

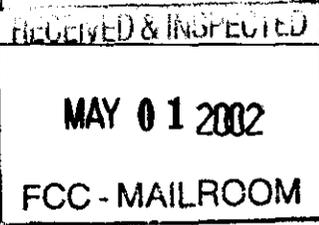
**VILLAGE OF
BUFFALO GROVE**

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April 22, 2002

William F. Caton
Acting Secretary
Federal Communications Commission
Washington, DC 20554

Dear Commissioners of the FCC:

The Village of Buffalo Grove, Illinois, hereby voices its concerns in regard to the Declaratory Ruling issued March 14, 2002 by the Federal Communications Commission (FCC): CS Docket 02-52.

Our comments serve to address our concerns as regard policy goals, the causes and effects of apparent legislative uncertainty, uses of rights-of-way, the local enforcement of customer service standards as an inextricable component of the use of local rights of way, access to broadband, and amendment issues.

Policy Goals

The FCC's ruling reasons that a quicker pace to market development for cable modem services could be achieved if regulatory barriers could be removed. The FCC states that its primary policy goal in the declaratory ruling is to "encourage the ubiquitous availability of broadband to all Americans", to "promote competition... and remove barriers to infrastructure investment", "preserve the vibrant and competitive free market that presently exists for the Internet... unfettered by Federal or State regulation". The FCC also states that it seeks to "remove regulatory uncertainty that in itself may discourage investment and innovation", and "create a rational framework for the regulation of competing services that are provided via different technologies and network architectures". These policy statements follow the assertion that cable modem service is available to approximately 73% of U.S. households.

The numbers indicated in your report, however, would seem to demonstrate that cable modem service has not been affected by any barriers to infrastructure investment, either real or imagined, or by any existing regulations placed on them by local governments. The fact that only 11% of all households subscribe to high-speed data (HSD) services, despite its wide availability, would seem to indicate that either data users have not found a need for this service, or cannot afford it, and not that states or municipalities are impeding it. To the contrary, it is in the interest of

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municipalities to have HSD, in all its forms, available to their residents as quickly, and safely, as possible. That only 29% of HSD users are DSL would seem to indicate that it is the telephone companies that need incentive to provide greater access to their product, and not cable companies. It is also possible that telephone companies are reluctant to replace their high-priced T-1 lines with DSL service at a fraction of the cost, and may be slowing DSL deployment to that end.

Legislative Uncertainty

It seems that the FCC's goals and actions may be in conflict, as defining cable modem service an interstate information service removes it from both Title VI and Title II regulation, which is fairly well defined, and places it under Title I, which seems more indefinite. The likely litigation to stem from the lack of definition for this service will certainly do nothing to encourage the investment and innovation the FCC seeks to foster. As well, the classification of cable modem service as an interstate information service would serve to maintain the cable industry's monopoly power over cable modem service, thereby further discouraging innovation. With no competition, there is little reason to improve upon a product for which there is good demand.

Use of the Rights-of-Way

The FCC notes that cable operators have had to make major system upgrades to provide cable modem service. The FCC further notes that the new Hybrid Fiber-Coaxial (HFC) architecture of these new systems has been converted to a ring, or star type infrastructure from the older tree-and-branch to provide increased reliability and bandwidth needed for advanced service offerings. It is further noted that cable modem service requires special equipment throughout the system. The FCC later goes on to assert that providing cable modem services has no impact on cable providers' use of the rights-of-way. This is in direct conflict with the FCC's prior statements, wherein it correctly deduces that cable systems are able to provide cable modem service because of upgrades built into the system, primarily within local rights of way, for the purpose of providing this service. The upgrades were not something that happened accidentally. Cable providers are employing larger hubs sites, more and larger nodes and additional fibers, power supplies and stand-by power sources to supply their modem service. There is also additional usage of streets as additional truck rolls are required for installation and repair of cable modem service.

Franchise fees are payments made to municipalities by cable providers for use of the rights-of-way, and not a tax (*City of Dallas v. FCC*, 118F.3d 393). The franchise fees are imposed for the privilege of using municipal property (the rights-of-way) for the corporate benefit of providing services to municipal residents for a profit. Regardless of how cable modem service is classified, it is a service provided by a cable provider over its cable system, which is using municipal rights-of-way to reach its subscribers. The amount of right-of-way needed to provide the services offered by the cable companies has increased due to the system upgrades required to provide cable modem, and other services. As cable modem revenues are derived from the operation of the cable system, over which the service is delivered and by which the revenues are derived, it is our opinion that revenues from cable modem service should be included in the calculation of franchise fees. It should be pointed out that the cable industry had not sought to exclude cable

modem service from franchise fees until the FCC ruling. To the contrary, the cable industry had heretofore sought the cover of having this service defined as a "cable service" rather than risking the unbundling of its data services.

Local enforcement of customer service standards.

Local franchising authorities must retain their rights to regulate customer service standards for cable modem service. This is the only way to effectively provide customer service oversight of cable modem service. AT&T Broadband, which is the cable provider in the greater Chicago area, has had extremely poor levels of compliance with FCC customer service standards since December of 2000. Many service problems go on for months with subscribers only finding resolution through municipal intervention. Complaints in the Chicago area rose drastically in 2001 with marked increases in customer service and data service filings. Municipalities are the only entities positioned to assist residents with problems that cable customer service centers are unable to resolve. To undertake this function at a state or national level would be impractical, if not impossible. We do not believe that the FCC, or any federal agency, is equipped to deal with the thousands of cable modem complaints from across the country they would surely receive each day.

Access to Broadband

To encourage the ubiquitous availability of broadband to all Americans, it is necessary to encourage competition. To this end, unfortunately, the Telecommunications Act of 1996 has failed. Cable and telecommunications companies have merged instead of competing. Rather than competing head to head as was intended with the Telecommunications Act of 1996, the Local Exchange Carriers (LECs) and cable companies have chosen to pursue competitive superiority by litigating monopolistic advantages relative to the very laws they helped to craft. Quite pointedly and simply, this is the reason there is not a greater availability of broadband services, and not because of costs incurred by the industry for use of local rights-of-way.

All wired broadband providers need the same rules to play by. Wireless broadband providers need affordable private frequency licenses. These are the tools to effective competition.

A declaratory ruling such as this seems intended to effect outcomes that help one HSD player over another through the policy process, as opposed to fostering a level market "playing field" on which both sides may compete fairly. In policy making, local rights-of-way should be referenced as a benefit to the provision of the service, rather than as a hindrance. It is painful to see our role in the delivery of this service painted inaccurately as a smokescreen to cover the true reasons for the failure in the creation of an effective market. Repeated rulings and decisions along these lines only seem to step us further and further away from the competitive markets we all say we wish to create.

Amendment Issues

We side with the National Association of Telecommunications Officers and Advisors (NATOA) in their statements pertaining to open access as regards cable modems, relative to the First and

Fifth Amendments. We believe that open access would allow greater choice and would serve to foster free speech to those who utilize cable modem service to access the World Wide Web.

In closing, the Village of Buffalo Grove believes that cable modem service should be considered a cable service. If the designation of "interstate information service" is retained, we believe that municipalities should retain customer service regulation. We also believe that municipalities should receive franchise fees for the use of the rights-of-way through which this service is delivered, and which have been impacted by the upgrades to cable plant required to deliver this system. Again, if cable modem service is the most widely used high-speed data service, it is our contention that municipalities and franchise fees have not been a barrier to deployment of this service.

Thank you for your consideration of our position on this matter.

Sincerely,

A handwritten signature in black ink that reads "William R. Balling". The signature is written in a cursive style with a large, stylized initial "W".

William R. Balling
Village Manager
Village of Buffalo Grove

Cc: Congressman Mark Kirk, U.S. 10th District