



## **Cable Modem Service is a Cable Service**

### **I Characterization of Cable Modem Service:**

- A. Local Government can accept the cable industry's position that cable modem services are not a telecommunications service.
- B. Local Government can accept the cable industry's position that cable modem services are an information service.
- C. Local Government cannot, however, accept any parties' claim that cable modem services are not a cable service. Local Government calls upon the Commission to pronounce that cable modem services are cable services subject to the protections and provisions of Title VI of the Communications Act. Such a finding by the Commission is supported:
  - by the provisions of the Cable Act as amended in 1996;
  - by the facts surrounding the offering of internet services over a cable system;
  - by the opinion of the FCC's Local and State Government Advisory Council; and
  - by a majority of the cable industry as expressed in their pre *Gulf Power* filings.

Failing to reach such a position, local government would request that the Commission refrain from defining the service as a non-cable service.

Further, local government would request that the Commission open a proceeding to identify and address the numerous legal and practical challenges facing local governments, consumers and industry arising from regulatory uncertainty surrounding a service that is protected neither by Title II or Title VI of the Act.

Finally, many in the Commission are acting on this matter laboring under the misconception that there is no additional burden placed upon the public's right-of-way. We welcome the opportunity to correct the record as there are numerous additional requirements on the rights-of-way from installing fiber, new and larger power sources and a proliferation of OTNs (optical transfer nodes).

### **II. Cable Modem is a Cable Service.**

Local Government agrees with the LSGAC and the cable industry that cable modem services are cable service as defined by Title VI of the Act and that while helpful to define the service also as an information service may be helpful for purposes of Title II, the service non-the-less remains a cable service.

#### **❖ The LSGAC in its Recommendation 26 stated:**

- Cable Modem Service is a cable service. Classifying cable modem service as an "Information service" may be useful for purposes of Title II of the Communications Act. However, classifying cable modem services as an "information service" does not preclude the service from also being a "cable service." The two definitions are not mutual exclusive. "Information service" is only relevant in the Title II context – where

an information service can not be both an "information service" and a "telecommunications service."...

...

Information services offered by cable operators on cable systems are subject to Title Vi jurisdiction and regulation as prescribed in 47 U.S.C. Section 544: "[LFAs] may enforce any requirements contained within the franchise...."

**LSGAC Recommendation 26**, paragraphs 7 & 9.

❖ **NATOA's Reply Comments stated:**

- The statutory definition of "cable service" was amended in 1996 to abandon the line drawn by the 1984 Cable Act between the capacity to retrieve selected information and content and the capacity to *use* "other programming," including third-party information services. Congress explicitly contemplated "the evolution of cable to include . . . information services made available to subscribers by the cable operator."  
*See NATOA et. al*, Reply Comments at page i.

❖ **Industry**

- The cable industry and its Association advocate were clear in their Comments and Reply Comments. Cable modem services, or cable data services, or cable internet were all information services that were also cable services.
  - "THE COMMENTS CONFIRM THAT CABLE MODEM SERVICE IS A CABLE SERVICE OR AN INFORMATION SERVICE, BUT NOT A TELECOMMUNICATIONS SERVICE." (Emphasis in original)  
*See NCTA Reply Comments* at p.3.
  - Charter Communications, having cited favorable to the Commission the *Henrico County* opinion handed down by the U.S. District Court for the Eastern District of Virginia as well as the legislative history of the Cable Act stated: "[T]he provision of Internet access service over a cable system by a cable operator ...is a 'cable service' under the definition of the Cable Act."  
*See Charter Communications Reply Comments* at p. 5.
  - "The high-speed data services offered over Cox's cable networks meet the statutory definitions of both 'cable service' and 'information service;'" ..."  
*See Cox Communications Inc. Reply Comments* at p.1.  
  
*Cox* reaffirmed its position in an *ex parte* on August 15, 2001. "Accordingly, under the Communications Act's definitions, cable modem service is not a telecommunications service, but an information service and a cable service."  
*See letter of Alexandra Wilson, Chief Policy Counsel* at p.1
- "Because cable modem services make information available to subscribers generally using the same telecommunications facilities that cable operators use to provide video programming, cable modem services are 'cable services.'"  
*See AT&T's Reply Comments* at p. 29.

Now that the Supreme Court has issued its opinion in *Gulf Power* and the threat of open access seems to have waned, many in the cable industry would like to avoid their earlier comments that cable modem service is a cable service. The Commissions should not permit this egregious case of argument shopping and refuse to allow the industry to run from their earlier assertions.

### **III. Local Government in asserting that cable modem service is a cable service is not arguing in favor or regulation but in opposition to regulatory limbo.**

- ❖ Local Government agrees with the LSGAC and the industry that failure to establish that cable modem service as more than simply an information service has ramifications beyond the legal arguments.<sup>1</sup> Local franchising authorities, consumers and industry alike will face these challenges.
- ❖ Consumers & LFAs:
  - Absent regulatory clarify under Title II or VI of the Act, to whom will consumers and LFAs look to address concerns such as:
    - Fraud (Telemarketing); Privacy concerns such as those recently experienced by Comcast access customers in Montgomery County Maryland; Customer Service and consumer protection. The recent failure of @Home is a vivid example of no level of government feeling that they had the right or authority to step in and protect consumers. Interestingly enough, consumers had no doubt that the local franchising authority was the governmental entity that they felt had the authority to address this crisis.
    - Failure to establish that cable modem is a cable service will result in a period of regulatory uncertainty. Such uncertainty will chill the investment community's support for this broadband alternative and potentially retard the deployment of the service.
- ❖ Industry
  - Absent regulatory clarity and unimpeachable jurisdiction over the service by the Commission under either Title II or VI of the Act, the industry will be faced with potential turmoil as parties seek clarity in the courts over issues such as:
    - A cable modem information service provider's right to occupy the rights-of-way and pole attachments. Majority of the Supreme Court in *Gulf Power* assumed that since Commission had held service was not a telecommunications service that Commission would hold that service was a cable service. The assumption was so large that it resulted in Justices Souter and Thomas joining in a dissent to point out the misguided assumption of the Court.
    - Litigation such as that seen in the @Home class action matters;
    - Litigation over open network and resale requirements as reflected in the *Verizon v. Cox* matter stayed in the District Court for the Southern District of California.
    - Litigation over what the rules governing inside wire when the only service provided over the wire is cable modem, or the service is predominately cable modem.

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<sup>1</sup> See Charter Communications *ex parte* of February 19, 2002.

#### **IV. Issues of fees and jurisdiction are open questions that have not been publicly noticed and addressed.**

##### **❖ Jurisdiction**

- Section 621 (b)(1) states that “a cable operator may not provide cable service without a franchise.”<sup>2</sup> Further, unlike articulated bar on franchising of telecommunications services found in Sections 621 (b)(3), the Act does not bar local government franchising of communication services, other than cable services, offered over a cable system and in Section 623 (a)(1) provides that a LFA “may regulate the rates for the provision of a cable service, or other communications service provided over a cable system...”
- Section 621(d)(1) provides for a shared jurisdiction between states and the Commission for “intrastate communications service provided by a cable system, other than cable service, that would be subject to regulation by the Commission or any state if offered by a common carrier subject in whole or in part, to title II of this Act.”
- Section 621 (d)(2) preserves the authority of States to regulate a cable operator “to the extent such operator provides any communications service other than cable service, whether offered on a common carrier or private contract basis.”

##### **❖ Fees**

Setting aside the specious assertions of some cable operators that they is no greater use of the public rights-of-way to employ a cable system to offer cable modem services as opposed to a system which provides only traditional video entertainment, the Act provides for the recovery of a franchise fee for any service which generates gross income from the use of the cable operator’s cable system.

- Section 622 (a) authorizes the imposition of a franchise fee, subject to the limitations contained in paragraph (b). Section 622 (b) establishes a ceiling of “5 percent of such cable operator’s gross revenues ...from the operation of the cable system to provide cable services.” The Act does not say that fees are limited to revenue generated from providing cable services, but are based on the gross revenues from the operation of the cable system, which is employed among other things to offer cable services. Since no one disagrees that the cable modem services are provided over the cable system, the fees paid for such services should be included in the gross revenues of the system as they result from the “operation of the cable system.”

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<sup>2</sup> Interestingly enough, had cable modem been found to be a telecommunications service, LFAs would have been barred from requiring a franchise or any other traditional requirements found in a franchise. Sections 621 (b)(3)(A), (B), (C) & (D) specifically bar LFAs from any franchising authority over telecommunications services provided by a cable operator. It appears that cable as an industry chose to reject the protections offered by Congress in this section of the Act so as to avoid the potential additional costs and requirements under Sections 224 (pole attachments) as well as Sections 251 and 253.

**V. Practical Concerns demand attention and review should Commission chose not to establish cable modem as a cable service.**

In addition to the legal arguments in favor of cable modem services constituting cable services subject to Title VI, there are the practical reasons. The cable systems being built by cable operators to provide advanced services such as cable modem are not the same as the systems being built to provide traditional video entertainment::

- Such systems include components that are not necessary to the provision of any cable service.
- The components of such systems are many times larger in both size and number to accommodate enhanced utilization of the system.
- Such systems include the addition of upstream equipment required for cable modem service that would not be present in the right-of-way for a traditional cable system.
- Other changes in cable system's infrastructure and where such infrastructure is located (above v. below ground) as well as increased number of re-entry into the ROW all of which absent the capture of the franchise fee would result in a subsidy to cable operators by local tax payers.

The Commission must also address the challenges facing consumers and LFAs arising from the industry commingle its cable modem and traditional cable customer service operations. This would include:

- the sales operations are intertwined, with companies selling both the digital services and Internet services as a package;
- installation is typically handled through the same appointments and by the same personnel;
- the same phone number is employed for sales, service and premiums requests for both modem and video offerings;
- there is but a single bill for services; and
- LFAs continue to be listed and/or viewed by the public as the responsible authority for all cable system provided services.

A prudent position by the Commission would be that so long as services and standards can not be separated, LFAs must be permitted to set standards.