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June 11, 2002

Ms. Marlene H. Dortch
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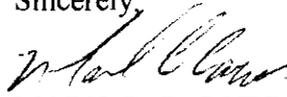
Re: Appropriate Regulatory Treatment for Broadband Access
to the Internet Over Cable Facilities.
CS Docket No. 02-52

Dear Ms. Dortch:

On behalf of the Utility, Cable & Telecommunications Committee of the City Council of New Orleans, please find enclosed Comments to filed in the record of these proceedings, along with nine (9) duplicate for each of the respective Commissioners.

Additionally, I have enclosed one (1) additional copy for you to date-stamp and return to my office in the self-addressed envelope that I have provided for your convenience.

Sincerely,

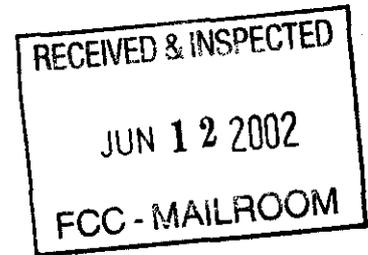

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Enclosures

cc: Qualex International, Portals II
Ms. Sarah Whitesell, Cable Services Bureau
Ms. Linda Senecal, Cable Services Bureau
Mr. Steve Garner, Media Bureau

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Before the
Federal Communications Commission
Washington, D.C. 20554



In the Matter of)
)
Appropriate Regulatory Treatment for) CS Docket No. 02-52
Broadband Access to the Internet Over)
Cable Facilities)

**Comments On Behalf Of
The Utility, Cable & Telecommunications Committee
Of The City Council Of New Orleans**

NOW COMES, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans ("CNO"), through undersigned counsel, who respectfully submits the following comments regarding the Federal Communications Commission's inquiry concerning the appropriate regulatory treatment for broadband access to the Internet over cable facilities.

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II. Introduction.

On September 28, 2000, the Federal Communications Commission published a *Notice of Inquiry*¹ to explore issues surrounding high-speed access to the Internet over cable infrastructures. Specifically, the Commission sought comments from the public as to how cable modem service should be classified. The Telecommunications Act established a regulatory classification system for the different types of telecommunication services. Depending upon the classification of the service, certain rules would apply to that service. The Commission could have classified cable modem service as a “telecommunication service,” a “cable service,” an “information service,” or a hybrid of all three types.

¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 Commission Rcd 19287 (2000).

In response to the *Notice of Inquiry*, the City of New Orleans filed Comments wherein it was asserted that (1) cable modem service should be classified as a “cable service;” and (2) cable operators should pay franchise fees on revenues derived from cable modem service.

On March 14, 2002, the Commission settled the debate over the regulatory classification of cable modem service.² The Commission concluded that the cable modem service is classified as an interstate information service and is subject to Commission jurisdiction. The Commission also determined that cable modem service is not a “cable service” as defined by the Communications Act. Additionally, the Commission said that cable modem service does not contain a separate “telecommunications service” offering and is not subject to common carrier regulation.

Having determined that cable modem service is an “information service,” the Commission then published a *Notice of Proposed Rulemaking* seeking comment on the role of state and local franchising authorities in regulating cable modem service in light of its classification as an “information service.”³ In other words, now that the Commission has classified cable modem service an “information service,” which rules apply?

As a result of classifying cable modem service as an information service, there are several issues which directly affect local franchising authorities which must be resolved by

² *Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, CS Docket No. 02-52.

³ 67 Fed. Reg. 18848 (April 17, 2002).

the Commission. The Commission recognizes that cable modem service is provided over the facilities of cable systems that occupy public rights-of-way in local communities. In order to facilitate the Commission's national policy goals, it seeks to clarify the authority of State and local governments with respect to cable modem service. In the *Notice of Proposed Rulemaking*, the Commission addresses potential areas of regulatory uncertainty at the State and local levels.

III. Summary of Argument.

The City of New Orleans contends that:

- The Commission erred when it classified as cable modem service as an “information service.”
- Cable modem service should be classified as a “cable service.”
- The Commission cannot preclude State and local authorities from regulating cable modem service and facilities.
- Local franchising authorities may impose open-access requirements on cable operators, *i.e.*, require cable operators to provide any Internet service provider with access to the cable platform.
- Even if cable modem service is an information service, revenue from cable modem service can be included in the calculation of gross revenues from which the franchise fee is determined.

- Alternatively, if revenue from cable modem service is not included in the calculation of gross revenues from which the franchise fee is determined, cable operators and/or local franchising authorities do not have to return that portion of the franchise fee previously collected.

IV. Cable Modem Service is a “Cable Service.”

Although the Commission concluded that the cable modem service is classified as an information service, CNO contends that high-speed access to the Internet over cable infrastructures should be classified as a “cable service.”⁴

Cable service is defined 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 for the selection or use of such video programming or other programming service.”⁵ (emphasis added) It was the 1996 amendment to 47 U.S.C. § 522(6)(b) that added the words “or use” into the definition of “cable service.” The Senate Conference Committee report stated that the purpose of the amendment was to “reflect the evolution of cable to include interactive services, such as game channels and information

⁴ CNO has intervened in the matter entitled *Petition for Review: EarthLink, Inc. v. Federal Communications Commission and the United States of America*. U.S. Court of Appeals for the District of Columbia Circuit. Case No. 02-1097 wherein petitioners seek a review of the Commission’s determination that cable modem service is an “information service.” In that intervention, CNO contends that high-speed access to the Internet over cable infrastructures should be classified as a “cable service.”

⁵ 47 U.S.C. §522(14).

services made available to subscribers by the cable operator as well as enhanced services.”⁶

With this being the purpose, local franchising authorities, cable operators and scholars have now legitimately questioned whether or not the Internet is an “interactive service” and/or “enhanced service.”

Clearly, the 1996 amendment which added “or use” was meant to include interactive and enhanced services into the definition of cable service.⁷ More importantly, “the 1996 amended definition of cable service is probably broad enough to encompass most Internet service.”⁸

In addition to the 1996 amendment to the definition of cable service, the Internet Tax Freedom Act also suggests that Congress intended to include cable modem service as a “cable service” thereby subjecting cable modem service to franchise fees. In 1998 Congress passed the “Internet Tax Freedom Act”.⁹ This Act placed a moratorium on taxes whereby no state or political subdivision could impose a tax on Internet access and electronic commerce until October 21, 2001. The statute further states that such a moratorium on Internet taxes “does not include any franchise fee or similar fee imposed by

⁶ S. Conf. Rep. No. 230, 104th Cong., 2d Ses. 1, 169 (1996).

⁷ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998.

⁸ Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][a].

⁹ 47 U.S.C. 1101

a State or local franchising authority pursuant to the Communications Act of 1934 (47 U.S.C. 542, 573) and any other fee related to obligations or telecommunications carriers under the Communication Act of 1934 (47 U.S.C. 151 et seq).”¹⁰

Again, 47 U.S.C. 542 states in pertinent part that a cable operator shall pay a franchise fee on the cable operator's gross revenues from the operation of the cable system to provide cable services.

Congress obviously believed that Internet access and electronic commerce provided by a cable modem service and/or a cable modem platform fell within the definition of “cable service” and that is why Congress specifically had to exclude franchise fees from the Internet Tax Freedom Act. If cable modem service is not “a cable service”, then there would have been no need for Congress to refer to 47 U.S.C. 542 in the Act.

In other words, in the Internet Tax Freedom Act, Congress realized that a local franchising authority could charge a cable operator a franchise fee on its cable modem services. Therefore, Congress preserved the local franchising authority’s right to collect such a fee and excluded the franchise fee from the tax moratorium. Obviously, Congress intended that a cable internet-based service is a cable service subject to franchise fees.

¹⁰ 47 U.S.C. 1104(8)(B). (emphasis added).

V. Cable Modem Service is Subject to Franchise Fees.

“Issues that hinge on the crucial definitional question [of cable service] include whether cable companies must pay franchise fees on revenues derived from providing Internet services.” *In re Application of the United States of America for an Order Pursuant to 18 U.S.C. 2703(d)*, 36 F.Supp.2d 430, 432-430 (D. Mass, 1999). CNO contends that cable operators must pay franchise fees on revenues derived from cable modem services.

Furthermore, several other scholars share the view that cable modem service is subject to franchise fees, to-wit:

- “A cable operator offering Internet as a cable service would be subject to franchising fees.”¹¹
- “Internet as a cable service is subject to franchising fees.”¹²
- One of the purposes of the revised definition of cable services was to enlarge the base of revenues upon which the cities could assess and receive franchise fees.¹³

¹¹ Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

¹² Daniel L. Brenner, et al, *Cable Television and Other Nonbroadcast Video: Law and Policy*. Vol. 2, p. 18-11, Release # 12, April 1998, Regulatory Classification of Internet Service § 18.02[3][b].

- The revised definition of cable services would affect local franchising authorities' revenues from cable franchise fees. This strengthens the ability of local governments to collect fees for the use of public right-of-way. This will result in additional revenues flowing to the cities in the form of franchise fees.¹⁴
- "The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base than that which is defined by the cable operator."¹⁵
- "If Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement."¹⁶

¹³ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

¹⁴ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

¹⁵ McQuilline, Eugene, *The Law of Municipal Corporations*, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

¹⁶ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 92.

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- The National Cable Television Association ("NCTA") has advocated that cable Internet-based services are not telecommunications services, and that the revenues gained through such services should be subject to the cable franchise fees authorized under section 622 of the Act.¹⁷

According to Congress, the 1996 amendment would now affect franchise fees because the definition of cable services has been expanded to include interactive services.¹⁸ Commenting on how the revised definition of cable services would affect local franchising authorities' revenues from cable franchise fees, Representative Dingell stated on the House floor immediately prior to the passage of the 1996 Act that "[t]his conference agreement strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term 'cable service' has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees."¹⁹

47 U.S.C. 542(b) provides that, 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

¹⁷ *Communications Daily*, Oct. 9, 1997. (*Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 93.)

¹⁸ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p. 85.

¹⁹ 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell).

such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services.” Consistent with other changes recognizing the expansion of service offerings by cable operators, the 1996 Act amended prior section 542(b) by inserting “to provide cable services” immediately before the period of the end of the first sentence, thus limiting the scope of the services on which cable operators must pay franchise fees with respect to any cable system to cable services only.

“Under revised section [542(b)], if Internet-based services offered by cable operators over their systems are treated as cable services, they would become subject to any franchise fees imposed for cable services under the relevant franchise agreement. [Again], this interpretation is supported by the floor statements of Representative Dingell, indicating that one of the purposes of the revised definition of cable services under section 602(6) was to enlarge the base of revenues upon which the cities could assess and receive franchise fees. The view that changed the definition of “cable services” was intended to expand the base upon which franchise fees may be assessed is reflected by McQuillin's treatise on the law of municipal corporations, in the section dealing with compensation for the use of public rights-of-way by cable franchisees.”²⁰

“The Telecommunications Act of 1996 expanded the definition of cable services to include interactive information and enhanced services made available to subscribers by the

²⁰ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, pp. 92-93.

cable operator. Consequently, some municipalities may be in a position to require fee payments on a broader revenue base than that which is defined by the cable operator.”²¹

Therefore, cable operators must pay franchise fees on revenues derived from cable modem services.

VI. Cable Modem Service as an “Information Service” is Subject to Franchise Fees.

Classifying cable modem service as an “information service” does not preclude the service from also being a “cable service.” The two definitions are not mutually exclusive. Thus, even if cable modem service is classified as an “information service,” cable operators must pay franchise fees on revenues derived from such cable modem services.²²

Furthermore, franchise fees are payments made to municipalities by cable providers for the use of the rights-of-way.²³ Regardless if cable modem service is classified as an “information service,” the cable operator is still using the rights-of-way. Franchise fees represent part of the compensation that a local government receives in exchange for a cable operator's use and occupation of public property, *i.e.*, the public rights-of-way. Thus, a franchise fee is in the nature of a rental charge, and is not a tax. A local government's

²¹ *Internet Over Cable: Defining the Future in the Terms of the Past*, Barbara Esbin, OPP Working Paper No. 30, Federal Communications Commission, August 1998, p.93, quoting McQuilline, Eugene, *The Law of Municipal Corporations*, Third Edition, 1995 Revised Vol. 12, Chap 34, Franchises § 34.37.20, 1996 Cumulative Supplement at p. 5.

²² See Federal Communications Commission Local and State Government Advisory Committee Recommendation No. 25.

²³ *City of Dallas v. FCC*, 118 F.3d 393.

right to charge a franchise fee stems from its basic rights over its own property. Furthermore, these rights predate the Telecommunications Act.

Whether a customer subscribes to cable television service or cable modem service or both, the cable operator uses the same cable line over the same public rights-of-way. However, under the Commission's *Declaratory Ruling*, the customer subscribing for cable television would pay a franchise fee, but the customer subscribing to only cable modem service would not pay a franchise fee – although both customers are using the same cable line over the same public rights-of-way. To the customer, there is no difference or distinction between the cable television line and the cable modem line since those services are being provided by the same cable operator over the same line (yet the *Declaratory Ruling* would permit franchise fees on the former but not the latter).

VII. Franchise Fees Are Not a Barrier to Competition or Infrastructure Investment.

The Commission has stated that its policy goal is to encourage the ubiquitous availability of broadband to all Americans, to promote competition, to remove barriers to infrastructure investment, and to preserve the vibrant and competitive free market that presently exists for the Internet, unfettered by Federal or State regulation. However, there is no evidence that the collection of franchise fees on revenues derived from cable modem service will thwart the policy goals of the Commission.

In fact, “more than 800,000 new customers signed up for cable-modem service during the last three months of 2001, up from 6.4 million subscribers at the end of the third

quarter . . . [d]eployment of, and demand for, advanced broadband services continued to experience strong growth during the fourth quarter of 2001, despite numerous [regulatory] uncertainties.”²⁴

VIII. Many Local Municipalities Depend on Franchise Fees.

Many municipalities have collected franchise fees on cable modem service and used such fees to create public, educational and governmental access channels or community media centers. Additionally, many other communities have realized benefits from franchise fees, such as using the fees to teach people how to use the Internet.²⁵

Furthermore, it has been reported that local governments will lose \$300 Million in revenue in 2002 if cable companies stop paying franchise fees on cable modem service.²⁶ The loss of this revenue will have a detrimental effect on local municipalities.

There are various revenue opportunities available for cable operators arising from their cable modem service. In addition to subscriber fees, cable operators are selling "banner ads" on their service, selling web hosting on their computers and obtaining fees based on business transactions conducted on or through their cable modem service. It would be unjust for cable operators to realize significant revenues from using the public-rights-of-way without having to compensate local governments for that use.

²⁴ Cable flourishes – FCC To Cut Red Tape, *Reuters*, March 12, 2002.

²⁵ See Comments on Behalf of the Newton Communications Access Center, Inc. (CS Docket 02-52) which details the economic impact that franchise fees has had on its community services.

²⁶ State and Local Communications Report, Volume 20, No. 10, p. 7 (May 16, 2002)

IX. Alternatively, No Retroactive Refund of Franchise Fees.

Prior to the Commission's *Declaratory Ruling* that cable modem service is an "information service," many cable operators have been paying, and many franchise authorities have been collecting, franchise fees on cable modem service. Some have argued that cable operators and local franchising authorities should refund these previously collected franchise fees.²⁷

Assuming for argument that the revenue from cable modem service should not have been included in the calculation of gross revenues from which the franchise fee is determined, cable operators and/or local franchising authorities should not have to return that portion of the franchise fee previously collected. Clearly, the franchise fees were collected in good faith under the belief that the franchise fees were permitted by law. Historically, all parties concerned have always treated cable modem service as a "cable service". More important, franchise fees were never considered to be unlawfully collected.

²⁷ See *Bova vs. Cox Communications*, United States District Court for the Western District of Virginia, Civil Action No. 7:01CV00090, filed Feb. 6, 2001 wherein petitioners allege that the collection of franchise fees by Cox from its broadband Internet access service subscribers was unlawful under the Telecommunications Act of 1996 and seeks restitution of all such fees collected.

X. Miscellaneous Issues.

In addition to issues surrounding franchise fees, there are several other issues which affect local municipalities, including open access to the cable platform, franchise agreements and consumer protection laws.

CNO believes that requiring cable operators to open their cable platform to non-affiliated Internet service providers on a non-discriminatory basis would promote competition and encourage the availability of broadband to all Americans.

CNO also believes that cable operators must obtain a franchise from the local municipality if the cable operator intends on using the public rights-of-way to provide cable modem service.

Additionally, local governments must be able to retain some regulatory control over cable operators in the provision of cable modem service. Cable modem service subscribers will inevitably voice their complaints about the service to the local franchising authorities. Thus, local governments must be in a position to protect the consumer. Furthermore, any such complaints by customers are best addressed at the lowest level, *i.e.*, the local government.

XI. Conclusion.

The City of New Orleans respectfully requests that FCC should reconsider its *Declaratory Ruling* and hold that cable modem service and/or cable modem platform is a "cable service" as defined in 42 U.S.C. §522(6). Furthermore, the City of New Orleans respectfully requests that FCC should find that pursuant to 47 U.S.C. 542, cable operators

must pay franchise fees on revenues derived from providing Internet services, whether cable modem service is an "cable service" or an "information service."

Respectfully submitted:



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XII. Certificate of Service

I hereby certify that the above and foregoing was this day served upon the following by depositing same into the US Mail, postage prepaid and properly addressed.

Signed in Metairie, Louisiana, this 11th day of June 2002.



MARK C. CARVER

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