

**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 FAIRFAX, VIRGINIA,
IN SUPPORT OF RETAINING LOCAL FRANCHISING
AUTHORITY WITH RESPECT TO BROADBAND
ACCESS TO THE INTERNET OVER
CABLE FACILITIES**

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INTRODUCTION

The City of Fairfax, Virginia (“City”), a Virginia municipal corporation, by counsel, herein files its comments to the March 15, 2002, Declaratory Ruling and Notice of Proposed Rulemaking (“Ruling”) of the Federal Communications Commission (“FCC”) in the above-styled matter, wherein it determined the regulatory classification of cable modem service to be an interstate information service, subject to FCC jurisdiction, instead of a “cable service,” as defined in the Telecommunications Act of 1996. For the reasons hereinafter set forth, the City respectfully disagrees with that determination and requests that the FCC either amend or clarify its Ruling to support the interpretation that cable modem service may be properly classified as a cable service. Alternatively, if the designation of cable modem service as an “interstate information service” is retained, the FCC should allow municipalities to enforce customer service standards and receive franchise fees for the use of its rights-of-way by cable modem service providers.

BACKGROUND

Pursuant to 47 U.S.C. § 541 and the 1950 Code of Virginia, as amended, Section 15.2-2108, the City enacted a Cable Communications Ordinance, which is set forth in Article III, Chapter 94 of the Code of the City of Fairfax, Virginia (“Ordinance”). Section 94-92 of the Ordinance details the minimum customer service standards that a franchisee must satisfy, and Section 94-109 of the Ordinance provides financial penalties for the failure to comply with those customer service standards. Section 94-79 of the Ordinance provides that cable system operators granted a franchise by the City must pay a franchise fee equal to five percent (5%) of their gross revenues as compensation for the use of public rights-of-way and public land. “Gross revenues” are defined in the Ordinance as “any and all cash, credits, property or consideration of any kind or nature from the operation of the Cable system to provide Cable services as specified in a Franchise agreement....” According to the FCC’s Ruling, cable modem access is not considered a cable service; therefore, revenues from cable modem service are excluded from the gross revenues used to calculate the franchise fee.

The action of the FCC in ruling adversely to local franchising authorities now precludes the City and municipalities throughout the United States from collecting franchise fees related to cable modem service, and deprives the consumer of the last great hope for a “minimal regulatory environment” that protects the needs and interests of the consumer while fostering competition among cable providers.

ARGUMENT

The FCC's ruling that cable modem service is an interstate information service, as opposed to a cable service, is in contravention of the Cable Act, ignores the constitutional limitations on its authority to regulate cable modem service¹, and, quite simply, is lacking in common-sense protection for American consumers. By promulgating this Ruling, the FCC challenges the authority of local governments to recover franchise fees related to cable modem service and to provide consumer protection and right-of-way management with respect to such service.

I. The Ruling leaves cable modem service unregulated and outside the operation of consumer protection and customer service standards.

The FCC should retain local regulation of cable modem service by classifying it as a cable service, thereby continuing the tradition of local oversight of cable operators; otherwise, the American consumer suffers at the hands of this FCC decision since there is nowhere for cable modem subscribers to turn to for much-needed protection. It is imperative that local franchising authorities retain the ability to regulate customer service standards for cable modem service.

To whom will the problem-ridden consumer turn? While responsive municipal intervention has long been an effective means of addressing consumer complaints, it is beyond belief that a similar regulatory effort could be undertaken at a state or national level. Neither the FCC nor any federal agency is prepared to deal with the voluminous

¹ In order to avoid undue repetition, the City aligns itself with the Illinois Chapter of the National Association of Telecommunications Officers and Advisors (IL NATOA) with regards to its statements concerning constitutional issues and open access to broadband, as set forth in their Comments dated April 12, 2002, and with the City of North Charleston and Charleston County, South Carolina, with regards to its statements concerning the proper classification of cable modem access as a cable service under the Cable Act, as set forth in their Comments dated May 14, 2002.

cable modem complaints that would surely surface each day. A re-examination and revision of the Ruling would perpetuate the existing cable regulatory system that currently protects consumers and guarantees the consumer the same level of service response as exists in the cable television system. If the FCC does not recognize the importance of re-evaluating its Ruling, the FCC will allow cable modem providers to become unregulated entities. Examples of ill-fated governmental de-regulation abound. In order to avoid such a situation, municipalities should retain the authority to impose customer service standards on cable modem service.

II. The Ruling deprives localities of the right to collect franchise fees for cable modem service.

The Ruling will have a significant impact on franchise fee revenues for municipalities across the country. These fees are not a tax or a revenue-raising device, but payments made to local governments by cable providers for the use of public rights-of-way. (*City of Dallas v. FCC*, 118 F.3d 393, 1997). 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 that uses municipal lands to reach subscribers. Cable modem service is provided via the same facilities that provide cable television service. Accordingly, revenues from cable modem service should be included in the calculation of franchise fees for the use of the rights-of-way through which this service is delivered.

It is interesting to note an example of exactly how the Ruling would result in the City's loss becoming a windfall for the cable service provider at the expense of the

consumer. As set forth in Section 94-79 of the Ordinance, the City receives a franchise fee of five percent of the gross revenues from the cable providers. Cable providers pass this fee through to the consumers. Now that cable modem service has been excluded from the gross revenues, the City observes that rather than decreasing the customers' bills to reflect the decrease in the franchise fee, Cox Communications has, instead, increased the cost of cable modem service, effective July 1, 2002. Prior to the price increase, cable modem service for Cox subscribers was \$32.42 per month, which included the pass-through cost for the franchise fee related to cable modem service. The cost without the fees was \$29.95 per month. After July 1st, the cost of cable modem service increases to \$34.95 per month, which to the consumer appears to be a net increase of only \$2.53, but in actuality, is an increase of \$5.00, since the franchise fee is no longer collected for cable modem service. The City, and more importantly, the consumer, are short-changed by this increase. Only Cox stands to benefit, to the tune of approximately \$78,000 per year² in a City with a population of only 21,498.³ Imagine the impact this will have on a nation-wide level.

² There are approximately 1,300 cable modem subscribers in the City. After the \$5.00 price increase, Cox's gross revenues will increase by \$6,500 per month (1,300 subscribers x \$5.00), or \$78,000 per year.

CONCLUSION

For the reasons hereinabove set forth, the City respectfully disagrees with the FCC's legal classification of cable modem service. The City requests that the FCC revise its Ruling and confirm the authority of state and local governments to regulate customer service standards and receive franchise fees related to cable modem service. Cable modem providers need to remain responsive to municipal oversight, and expect to pay for crossing public lands to reach their subscribers.

Respectfully submitted,
THE CITY OF FAIRFAX,
VIRGINIA
By Counsel

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³ Based on the 2000 U.S. Census.

CERTIFICATE OF SERVICE

I, Charles L. Shumate, Deputy City Attorney for the City of Fairfax, Virginia, do hereby certify that on June 14, 2002, I electronically filed a copy of these Comments to the following:

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

Charles L. Shumate