

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

In re CS Docket No.02-52 )  
)  
)  
Notice of Proposed Rulemaking— )  
Appropriate Regulatory Treatment )  
For Broadband Access to the )  
Internet Over Cable Facilities )

TO: The Commission

**COMMENTS OF THE**  
**CITY OF NORTH CHARLESTON, SOUTH CAROLINA,**  
**AND CHARLESTON COUNTY, SOUTH CAROLINA,**  
**IN SUPPORT OF RETAINING LOCAL FRANCHISING**  
**AUTHORITY WITH RESPECT TO BROADBAND**  
**ACCESS TO THE INTERNET OVER CABLE FACILITIES**

Michael D. Hunt

Consult First, Incorporated  
P.O. Box 4069  
Sarasota, Florida 34230-4069  
941-928-9071

Telecommunications Consultant/  
Counsel for the City of North  
Charleston, South Carolina, and  
Charleston County, South Carolina

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## SUMMARY

Local franchising authorities that receive franchise fees for revenues associated with cable modem access is both consistent with the tone and tenor of Section 622 of the Cable Act (codified at 47 USC 542). Specifically, cable modem access may be classified as a cable service under the Cable Act. In selected jurisdictions, cable operators have treated cable modem access as either a bundled cable service, or as a separately billed cable service. Moreover, from both a statutory and historic perspective, cable modem access has been properly classified as a cable service. However, the Commission's March 14, 2002 ruling that cable modem access is an information service that is not subject to franchise fees, and perhaps local franchising authority regulation is an artificial separation/division/distinction that is inconsistent with both the historic and practical effect of the Cable Act, and the evolution of cable television services. Because cable modem access is viewed and treated as a cable service by individual subscribers, it is critical for local franchising authorities to maintain regulatory authority over certain aspects of cable modem access, including customer service/consumer protection, and franchise fees. Local franchising authorities relying on both the Cable Act and cable operators have entered into long-term franchise agreements with cable operators that included cable modem access revenues, as part of the computational base for franchise fees. To remove these revenues from the franchise fee computational base creates a gigantic hole in mutual covenants and promises that formed the basis for the franchise agreements. Should the Commission not reverse its ruling concerning removing cable modem access revenues from the computational base, then the Commission must (consistent with Section 622 of the Cable Act) require cable operators to both notify

subscribers that such revenues are no longer part of the computational base for franchise fee purposes, and reduce (if the cable operators pass-through the amount of such fees) subscribers' periodic invoices, to reflect the elimination of the cable modem access component from franchise fees. Moreover, in the interest of fairness, and for the reasons expressed above, and below, the Commission should not allow the cable operators to seek refunds/rebates on any previously paid franchise fees which included cable modem access revenues as part of the computational base for said franchise fees.

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**INTRODUCTION:**

The City of North Charleston, South Carolina, and Charleston County, South Carolina, through their undersigned cable/telecommunications consultant/counsel, Michael D. Hunt of Consult First, Incorporated, file joint Comments in support of retaining local franchising authority with respect to broadband access to the Internet over Cable Facilities.

**COMMENTS IN SUPPORT OF RETAINING LOCAL FRANCHISING AUTHORITY WITH RESPECT TO BROADBAND ACCESS TO THE INTERNET OVER CABLE FACILITIES:**

**1: CABLE MODEM ACCESS MAY BE PROPERLY CLASSIFIED AS A CABLE SERVICE UNDER THE CABLE ACT:**

That cable modem access has been traditionally considered a *cable* service, and therefore, subject to the imposition of franchise fees by local franchising authorities should come as no surprise, since from the inception of cable modem access it was treated as a *cable* service by all parties concerned. Note well, that at no time during Congress' consideration of the relationship between local franchising authorities and cable operators has Congress specifically pre-empted local franchising authorities from including cable modem access as a cable service. Bear in mind though, that to the extent that local franchising authorities did include cable modem access as a cable service, such local franchising authorities did so with the tacit approval of then existing cable operators. The reason that both cable operators and local franchising authorities both accepted and approved of cable modem access being considered a *cable service* is simple—the Cable Act itself provides the rationale and justification for such an interpretation.

In order to understand the historic underpinnings of such a conclusion, it is necessary to review various provisions of the Cable Act.

Section 542(b) of the Cable Act (codified at 47 USC 542(b)) states in relevant part—“For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator’s gross

revenues derived in such period from the operation of the cable system to provide cable services.”

Section 602(6) of the Cable Act (codified at 47 USC 522(6)) defines “*cable service*” as “(a) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (b) subscriber interaction, if any, which is required from the selection or use of such video programming or other programming service.”

Section 602(14) of the Cable Act (codified at 47 USC 522(14)) defines “*other programming service*” as “information that a cable operator makes available to all subscribers generally.”

It is key to note that the definition of *other programming service* is specifically differentiated from the definition of *video programming*. Such a distinction and differentiation would certainly suggest that Congress both understood and accepted that different services, products, information, and data, could be provided to subscribers via a cable operators’ cable system. Moreover, the definition of *cable service* which includes the differentiation between *video programming*, and *other programming service* has not changed since the original 1984 Cable Act. Given the fact that ancillary services such as home alarm security, personal banking via cable, and certain Institutional Network uses (including uses for the transmission of medical information) were either available, or in the advanced development stage at the time the 1984 Cable Act was being debated and adopted, it is quite plausible to believe that such operative facts contributed to Congress’ differentiation between *video programming* and *other programming service* in its

definition of *cable service*. Nevertheless, while the distinction between *video programming* and *other programming service* is apparent, the fact remains that both concepts are considered components of what constitutes a *service*. Therefore, the inclusion of *information* which includes later developed services such as cable modem access/Internet would be consistent with the tone and tenor of the Cable Act's definition of *cable service*.

Of equal importance is the fact, that for purposes of transmission, the video (cable), and data (cable modem access/Internet) aspects of the cable system are provided by the same fiber optic line. There is no technological difference for transmission/delivery purposes. Congress did not artificially remove *other programming services* which included *information* from the definition of *cable service*. Likewise, the Commission should refrain from creating such an artificial removal. The artificial distinction confuses, rather than assists and/or clarifies as it relates to how cable modem access is treated in a technologically-evolving world. But one fact that is inescapable is that cable modem access is part of the same fiber optic cable that provides video programming, and that lies within the local government's rights-of-way in a permanent or semi-permanent fashion, is one of the reasons why local franchising authorities are permitted to receive some form of monetary payment from the cable operators. To put it another way, both cable modem access, and traditional cable (video) impact the local government rights-of-way in the same form, fashion, and degree. To not recognize that the Cable Act has already accounted for such distinctions, but nevertheless classified both cable modem access (*other programming service/information*), and traditional cable

(*video programming*) as components of *cable service* is to ignore the historic import and application of the definition.

By creating an artificial distinction between traditional cable video programming services, and cable modem access, the Commission (in the long-term) threatens the ability of local franchising authorities to secure payment (in the form of franchise fees) from cable operators for traditional video programming services. Certainly there are disparate treatment and First Amendment arguments that cable operators might make should the artificial distinction between traditional cable (video), and cable modem access (information) remain.

In a number of cable systems, cable operators provide bundled services which recognize that the means of transmission is the same for voice, video, and data services. As a result, in those cable systems, the cable operators take into account all costs and expenses associated with the delivery of the products, and offer a single price to the subscriber/consumer.

**2. TO THE EXTENT THAT CABLE MODEM ACCESS MAY BE PROPERLY CLASSIFIED AS A CABLE SERVICE, LOCAL FRANCHISING AUTHORITIES HAVE A RIGHT, UNDER THE CABLE ACT, TO REGULATE CERTAIN ASPECTS ASSOCIATED WITH CUSTOMER SERVICE/CONSUMER PROTECTION, AND FRANCHISE FEES:**

Simply put, local franchising authorities have a legitimate regulatory interest in cable modem access regardless of whether cable modem access is classified as a cable service or an information service. However, to the extent that cable modem access may be properly classified as a cable service, local franchising authorities retain, under the Cable Act (specifically Section 632, codified at 47 USC 552) the right to regulate certain

aspects associated with customer service/consumer protection, and franchise fees (under Section 622), as previously noted.

Issues related to negative option marketing, billing, refunds/rebates, installation, and scheduling of conference calls occur with respect to both traditional cable (video), and cable modem access (data/Internet). To the individual subscriber/consumer there is no distinction between traditional cable and cable modem access since those services are being provided by the same operator over the same fiber optic line. Additionally, because individual subscribers/consumers see no distinction between traditional cable and cable modem access, to the extent that subscribers have concerns with respect to either traditional cable or cable modem access, the subscribers will address their concerns to both the operators and local governments. If local franchising authorities are prohibited from addressing customer service inquiries/complaints/questions concerning cable modem access because of some artificially-created barrier created by the Commission, then the frustration level of the individual subscriber/consumer will be elevated, and the ability to handle these issues at the grass-roots level is thwarted.

**3. LOCAL FRANCHISING AUTHORITIES AND CABLE OPERATORS BARGAINED IN GOOD FAITH FOR THE INCLUSION OF FRANCHISE FEES ON CABLE MODEM ACCESS REVENUES:**

In light of a belief that cable modem access provided over a cable system was indeed a cable service, a number of local franchising authorities bargained in good faith with cable operators for the inclusion of cable modem access revenues as part of the computational base for franchise fee purposes. With an arms-length agreement between the parties, these provisions concerning the inclusion of franchise fees on cable modem

access revenues were then placed within individual franchise agreements. In point in fact, this is precisely what happened in the case of local franchising authorities, the City of North Charleston, South Carolina, and Charleston County, South Carolina.

As noted above, both the City of North Charleston, South Carolina, and Charleston County, South Carolina believe that there is a firm, and justifiable basis that would support an interpretation that inclusion of cable modem access revenues is consistent with the definition of *cable service* under the Cable Act.

From the dual perspectives of both the City of North Charleston, and Charleston County, it is essential that the Commission recognize and address the following three (3) points:

- 1) that any franchise fees that local franchising authorities collected/received on cable modem access prior to the Commission's March 14, 2202, ruling should not be subject to refunds on the part of cable operators;
- 2) that to the extent that cable operators no longer collect franchise fees on cable modem access revenues, and to the extent that such franchise fees on cable modem access revenues were passed-through and/or included as a separate line item on subscribers' periodic invoices, cable operators should be required to notify subscribers of that fact; and
- 3) that to the extent that cable operators no longer collect franchise fees on cable modem access revenues, and to the extent that such franchise fees on cable modem access were passed-through and/or included as a separate line item on subscribers' periodic invoices, cable operators should be

required to reduce subscribers' periodic invoices (consistent with Section 622 of the Cable Act) in the amount of the prior pass-through or separate line item amount.

For the Commission to rule in any manner that is inconsistent with these requests would punish both the local franchising authorities and individual subscribers in ways that were not intended under either the Cable Act, or the good faith bargaining of the parties (local franchising authorities, and cable operators).

**CONCLUSION:**

In light of the fact that the plain language of the Cable Act supports the interpretation that cable modem access may be properly classified as a cable service, the Commission should either amend or clarify its March 14, 2002 ruling to reflect such an interpretation. At the very least, the Commission should require (where warranted) that cable operators notify subscribers that cable modem access revenues are no longer part of the computational base for determining the amount of franchise fees, and that the subscriber's periodic invoice will be adjusted downward to reflect such an occurrence.

The City of Charleston, South Carolina, and Charleston County, South Carolina submit these comments in order to strongly state their position that cable modem access may be classified as a cable service.

Respectfully submitted,

THE CITY OF NORTH CHARLESTON, SOUTH CAROLINA,  
AND CHARLESTON COUNTY, SOUTH CAROLINA

By: \_\_\_\_\_

Michael D. Hunt Esquire  
Consult First, Incorporated  
Telecommunications  
Consultant/Counsel  
City of North Charleston,  
South Carolina, and  
Charleston County, South  
Carolina

## **CERTIFICATE OF SERVICE**

I, Michael D. Hunt, General Counsel for Consult First, Incorporated, and Telecommunications Consultant/Counsel for the City of North Charleston, South Carolina, and Charleston County, South Carolina do hereby certify that on May 14, 2002, I electronically filed a copy of these Comments to the following:

Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, D.C. 20554  
e-mail filing <http://www.fcc.gov/e-file/ecfs.html>