("LFAs") based on gross revenues derived from their providing cable modem service. Those fees were paid based on the understanding – by both cable operators and the local franchising authority that assessed the fees – that cable modem service was a "cable service" for which franchise fees were due. Should the Commission determine that cable modem service in fact is not a cable service, questions have arisen about the treatment of fees already collected from subscribers and paid to the cities based on the assumption that cable modem service is a cable service. The Commission should make clear that any issues that might arise as to past collection of such fees by LFAs and the pass-through of such fees to cable customers are questions for the Commission, rather than for the courts, to resolve.

Ample Commission precedent supports this conclusion. The Commission has made clear that "it would exercise jurisdiction over franchise fee disputes that impinge on 'national policy concerning cable communications.'" Franchise Fee "Pass_Through" and Dallas v. FCC, 13 FCC Rcd. 4566, 4569-70 (1998). See also ACLU v. FCC, 823 F.2d 1554, 1574-75 (1987) (FCC made clear its intention to "stand ready to enforce the franchise fee provision where circumstances require Commission intervention.") Disputes that might arise about the effect of an FCC regulatory classification of cable modem service on prior franchise fee payments are precisely the type of national policy questions that warrant FCC intervention.

The Commission has also made clear that the courts are ill-suited to resolve disputes arising from recovery of franchise fees from customers and the permissibility of a cable operator's rates that included those fees. Here, too, the FCC has asserted its authority, stating that "the Commission regards questions relating to the propriety of such franchise fee pass-throughs as rate regulation matters." Letter from Meredith Jones to Thomas Nathan, Comcast Cable Communications, 13 FCC Rcd. 9254, 9256 (1997). The Commission's rules and procedures, therefore "[p]rovide the exclusive means for determining whether franchise fees have been properly 'passed through' and whether the resulting rates are permissible." Id. at 9257.

Thus, the Commission is the proper locus for resolving these issues. Accordingly, should the Commission conclude that cable modem service is not a "cable service" against which cable franchise fees can be assessed going forward, it should clearly state that the Commission – not the courts – is the proper forum for determining the propriety of any previous franchise fee assessments by LFAs and collections from cable subscribers based on the good faith assumption that cable modem service was a cable service.

Respectfully submitted,

**/s/ Daniel L. Brenner**

Daniel L. Brenner

cc: Chairman Michael K. Powell
Commissioner Kathleen Q. Abernathy
Commissioner Michael J. Copps
Commissioner Kevin J. Martin
Ken Ferree, Chief, Cable Services Bureau
Sarah Whitesell, Associate Bureau Chief, Cable Services Bureau
Susan Eid, Legal Advisor to the Chairman
Matthew Brill, Legal Advisor to Commissioner Abernathy
Stacy Robinson, Legal Advisor to Commissioner Abernathy
Susanna Zwerling, Legal Advisor to Commissioner Copps
Catherine Bohigian, Legal Advisor to Commissioner Martin