

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

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities)	GN Docket No. 00-185
)	
Internet Over Cable Declaratory Ruling)	
)	
Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities)	CS Docket No. 02-52
)	

COMMENTS OF CHARTER COMMUNICATIONS, INC.

By: Paul Glist
Laura Schloss Moore
Kristy Hall
Danielle Frappier
COLE, RAYWID & BRAVERMAN, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

(202) 659-9750

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Summary

The broadband market has experienced explosive growth in last few years and new technology, content, and broadband-related products have emerged. Vigorous competition in this market should not be displaced by federal regulation of broadband technology. Instead, the Commission should provide a regulatory incubator that allows the marketplace to regulate cable modem service for the promotion and development of this service, which provides innovative communications services and brings intermodal competition to traditional communications markets. Allowing Internet Service Providers (“ISPs”) and cable operators the flexibility to work out arrangements in the free market is the best means for assuring consumers the benefits of various Internet offerings. This approach also offers far more potential for product differentiation than that which would arise under a government-managed regime of forced access.

Charter Communications Inc. currently employs various ISPs and broadband strategies in its provision of cable modem service. It would be a mistake to conclude that Charter’s present success in providing cable modem service, or for that matter the success of any cable modem provider, is pre-ordained, making it a “dominant” provider of broadband. The first broadband ISPs to enter the market, [Excite@Home](#), ISP Channel, and High Speed Access Corp., have collapsed. Predictions of permanent “dominance,” therefore, should be approached warily.

The present-day competitive market has emerged in no small part due to the deregulatory laws and policies established by Congress and the Commission regarding broadband. These directives support federal preemption of the broadband field and the Commission’s imposition of market-based regulation. Specifically, Sections 706 and 230 of the Telecommunications Act of 1996, and explicit provisions of the Cable Act, support a deregulatory environment for cable-

provided information services. Under these statutory provisions, the Commission has articulated a goal of promoting the deployment of broadband services with a minimum of regulation.

Recent Congressional actions also mandate that Internet services and entities providing such services may not be taxed. Taken together, the most consistent, rational direction the Commission can take is to impose a regulatory incubator on cable modem services to allow such services to thrive in and grow with the broadband market.

This deregulatory policy also must be taken one step further. Local authorities are acting as discriminatory barriers to the development of cable modem services. Through overreaching ordinances that profess to address privacy and consumer protection concerns, local franchising authorities are inappropriately regulating cable modem service. Local authorities are assessing penalties, franchise fees, and imposing other burdens on cable modem providers but not on other providers of Internet service. The repercussions for violations of these regulatory impositions are serious, including threats of cable franchise revocation. Justifications for these local regulations include labored theories that the provision of cable modem service further burdens the rights-of-way when in reality, the addition of cable modem service only results in additional photons and electrons flowing through already-authorized cable system fiber, trunk, feeder, and drop cables.

The Commission should use its Title I authority to constrain overreaching local ordinances that impede the development of cable broadband service, as it has previously employed its Title I authority to promote Satellite Master Antenna Television (“SMATV”), Direct Broadcast Satellite (“DBS”), Multipoint Distribution Systems (“MDS”), information services, and Customer Premises Equipment (“CPE”) when these markets were emerging. Specifically, the Commission must affirmatively state that no additional local authority or

franchise is necessary for the provision of cable modem service, because a Title VI cable franchise authorizes a cable operator to use the rights-of-way without limitations on the services it may provide. The Commission also must prohibit local authority attempts to seek cable franchise or other fees on cable modem service revenues, as contrary to the Cable Act, the federal policy of advancing broadband service in a deregulatory environment, and the tax-free environment envisioned by Congress for Internet services.

Overreaching local consumer protection and privacy ordinances must be restrained to ensure that they are not used as subterfuges to raise local revenues, to impose discriminatory regulatory superstructures on cable modem providers, or to disrupt the delicate federal balance between the appropriate business use of consumer information by cable operators and consumers' concerns for privacy.

Finally, the Commission should forebear from Title II regulation of cable telephony offerings, as part of its broader deregulatory and pro-competitive broadband policy.

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COMMENTS OF CHARTER COMMUNICATIONS, INC.

I. INTRODUCTION.

Pursuant to the Commission’s Notice of Proposed Rulemaking (“NPRM”) in the above captioned matter, Charter Communications, Inc. (“Charter”) submits the following Comments regarding the provision of Internet access service over cable television systems.¹ As requested in the NPRM, Charter will refrain from repeating the Comments it filed in response to the Commission’s Notice of Inquiry regarding cable modem service in September 2000,² but incorporates them herein by reference.

¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CS Docket No. 02-52, 67 Fed. Reg.18848 (Apr. 17, 2002) [hereinafter *Cable Modem Order and NPRM*].

² *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry, 15 F.C.C.R. 19287 (2000).

II. THE BROADBAND MARKET IS NASCENT AND DYNAMIC.

Charter entered the competitive market for information services by offering customers a choice of Internet access other than the prevailing dial-up services. Rapid deployment of this service required the use of a single integrated ISP. Charter, like other cable operators, designed its plant and deployed its modem services using the same destination routing through which traffic flows through the Internet backbone. This particular design allowed rapid deployment of an alternative method for accessing the Internet, but it also involved delivery of a service in which “Internet access” was integrated with “transportation,” much as delivery of cable programming is integrated with the cable network. This architecture, however, did not imply that Charter would never structure service offerings using other ISPs. As detailed in prior Comments, Charter initially offered service through arrangements with a number of Internet participants, including High Speed Access Corp., Earthlink, ISP Channel, and Excite@Home.³

As the Commission and analysts have predicted, this dynamic market has proven volatile. The following three examples illustrate the volatility of the broadband market.

A. Charter Offers High-Speed Internet Access In Conjunction With Third Party Internet Service Providers.

First, rather than permanently capturing consumers (as critics had predicted), the “first mover” broadband ISPs have collapsed. With the bankruptcy and shutdown of Excite@Home, and the financial collapse of High Speed Access Corp., Charter today generally provides its high-speed Internet access service to its customers under the Charter Pipeline brand. However, in

³ See Comments of Charter Communications Inc. in Notice of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities in GN Docket No. 00-185 at ii (filed Dec. 1, 2000).

certain markets, Charter offers high-speed Internet access in conjunction with third party ISPs (rebranded as Charter Pipeline powered by Earthlink, and Charter Pipeline featuring MSN). The Commission reported in the NPRM (based on information from 2001) that Charter did not plan to offer multiple ISP access.⁴ Charter actually has contacted several ISPs and is engaged in substantive negotiations with ISPs to commence a multiple ISP access trial.⁵

Charter does not yet know what future transactions will look like with third party ISPs, but Charter does know that it is not a matter of one size fits all. Deals could be made with joint investment in front-end plant and equipment and a revenue share. There could be sharing of advertising by an ad-supported ISP. There could be payments in equity or warrants.⁶ Parties could negotiate for leases of capacity fully engineered by the cable operator, or turnkey arrangements where the ISP designs the system plant upgrade. There could be a percentage commission on transaction-based services. All of these models have analogues in the Internet space and in e-commerce.⁷ Different ISPs might reach different deals with cable operators, just as different video channels have different economic models and therefore different carriage

⁴ See *Cable Modem Order and NPRM* at ¶ 28.

⁵ As the Commission well knows, other MSOs are providing system access to unaffiliated ISPs. See *New ISPs Approved for AOL Time Warner*, BROADCASTING & CABLE, (May 14, 2002), available at http://www.tvinsite.com/broadcastingcable/index.asp?layout=story&doc_id=86184; Reuters, *AT&T, Comcast to Offer Choice of ISP*, REUTERS (Apr. 1, 2002)(stating that these two companies are independently negotiating commercial agreements with unaffiliated ISPs), available at <http://news.com.com/2100-1033-872505.html>.

⁶ Warrants are securities that entitle the holder to buy a proportionate amount of common stock at a specified price for a period of years or to perpetuity.

⁷ See, e.g., *Pacific Century Cyberworks, Telstra Sign Agreement*, ASIA PULSE, Oct. 13, 2000 (outlining joint venture with 50/50 equity split); *High Speed Access Corp. Reports First Quarter Results*, PR NEWswire, May 3, 2000 (discussing turn-key deal between HSA and Charter); Steve Donohue, *Diva Rolling Out Remote Technology: New System Could Raise PPV Profits*, ELECTRONIC MEDIA, Nov. 30, 1998 (discussing equity and warrant deals); Teresa Poole, *Meet*

arrangements with cable operators.⁸ In the meantime, in all markets, all ISPs are already connected to cable modem customers “upstream” of the cable headend, at a carrier hotel or at the backbone level; and every customer, once he or she has accessed the Internet, can go anywhere.

B. Consumer Demand For And Expectations Of Internet Service Are Ever-Changing.

Second, consumer demand for Internet service has proven to be highly variable and sensitive. In the early days of “forced access” debates, it was assumed that consumer demand for the dominant ISP (America On Line or “AOL”) was voracious. Since then, demand for AOL has slowed considerably (along with many other elements of the Internet economy).⁹ This situation has remained so even where Charter accommodates AOL’s Bring Your Own Access program, under which Charter Pipeline customers can keep their AOL e-mail address, access to AOL content and use of AOL Instant Messenger™, and AOL gives the customer a discount on the service.¹⁰

Likewise, buried in the early days of “forced access” debates, and in today’s policy debates, is the assumption that customer demand for Internet access itself is unlimited. Charter’s experience is to the contrary. As detailed in Comments to the National Telecommunications and Information Administration, even where Charter effectively provided Internet access *for free* in

Mr. Freeserve, THE INDEPENDENT (London), June 30, 1999 (mentioning the importance of commissions from e-commerce for ISPs).

⁸ Shopping channels typically pay cable operators commissions on transactions. Pay channels split revenues with operators. Basic channels provide ad avails. Leased access channels rent time from operators.

⁹ Seth Schiesel, *Chief-to-Be Says AOL Has One Problem Area*, N.Y. TIMES, May 7, 2002, at C8 (stating that the AOL Internet division is struggling and that the future for narrowband connections is unknown including the growth of this medium).

¹⁰ See <http://www.charter.com/products/Internet/Internet.asp>.

LaGrange, Georgia, Internet take rate was only at 29% after one year of the free service offer.¹¹

As with other consumer products, demand is not unlimited, even at near zero cost.

As another example, today's policy debates also are based on the faulty assumption that consumers' expectations of "Internet access" are uniform and can or should be regulated. In fact, consumer expectations of Internet access are as variable as they are for other consumer products, and the market responds. It was, for example, consumer demand for access to the world wide web, rather than government regulation, that led AOL away from an exclusive offering of limited content to an offering of the entire web.¹²

C. The Broadband Market Is Exceedingly Competitive And Has Experienced Marked Growth In The Past Few Years.

Third, the competitive battle among providers of Internet access is quite vigorous, and the precise outcome will defy regulatory prediction as well as it has eluded analysts. Charter has great confidence in the quality of its cable modem service and in its own ability to compete. Its cable modem product triggered a competitive response from Incumbent Local Exchange Carriers ("ILECs") who did not deploy high-speed residential Digital Subscriber Line ("DSL") technology for years,¹³ and inspired other technologies (*e.g.* satellite, and wireless) to create

¹¹ See Comments of Charter Communications Inc. submitted to Department of Commerce, National Telecommunications and Information Administration, Deployment of Broadband Networks and Advanced Telecommunications, Docket No. 011109273-1273-01 (filed Dec. 19, 2001).

¹² See JEANNE MARIE FOLLMAN, *Content and Connection in a Broadband World*, ON THE INTERNET (stating that in 1996, AOL determined that unlimited access to both the world wide web and to its proprietary content was a good idea), at <http://www.isoc.org/oti/articles/0700/follman.html> (last visited June 17, 2002).

¹³ *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report and Order, 14 F.C.C.R. 2398, ¶ 42, n.84 (1999).

competing products.¹⁴ Consumer demand for cable modem service is sensitive to the price of DSL and to the price of “dial-up” service. In fact, Charter offers “tiered” cable modem service at 256K for \$24.95 per month¹⁵ to appeal to consumers presently obtaining dial up access at the average price of \$19.99 per month. It expects to end this year with another 550,000 to 600,000 cable modem customers.¹⁶ This consumer price sensitivity alone belies any claim that cable operators are “dominant” in this market. It would be a mistake to conclude that Charter’s success—or for that matter the success of any cable modem provider—is pre-ordained and that a market of vigorous competition may be replaced with one of regulation of a “dominant”

¹⁴ DBS now has a competitive stake in the residential broadband market. In April of this year, SBC and EchoStar announced a strategic marketing alliance that will combine EchoStar's DISH Network digital satellite television offerings with SBC's broadband DSL Internet access service to provide consumers with an alternative to cable broadband and video services. *SBC, Echostar Announce Strategic Marketing Alliance*, DIGITAL TELEVISION .COM (Apr. 22, 2002)(stating that SBC and Echostar were combining SBC’s DSL service and Echostar’s digital satellite television offerings to provide consumers with an alternative to cable), *at* http://www.digitaltelevision.com/2002/april/news0422_4.html. DirecTV Broadband provides residential DSL service. Ryan Naraine, *DirectTV Broadband Going Vo-IP Route*, ISP NEWS (Apr. 2, 2002), *at* http://www.Internetnews.com/isp-news/article/0,8_1002011,00.html. Wireless providers of residential broadband also are continuing to develop. *See Competition in the Video Marketplace Is Here to Stay*, NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *at* <http://www.ncta.com/legislative/legAffairs.cfm?legRegID=19> (stating that companies like WorldCom provide broadband fixed wireless services)(last visited May 23, 2002); *AT&T Wireless to Offer Residential Broadband Service in Four New Cities*, *at* <http://www8.techmall.com/techdocs/TS000719-7.html> (last visited May 23, 2002); *A Fixed Wireless Internet Service Provider* (discussing the services of Frontier which provides fixed wireless broadband services to residential customers in Richmond, VA), *at* <http://www.frontierbb.com/index.php> (last visited May 23, 2002).

¹⁵ An additional fee is imposed if the customer rents a cable modem from Charter.

¹⁶ *See* Charter 2001 Pro Forma Customer Stats by Quarter, *available at* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=CHTR&script=1500&layout=7 (last visited June 7, 2002).

provider. Analyst projections of the comparative market share of broadband have been as volatile as the market itself.¹⁷

In addition, the broadband market has experienced explosive growth in the last few years. According to current press accounts, the broadband market grew to 25.2 million individual subscribers in April of 2002.¹⁸ For the first time, high-speed connections accounted for 51 percent of the hours Americans spent online. In January of this year, people who have broadband connections in their home spent more time online than people with traditional phone

¹⁷ In 1998, industry experts believed that the cable modem market share of the Internet access market would lag significantly behind other providers of Internet access for the foreseeable future. See *Strategic Planning Services, Last Mile Strategies*, JUPITER COMMUNICATIONS, at 3, 10 (Aug. 1998) (estimating cable Internet service providers will serve only twenty percent of the Internet access market by 2002). In 1999, analysts projected penetration rates for cable modem service to be in the range of 17 to 30 percent by 2004. See Jessica Reif Cohen and Nathalie Broochu, *Q4: Cable Modems, Christmas 1999's Hot Toy! Expect High-Speed Data to Drive Results in 2000*, MERRILL LYNCH, at 34 (Feb. 16, 2000). Other analysts in that same year predicted that DSL penetration would increase to 27 percent in 2004 and that DSL subscription would outpace new cable modem subscription in part because of the ease of DSL modem installation. See *Broadband!*, STANFORD C. BERTSTEIN & CO. AND MCKINSEY & CO., INC., at 30-31 (2000). In 2000, different analysts predicted that by 2004, 28.2 percent of household will access the Internet through cable modem services, 21.1 percent through DSL and 5.7 percent through wireless and satellite technologies. *Industry Overview: Broadband Cable Second Quarter Review*, MORGAN STANLEY DEAN WITTER (Aug. 29, 2000); see also *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33, ¶ 68 (Feb. 6, 2002) [hereinafter *Third Report on 706*] (“Analysts differ, however, as to which technology will ultimately take the lead [in the broadband market].”); *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations From MediaOne Group, Inc. to AT&T Corp*, Memorandum Opinion and Order, 15 F.C.C.R. 9816, at n.330 (June 6, 2000) (“Analysts appear to disagree on when or if cable-based Internet access will lose its current lead over alternative broadband technologies.... There is little dispute, however, that cable faces increasing competition from alternative broadband technologies.”).

¹⁸ Robyn Greenspan, *Overall Broadband Market Grows*, ISP-PLANET (May 23, 2002), at http://www.isp-planet.com/research/2002/cable_020524.html.

line connections.¹⁹ Subscribership to high-speed services grew at a rate of 62 percent in 2000 and 36 percent during the first half of 2001.²⁰ The number of lines deployed to provide high-speed services grew 45 percent for cable modem service, 36 percent for DSL, and 73 percent for satellite or fixed wireless technologies.²¹ By the last count, cable modem providers have 7.2 million subscribers, while DSL providers have signed up roughly half this number of subscribers.²² Cable providers have added content²³ and are developing home networking to enhance the modem service.²⁴ Other providers of high-speed Internet service have made similar improvements to their service.²⁵

D. In The Nascent, Competitive Broadband Market, No Service Provider Is Dominant Making Business Regulation Of Cable Modem Providers Inappropriate.

It is tempting for some to conclude from a snapshot of the moment that cable is “dominant” and should be regulated like a “dominant” ILEC. Such a conclusion would be a serious mistake. The telephony market has a substantial, century-long record from which the

¹⁹ Rachael Konrad, *Survey: Broadband Goes Mainstream*, CNET News.com (Mar. 5, 2002) (based on a Nielsen/NetRating report on Internet usage in the month of January 2002 and also stating that roughly 63 percent of people with Internet connections at work have high-speed connections), at <http://news.com.com/2100-1033-852084.html>.

²⁰ *High-Speed Services for Internet Access: Subscribership as of June 30, 2001*, Industry Analysis Division, Common Carrier Bureau (Feb. 2002).

²¹ *Id.*

²² Reuters, *FCC Challenged on High-Speed ISP Ruling*, CNET.COM (Mar. 25, 2002), at <http://news.com.com/2100-1033-868329.html>.

²³ For example, Charter has created a custom start page in conjunction and co-branded with MSN containing content modules including movie trailers, previewing movies on pay-per-view, video-on-demand, and television listings.

²⁴ See <http://www.cablelabs.com/cablehome/> (detailing the Cable Home product that will allow for home networking).

Commission and the courts have reached informed conclusions. Detailed regulatory rules on “dominance,” *Computer II* and *Computer III* obligations under Title I, and Unbundled Network Elements (“UNEs”) were crafted against this record.²⁶ The collapse of most Competitive Local Exchange Carriers (“CLECs”) since the 1996 Act,²⁷ and the tenacious hold of ILECs on their

²⁵ See *Thomson Spotlights Advanced DSL Decoder Gateway Enabling Delivery of Multiple Entertainment Services Via Telephone Lines*, BUSINESS WIRE (June 3, 2002)(describing innovative DSL technology that allows for new personal entertainment applications).

²⁶ See *Verizon Communications, Inc. v. FCC*, 2002 U.S. LEXIS 3559, at *39-40 (May 13, 2002)(stating that the price cap on local telecommunications services was “the final stage *in a century of developing rate-setting methodology*” and that the 1996 Act moved away from using traditional rate-based methodologies that gave ILEC monopolists too great an advantage to provide CLECs access to UNEs)(emphasis added); *In re Amendment of § 64.702 of the Commission’s Rules and Regulations*, Final Decision, 77 F.C.C.2d 384 ¶¶ 5, 14, 219 (1980)(stating that the decision was made on a voluminous record to separate bottleneck facilities from enhanced services based on the carriers’ location and number of subscribers and on a proceeding that was initiated more than a decade before)[hereinafter *Computer II*]; *on reconsideration, Memorandum Opinion and Order*, 84 F.C.C.2d 50 (1980) and *Memorandum Opinion and Order on Further Reconsideration*, 88 F.C.C.2d 512 (1981), *aff’d sub nom. Computer and Commun. Indus. Ass’n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *In re Amendment of § 64.702 of the Commission’s Rules and Regulations*, Report and Order, Memorandum Opinion and Order on Further Reconsideration, 104 F.C.C.2d 958, ¶¶ 9, 13 (1986)[hereinafter *Computer III*] (stating that the Commission had dealt with the issues continuously for the previous twenty years based on a record that went back to the 1956 Consent Decree regarding AT&T’s provision of monopoly telephone services and subsequent legal decrees regarding AT&T’s monopoly service)(subsequent history omitted).

²⁷ See *Third Report on 706* at ¶ 69 (wherein one analyst noted that with stock prices of CLECs down 90 percent or more from their all-time highs, the industry has lost an estimated \$100 billion in equity capitalization); Carl Weinschenk, *Cable Makes Advances Into CLECs’ Wake*, MULTICHANNEL NEWS (Dec. 3, 2001) (finding that CLECs have suffered from the “bad economy, bad business plans and a reliance on regional Bell operating companies for connections to their customers”), available at <http://www.tvinsite.com/multichannelnews/index.asp?layout=story&articleID=CA184593>; Martha Buyer, *CLECs in Trouble*, (Apr. 5, 2001) (suggesting that part of the competitive problem is that CLECs must wean themselves off of using the ILECs’ network), at <http://www.cconvergence.com/article/CTM20010330S0002>; Clayton Bellamy, *Williams Communications Files for Chapter 11 Bankruptcy*, WASHINGTONPOST.COM (Apr. 22, 2002), available at <http://www.washingtonpost.com/wp-dyn/articles/A31524-2002Apr22.html>; Jen Muehlbauer, *One Covad On the Rocks, With a Twist*, THE INDUSTRY STANDARD (Aug. 8, 2001) (discussing Covad’s bankruptcy filing), available at <http://www.thestandard.com/article/0,1902,28547,00.html>; Jim Thompson, *NorthPoint Puts On*

core market share,²⁸ have confirmed the conclusion that ILECs are dominant in every sense of the word.

By contrast, in new and rapidly developing technologies, labeling (and regulating) one provider among several as “dominant” is particularly treacherous. Consider home gaming terminals. In the late 1980s and early 1990s, most would have labeled the pioneer Atari as the leader of the video game industry. By 1996, Atari had lost considerable ground to new competitors, Nintendo and Sega.²⁹ Today, a battle for market position in home video game gateways rages between Sony PlayStation and Microsoft Xbox,³⁰ while Atari has reemerged on

A Happy Face, ISP PLANET (examining NorthPoint’s bankruptcy filing), at <http://www.isp-planet.com/technology/dsl/thompson/northpoint.html> (last visited April 24, 2002).

²⁸ At the end of June 2001, CLECs reported only 9% of the switched access lines nationwide. *Local Telephone Competition: Status as of June 30, 2001*, Industry Analysis Division Common Carrier Bureau (Feb. 2002), available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0202.pdf.

²⁹ See Denise Shelton, *Atari Announces PC Games Unit*, CNET NEWS.COM (Jan. 3, 1996), at <http://news.com.com/2100-1023-201192.html>.

³⁰ See David Becker, *Sony Stands Firm on U.S. PlayStation Price*, CNET NEWS.COM (Sept. 26, 2001)(discussing Sony’s initial PlayStation console which was introduced in 2000 and Microsoft’s Xbox introduction in 2001), at <http://news.com.com/2100-1040-273568.html>; David Becker, *Game Industry Girds for Battle*, CNET NEWS.COM (May 14, 2002)(discussing Microsoft’s subscription only broadband network that will allow Xbox owners to play against one another online and stating that the service will include live voice chat), at <http://news.com.com/2100-1040-912702.html>; Margaret Kane, *Nintendo Give GameCube A Markdown*, CNET NEWS.COM (May 20, 2002) (reporting that Nintendo is working on plans to sell a network adapter for Internet connections and a modem for dial-up connection for GameCube), at <http://news.com.com/2100-1040-917487.html>; David Becker, *Holes Found in Sony’s Online Game Plan*, CNET NEWS.COM (Mar. 7, 2002)(announcing that Sony will sell a PlayStation2 network adapter that will have an Ethernet port for broadband Internet and a modem for dial-up access along with games from Sony and third party publishers that support online play, and stating that for now, Sony is not interested in becoming an ISP but is planning to deliver online music and movies via that console next year as a “mass-market broadband platform in the home”), at <http://news.com.com/2100-1040-855039.html>.

cell phones.³¹ Clearly, the consumer would have been grossly dis-served if, anywhere along the way, the government had declared one of these companies to be “dominant” and established regulatory terms of access to that government-chosen platform.

The record for broadband is even briefer than the video game industry record. CLECs started using incumbent networks to provide broadband services after passage of the 1996 Act.³² Cable operators likewise introduced residential broadband services in 1997.³³ Consumer penetration for cable modem service reached only 8 percent of American homes in mid-year 2001.³⁴ It would be wholly improper to impose access regulation on cable modem service providers on the brief record available regarding the broadband market.³⁵

³¹ Ben Charny, *Atari Classic Coming to Cell Phones*, CNET NEWS.COM (May 17, 2002) at <http://news.com.com/2110-1033-916659.html>.

³² See *Third Report on 706* at ¶ 68 (DSL deployment began in response to the 1996 Act and the presence of competitive access providers); Council of Economic Advisers, *Economic Report of the President*, 187-88 (Feb. 1999), available at <http://w3.access.gpo.gov/usbudget/fy2000/pdf/erp.pdf>

³³ See Sim Hall, *Winning the Broadband Race, Internet Access Spurs Demand*, OUTSIDE PLANT MAGAZINE, (Aug. 2000) available at http://ww.ospmag.com/features/2000/winning_the_broadband_race.html.

³⁴ *Third Report on 706* at ¶ 45.

³⁵ Indeed, constitutional concerns also would exist if the Commission regulated third party access to the cable platform for the provision of information services. A requirement for third party access would take the cable operator’s spectrum and restrict the operator’s ability to speak on that spectrum, a First Amendment violation. See *Comcast Cablevision Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000)(finding that the transmission aspect of cable modem service cannot be separated from the speech presented by operator in its provision of broadband service); see also *infra* Footnote 89 (regarding additional First Amendment concerns raised by the NPRM). In addition, a third party access requirement would involve a taking of cable operator property. *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994), superseded by statute as stated in *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)(concerning mandatory collocation). Although the ultimate issue of collocation was superseded by statute, the Court’s “takings” analysis nevertheless remains valid. Equal Protection concerns also would be raised by a cable specific mandatory access requirement if the Commission did not impose such a Title I requirement on ILEC, CLEC, or wireless broadband providers that are similarly situated. See U.S. CONST. amend. V (providing for due process of

Accordingly, there is no basis to impose rate or other business term regulations on the provision of cable modem services, such as third party access to the cable plant.³⁶ Even in regulatory contexts where there are statutory obligations to negotiate “access”—as in retransmission consent and program license affiliate rules³⁷—the Commission has refrained from imposing rates, terms and conditions. In the retransmission consent context, the Commission found that because the legislative history of the Cable Act sought marketplace regulation, its rules should provide the widest possible range of opportunity for both broadcast stations and cable operators to negotiate retransmission deals.³⁸ Even with a subsequent statutory obligation

law); *State of Louisiana v. Verity*, 853 F.2d 322, 333 (5th Cir. 1988)(stating that the basic concepts of Equal Protection as set forth in the Fourteenth Amendment apply to federal action through the Due Process Clause of the Fifth Amendment and where administrative classifications or burdens are made, Equal Protection requires that the classification or burden bear a rational relationship to the legislative purpose of the enabling statute); *Cable Modem Order and NPRM* at n.5 (stating that the NPRM does not apply to wireless broadband providers). The Commission can and should avoid these constitutional concerns by relying on the marketplace to regulate and develop intermodal broadband competition. See *Cable Modem Order and NPRM* at ¶¶ 80-82 (asking for comment on constitutional concerns raised by a Commission mandated multiple ISP access requirement).

³⁶ The Commission asked whether it should impose rules of reasonableness on the business of providing cable modem service. *Cable Modem Order and NPRM* at ¶¶ 84, 88.

³⁷ See *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Report and Order, 8 F.C.C.R. 2965 (1993)(providing that the Commission would not oversee retransmission consent negotiations)[hereinafter *Broadcast Signal Issues Order*]; *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection Act of 1992, Development of Competitive and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 F.C.C.R. 2642 ¶¶ 1, 14, 17 (1993) [hereinafter *Second Video Programming Distribution Order*] (stating that under its statutory obligation to promulgate regulations pertaining to program access and carriage agreements embodied in Section 616 of the Act, the Commission would provide regulations that were very general in nature to ensure that the regulations did not restrain legitimate business practices common to a competitive marketplace).

³⁸ *Broadcast Signal Issues Order*, 8 F.C.C.R. 2965 at ¶ 178; see also *In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Broadcast Signal Carriage Issues*, Memorandum Opinion and Order, 9 F.C.C.R. 6723, ¶ 105 (1994)(“We believe that our

of good faith negotiation in the retransmission consent field, the Commission did not regulate the explicit terms of retransmission consent negotiations.³⁹ In the program license affiliate rules, the Commission also found that its regulations should be general in nature⁴⁰ to ensure that its regulations did not preclude legitimate “aggressive” negotiations in a competitive marketplace.⁴¹

In the context of cable modem service, there is no cause for the Commission to promulgate cable modem business regulations even at the general level used in retransmission consent and program access realms. Cable modem service is being offered in a nascent broadband market against a backdrop of intense competition and clear federal policies of deregulation.⁴² There has been no market failure in the deployment of broadband. There is no evidence that a “resale” broadband model over cable plant, which is the essence of forced access, would provide any consumer benefits sufficient to overcome the substantial costs of regulation. There is not even the statutory authority to impose third party “forced access;” no case law permits the Commission to use its ancillary jurisdiction in this way. No statutory hook identified

rules should provide the widest possible range of opportunity for both broadcast stations and cable operators, where the must-carry provisions are not applicable.”).

³⁹ *In re Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, First Report and Order, 15 F.C.C.R. 5445 ¶ 6 (2000)(stating that the statute did not intend and nor would the Commission subject retransmission consent negotiation to detailed substantive oversight); *see also In re EchoStar Satellite Corp. v. Young Broadcasting, Inc.*, Memorandum Opinion and Order, 16 F.C.C.R. 15070 (2001)(declining to find that the broadcaster had failed to negotiate in good faith when it was an active participant in contentious negotiations).

⁴⁰ *Second Video Programming Distribution Order*, 9 F.C.C.R. at 2648, ¶ 17 (finding that in absence of a more explicit record, it was “neither helpful nor necessary to develop specific indicia of coercion or further illustrative guidelines”). Similarly, the record in this proceeding is devoid of explicit examples of unreasonable practices in the cable modem business and there is no statutory obligation requiring the Commission to promulgate cable modem or information service negotiation regulations.

⁴¹ *Id.* at ¶14.

⁴² *See infra* Section III.

in the NPRM overrides the explicit deregulatory commands contained in the 1996 Act, or supports a regime of regulation independent from any explicit statutory grant. By contrast, allowing ISPs and cable operators the flexibility to work out their arrangements in the free market is consistent with statutory directives detailed below, and is the best means for assuring a variety of Internet offerings, with far more potential for product differentiation than that which would arise under a government-managed regime of forced access.

III. THE LAW AND COMMISSION POLICIES REQUIRE THE COMMISSION TO DEREGULATE AND PROMOTE BROADBAND DEPLOYMENT.

The broadband market emerged and has been developing not through regulation but through federal law and firmly established Commission policies that mandate a deregulatory broadband environment. Commission studies have previously noted how the statutory “hands-off” policy has animated the Commission’s successful policy towards enhanced services.⁴³ (The same pattern has been followed in technology after technology. FM subcarriers, television Vertical Blanking Intervals, telephone “dark fiber,” electric utility fiber, and DBS providers all faced claims that their technologies should be regulated as some form of a tariffed common carrier platform, and the Commission wisely resisted.⁴⁴)

⁴³ FCC STAFF REPORT, INDUSTRY MONITORING SESSIONS CONVENED BY CABLE SERVICES BUREAU, *Broadband Today* at 43, 45 (Oct. 1999); *see also* 47 U.S.C. § 230(b)(2).

⁴⁴ *See, e.g., Amendments of Parts 2, 73, and 76 of the Commission’s Rules to Authorize the Offering of Data Transmission Services on the Vertical Blanking Interval by TV Stations*, 57 Rad. Reg. 2d 832, ¶ 15 (1985); *Amendment of Parts 2 and 73 of the Commission’s Rules Concerning Use of Subsidiary Communications Authorizations*, 48 Fed. Reg. 28445 (1983); *Southwestern Bell Tel. Co. v. Federal Communications Comm’n*, 19 F.3d 1475, 1484 (D.C. Cir. 1994)(reversing the Commission determination that individual case basis (“ICB”) dark fiber offerings were common carriage services); *In re Policy and Rules Concerning Rates for Dominant Carriers*, 5 F.C.C.R. 6786, 6810 (1990)(recognizing that in some cases ICB services feature new technologies); *National Ass’n of Broadcasters v. FCC*, 740 F.2d 1190 (D.C. Cir. 1984) (affirming Commission rejection of calls to impose common carrier or other legacy regulatory schemes on DBS).

Congress and the Commission have repeatedly stressed the importance of deploying broadband facilities through deregulatory, market-based policies. Congress stated in Section 230 of the Communications Act that it is the policy of the United States “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, *unfettered by Federal or State regulation.*”⁴⁵ In Section 706 of the 1996 Act, Congress directed the Commission to encourage the provision of new technologies and services to the public, including broadband deployment, by employing various regulatory methods including removing barriers to infrastructure development.⁴⁶ In 1998, the Commission noted in its Section 706 Notice of Inquiry that it, “intend[s] to rely as much as possible on free markets and private enterprise to deploy advanced services. . . . We underscore our commitment to [. . .] seeking to promote the deregulatory and pro-competitive goals of the 1996 Telecommunications Act”⁴⁷ It is under this deregulatory policy that broadband networks have flourished.

Moreover, Congress clearly stated that the purpose of the 1984 Cable Act was to “assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public . . . and [to] minimize unnecessary regulation. . . .”⁴⁸ The Commission has promoted cable-delivered broadband services in a “minimally regulated space . . . in order to encourage investment,”⁴⁹ and has worked to

⁴⁵ 47 U.S.C. § 230(b)(2) (emphasis added).

⁴⁶ 47 U.S.C. § 157 nt.

⁴⁷ *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, 13 F.C.C.R. 15280, ¶ 5 (1998).

⁴⁸ 47 U.S.C. §§ 521 (4), (6).

⁴⁹ See Remarks of Michael K. Powell, Chairman, Federal Communications Commission, At The National Summit On Broadband Deployment, Washington, D.C., as prepared for delivery (Oct.

encourage the development of *intermodal* competition to promote broadband deployment.⁵⁰ In fact, in a companion proceeding, the Commission found that its principal goal is to promote the deployment of broadband services across multiple platforms, including cable networks, “in a minimal regulatory environment that promotes investment and innovations in a competitive market.”⁵¹

25, 2001) *available at* <http://www.fcc.gov/Speeches/Powell/2001/spmkp110.html> (“I believe strongly that broadband should exist in a ***minimally regulated space***. Substantial investment is required to build these networks and we should limit regulatory costs and uncertainty. We should vigilantly guard against regulatory creep of existing models into broadband, ***in order to encourage investment***. . . Innovation is critical and can be stifled by constricting regulations. . . When someone advocates regulatory regimes for broadband that look like, smell like, feel like common carriage, scream at them! They will almost always suggest it is just a ‘light touch.’ Demand to see the size of the hand that is going to lay its finger on the market. Insist on knowing where it all stops. Require they explain who gets to make the key decisions—if it is enlightened regulators, rather than consumers and producers, walk out of the meeting.”)(emphasis added).

⁵⁰ In enacting the 1996 Act, Congress originally called for intermodal competition in telecommunications markets. Intermodal competition generally connotes competition between different entities using varied telecommunications infrastructure and technology. For instance, an example of intermodal competition is competition between ILECs and cable operators in the provision of local telephone service. As a contrary example, intramodal competition would be competition between all facilities-based carriers providing local telephone service. In the legislative history of Section 271, Congress recognized that cable operator entry into the local telecommunications market holds the promise of providing the sort of “local residential competition that has consistently been contemplated.” S. CONF. REP. NO. 104-230 at 148 (1996); *see also Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 F.C.C.R. 1244 ¶ 10 (2002) (stating that under the 1996 Act, cable operators were to enter the telephone market to provide intermodal competition against ILECs). Heeding this call, the Commission has made clear its intent to facilitate development of intermodal competition in high-speed services. *See In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 F.C.C.R. 19287 ¶ 3 (2000)(wherein the Commission stated that it desired a record regarding all high-speed platforms to reduce barriers to entry, to encourage investment, and to facilitate deployment of high-speed services across all technologies). Through the deployment of broadband plant, cable operators can provide competitive high-speed services and telephony services such voice over Internet Protocol (“VoIP”).

⁵¹ *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Service; 1998 Biennial*

Congress has confirmed its commitment to establishing an environment in which the Internet is free from regulation, particularly discriminatory regulation. The 1998 Internet Tax Freedom Act (the “ITFA”), and its extension through the Internet Tax Non-Discrimination Act, imposes a moratorium on state and local governments’ authority to institute additional taxes on “Internet access service” until November 2003. The ITFA states that “[n]o state or political subdivision thereof shall impose any . . . taxes on Internet access,”⁵² including cable modem service and online services.⁵³ Congress has clearly sought to protect the Internet and its tools of access from the weight of state and local taxation. It also has prohibited state and local governments from imposing any discriminatory taxes in this new space. The ITFA states that “[n]o state or political subdivision thereof shall impose any . . . multiple or discriminatory taxes on electronic commerce.”⁵⁴ The ITFA further states that information service providers may not be taxed differently based on the delivery method of the service.⁵⁵ Thus, state and local governments are prohibited from imposing a tax focused solely on cable modem service providers. Congress’ intent was to establish an environment free from regulation in order to continue to foster the explosive growth of the Internet.⁵⁶ Accordingly, the Commission’s

Regulatory Review - Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking, FCC 02-42 at ¶ 5 (Feb. 15, 2002) [hereinafter *Wireline NPRM*].

⁵² The Internet Tax Freedom Act, Pub. L. No. 105-277, §1101(a), 112 Stat. 2681 (1998). This section also grandfathers any taxes there were “generally imposed and actually enforced prior to October 1, 1998.” *Id.*

⁵³ The ITFA defines “Internet access service” as “a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users.” *Id.* at § 1104(5) & (9).

⁵⁴ *Id.* at § 1101(a).

⁵⁵ *Id.* at § 1104(2).

policies toward broadband cable modem deployment should be consistent with Congressional policies and objectives espoused in the ITFA.

IV. THE COMMISSION SHOULD PREEMPT STATE AND LOCAL REGULATIONS THAT HAVE A DETRIMENTAL EFFECT ON BROADBAND SERVICE DEPLOYMENT.

A. Local Franchise Authorities Are Acting To Balkanize And Tax The Broadband Market.

The reaction of Local Franchising Authorities (“LFAs”) to the Commission’s March 15, 2002 decision has been striking. The U.S. Supreme Court specifically deferred to the Commission’s expert ability to classify cable modem service.⁵⁷ Accordingly, the Commission classified cable modem services as information services, exercising its responsibilities in a manner that has had an impact on local franchises—for example, by limiting cable franchise fees to exclude modem service revenues.⁵⁸

The response of LFAs in the field has been a massive campaign to insist upon new and burdensome regulatory structures for cable modem service. Charter is one among many MSOs that has received an overwhelming number of demand letters from LFAs marking the beginning of what appears to be a coordinated LFA campaign. The letters:

⁵⁶ H.R. REP. NO. 105-570, pt. 1 (1998) (“Unnecessary regulation of [online service providers] can only hamper the development of the Internet.”). *Id.* (statement of Hon. Christopher Cox) (“The Internet Tax Freedom Act is based on a simple principle: Information should not be taxed. . . . It is intended that this temporary ban [on state and local taxation of Internet access or online services] will be made permanent in the future. . . .”).

⁵⁷ *National Cable and Telecommunications Ass’n v. Gulf Power*, 122 S. Ct. 782, 788-89 (2002).

⁵⁸ *See Cable Modem Order and NPRM* at ¶ 7, 105 (finding that cable modem services are information services and not cable services, and that such revenues would not be included in the calculation of gross revenues from which the cable franchise fee ceiling is determined).

(1) state that the Commission does not have the authority to override a contractual provision concerning franchise fees;

(2) assert that non-payment of franchise fees on cable modem services constitutes a material franchise breach;

(3) assert that if franchise fee calculations exclude cable modem services, then Charter has no authorization to use the rights-of-way to provide cable modem service over the cable system;

(4) state that non-payment of franchise fees on cable modem service is material non-compliance that justifies non-renewal of the franchise; and

(5) threaten revocation of the cable franchise.⁵⁹

Charter has learned that after this Commission Comment cycle closes, at least one well-known municipal consultant plans to conduct non-compliance hearings across the country and to impose substantial “penalties” on cable operators who fail to pay franchise fees on cable modem services, even if this imposition exceeds the 5% cable franchise fee cap.⁶⁰ Given the apparent coordination among LFAs on this issue, Charter anticipates many hearings across the country.

LFAs have sought to bolster their position by adopting ordinances to gain bargaining leverage. Many LFAs have adopted ordinances with liquidated damages or fines ranging from \$250 per day to \$10,000 one-time payments for non-compliance, as well as costly security

⁵⁹ See Letter from City of Wharton, TX to Charter Communications, (Apr. 26, 2002) (on file with author); Letter from City of Southlake, TX to Charter Communications, (May 6, 2002) (on file with author); Letter from City of Grants Pass, OR to Charter Communications, (Apr. 29, 2002)(on file with author); Letter from Shelby County, AL to Charter Communications, (Apr. 8, 2002) (on file with author); Letter from St. Tammany Parish, LA to Charter Communications, (Apr. 25, 2002) (on file with author).

deposits from which to collect these penalties. One city recently passed a consumer protection ordinance that imposes a \$10,000 security fund and a \$1,000 per day fine for any infraction. Another city requires in its franchise agreement with Charter a \$50,000 security fund to guarantee performance under the contract and to cover any penalties assessed there under, and imposes penalties of \$250 per day for noncompliance with performance standards and other incidents of noncompliance. This particular city also imposes fines ranging from \$200 to \$3,000 for violations of the city's customer service standards, which were defined (at least before March 15, 2002) to cover cable modem service. These fines do not apply to DSL, to DBS, to any other Internet access provider, or to any other information service provider.⁶¹

Another approach to LFA regulation of cable modem service is reflected in a Seattle ordinance adopted one month after the Commission's classification of modem service as an information service. Seattle Ordinance 120775⁶² carves out Seattle residents from the operation of the privacy provisions contained in the Cable Act. The Cable Act strikes a balance between cable-related business use of customer information by the cable operator, which is authorized by the Act, and consumer privacy expectations.⁶³ The Seattle Ordinance, however, defines market

⁶⁰ See 47 U.S.C. § 542(b)(limiting cable service franchise fees to 5 percent of the operators' gross revenues "derived ... from the operation of the cable system to provide *cable services*")(emphasis added).

⁶¹ Additional examples include a city ordinance that authorizes liquidated damages ranging from \$200 to \$1,000 per day for violations of technical standards, customer service requirements or the requirement to provide certain data or reports. Another city has required in a franchise agreement with Charter liquidated damages of **\$5,000** for a second violation of certain customer service standards, and **\$10,000** for subsequent violations. Similarly, a third city has imposed liquidated damages of \$400 per day plus enforcement costs for technical standards violations, to \$500 per violation per day for noncompliance with customer service rules. Some of these provisions have or can be interpreted to have retrospective application as well.

⁶² Seattle, Wash. Ordinance 120775 (Apr. 22, 2002), amending SMC § 21.60.

⁶³ See 47 U.S.C. § 551(b)(2).

research, telemarketing, and other marketing of services or products as “non-cable-related purposes.” It establishes an onerous paper mailing and reporting barrier to even legitimate uses of Personally Identifiable Information (“PII”) information; rather than relying upon annual notice as does the Cable Act and the Commission’s customer service rules, the Ordinance requires notices be sent to subscribers and to the government at least 30 days before each use. Each time, each customer must be provided a postage paid post card, a check box on the bill, or a toll-free number with which to opt-out of each use. The process is to be repeated 45 days after each use. The ordinance also requires that cable operators police the cookies of affiliated web sites.⁶⁴ The ordinance does not apply to DSL, DBS, other Internet access or information service providers, or to any other website. Most intriguingly, the ordinance expressly exempts the City of Seattle itself. For government access to and use of PII, it seems that the consumer protections of the Cable Act are just fine.

The justification for the above fees and laws are labored at best. Some LFAs claim an additional burden on the rights-of-way. In fact, the provision of cable modem service imposes no such burden. A Cable Modem Termination System (“CMTS”) must be installed at the headend, a cable modem at the subscriber premises, and a Network Interface Unit (NIU) installed on the subscriber's home. In between are photons and electrons flowing through the cable system fiber, trunk, feeder, and drop cables. No rights-of-way permits, other than those

⁶⁴ A cookie is a file written to the user’s computer hard drive that records certain technical information about Internet usage, such as the user’s IP address, browser type, or domain name. A user may set its Internet browser preferences to notify the user when it receives a cookie or to decline acceptance of cookies.

permits necessary for the construction of standard two-way broadband plant, are needed.⁶⁵

Whatever “burden” is imposed on the rights-of-way by the cable system is regulated through the cable franchise and compensated through the cable franchise fee.

LFAAs have launched this campaign based on the slenderest of hooks: their historical regulation of cable systems occupying the public rights-of-way. However, unlike cable franchising, where Congress has explicitly preserved a limited role for LFAs over cable services, there is no historic or legal predicate for LFA regulation of interstate information services, nor is there the slightest basis for an assessment of discriminatory fees, taxes and/or rules on such services. The time and effort dedicated to responding to municipalities, as well as the litigation that is likely to ensue, will sap the resources that should be spent on deploying cable modem services. Perhaps this battle is to be expected, given the municipal reaction to Congressional and Commission efforts to rein in duplicative and overreaching local regulation of CLEC offerings.⁶⁶

⁶⁵ These standard two-way broadband upgrades are generally required by the local cable franchise. *See e.g.* City Zillah, Washington, Ordinance No. 869, Art. IV, § 1 (Sept. 8, 1998) (Granting a Cable Television Franchise)(Cable System Upgrade); Village of Waunakee, Wisconsin, § 23 (April 6, 1998) (Cable Television Franchise Agreement Between Village of Waunakee, Wisconsin and Marcus Cable Partners, LP)(System Design); City of Sebastian, Florida, Ordinance No. 0-98-21, Appendix A (Feb. 15, 1999)(Granting to Falcon Cable Media a Cable Television Franchise)(detailing system requirements including the requirement that the system be state-of-the-art).

⁶⁶ Even after the Commission warned local governments in 1997 that “the administration of the public rights-of-way should not be used to undermine the efforts of either cable or telecommunications providers to either upgrade or build new facilities to provide a broad array of new communications services,” the municipalities continued to attempt to apply overreaching local regulation. *See TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶ 78 (1997); *AT&T Communications of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 592-593 (N.D. Tex. 1998), *vacated as moot*, 2001 U.S. App. LEXIS 3890 (5th Cir. Mar. 15, 2001) (“The City’s actions in this instance have overstepped [its] narrow grant of authority in several ways. . . Dallas also does not have the power to require a comprehensive [franchise] application and consider such factors as the company’s technical and organizational qualifications to offer telecommunications services.”); *BellSouth Telecomms., Inc. v. City of Coral Springs*, 42 F. Supp. 2d 1304, 1310 (S.D. Fla. 1999) (striking local statute that required telecommunications

However, such massive resistance to federal policy can and must be better addressed through Commission directives.

B. To Ensure Continued Development Of Broadband Applications Such As Cable Modem Service, The Commission Should Preempt The Cable Modem Service Market Using Its Title I Authority To Create A Regulatory Incubator.

The Commission has ample authority under Title I to put a stop to overreaching by state or local governments that seek to regulate cable modem service. Title I authority can be used by the Commission to effectuate the goals and accompanying provisions of the Communications Act in absence of explicit statutory authority, if Commission directives are reasonably ancillary to existing Commission authority. Using Title I authority, the Commission should affirmatively find that regulation of the provision of cable modem service is unnecessary. Furthermore, as the Commission has done in numerous situations, it should utilize this power to provide a regulatory incubator for cable modem service, for the promotion of this competitive communications service.

The Commission has used its Title I power successfully in the past to cultivate new competitive communications services. In the early years of cable television, the Commission

companies applying for franchise to submit proof of “financial, technical and legal qualifications.”); *TCG New York, Inc. v. City of White Plains*, 125 F. Supp. 2d 81, 91 (S.D. NY 2000) (striking down provisions of a local ordinance that required “a description of the telecommunications services to be provided, . . . the provider’s proposed financing for the operation and construction of the services to be provided, as well as a description of the applicant’s legal financial, technical and other . . . qualifications to hold the franchise.”); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176 (9th Cir. 2001) (in 1998, a group of cities brought suit against Qwest in an attempt to enforce local ordinances that the Ninth Circuit Court of Appeals found “have the effect of prohibiting Qwest and other companies from providing telecommunications services, [. . .] and create a substantial and unlawful barrier to entry into an participation in the Counterclaim Cities’ telecommunications markets”) (quoting *City of Dallas*, 52 F. Supp. 2d at 770).

used its Title I authority to create national cable policy that preempted state and local regulation.⁶⁷ It later fostered competition to cable by using its Title I authority to preempt state and local regulation of SMATV, DBS, and MDS, and allowed the marketplace to regulate these technologies to advance the growth and development of the Multichannel Video Programming Distributors (“MVPD”) industry.⁶⁸

In order to promote competitive information services, the Commission already has used its Title I powers to preempt the information service field to allow market forces to regulate information service provisioning.⁶⁹ The Commission employed this power to develop the CPE and enhanced telecommunications markets. These markets have been very competitive ever since under this deregulatory regime.⁷⁰

⁶⁷ See *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968); *Cable Modem NPRM* at 75 n.289; *U.S. v. Crisp*, 467 U.S. 601, 704-05 (1984)(finding that the Commission may exert jurisdiction over cable television signal carriage to develop a range of programming to potential cable customers and the Commission may allow the marketplace to regulate programming carriage issues). [This case occurred before the passage of the Cable Act which gave the Commission explicit jurisdiction over cable systems.]

⁶⁸ *Town of Deerfield v. FCC*, 992 F.2d 420, 423 (2d Cir. 1993)(analyzing the Commission’s 1986 ruling to preempt local zoning provisions that frustrated the federal goal of expanding satellite-delivered services where the ruling relied in part on Title I authority); *New York State Commission on Cable Television v. FCC*, 749 F.2d 804, 807-08, 811 (D.C. Cir. 1984)(upholding the Commission’s preemption of state and local regulation of SMATV under Title I for the promotion of this service and allowing the marketplace to regulate the industry); *New York State Commission on Cable Television v. FCC*, 669 F.2d 58 (2d Cir. 1982)(concerning preemption of local regulations that have the affect of regulating MDS and holding that a preemption order by the Commission is not invalid because it fails to impose regulations on the particular service).

⁶⁹ In finding that CPE and enhanced data services are not common carrier services but information services, the Commission asserted its Title I power to advance this communications market. See *Computer and Communications Industry Ass’n v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983)(holding that the Commission may use its ancillary powers to regulate enhanced and CPE services, that its preemptive regulations need not be heavy handed, and that the Commission may permit mere marketplace regulation).

⁷⁰ See *California v. FCC*, 905 F.2d 1217, 1234 (9th Cir. 1990)(stating that the Commission found in Computer III that the enhanced services market was “extremely competitive”).

In the broadband arena, the preemption and imposition of a regulatory incubator is appropriate to promote the development of cable modem service, another competitive information service and possible platform for competitive telecommunications. Under Sections 706 and 230 of the Act, Congress required the Commission to promote broadband service on a deregulatory basis.⁷¹ Under statutory provisions specifically applicable to cable operators, Congress stated that cable communications⁷² should be *encouraged* to provide the widest possible diversity of *information sources and service* to the public, that *competition* in cable communications should be *promoted*, and that, in the franchise process, a state or local *franchising authority may not establish requirements for video programming or other information service*.⁷³ To effectuate these provisions, the Commission should preempt the cable modem information service field, impose a market based regulatory scheme, and ensure that state and local regulations do not impede the advancement of this competitive telecommunications platform.

The Commission also should hold explicitly that the stratagems being used by LFAs to impose discriminatory regulation (and taxation) on cable modem service are impermissible.

⁷¹ See *supra* Section III (discussing the national policy objectives regarding development of broadband services).

⁷² The statute uses the words cable communications and not cable services. Therefore, cable modem services, as information services provided over cable systems, would be included in the cable communications goal provisions of this Title.

⁷³ See 47 U.S.C. §§ 521(4), (6), 544(b)(1)(emphasis added).

1. The Commission Should Clarify That No Additional Authority Or Franchise Is Necessary For Cable Modem Services.

To promote regulatory certainty for cable operators providing broadband Internet access, the Commission should remind LFAs that no additional authority or separate franchise is necessary to provide cable modem information services.

Just as the Supreme Court ruled in *Gulf Power* that a cable system remains a cable system (on the pole) even when it carries information services, under the Cable Act, a cable system remains a cable system (in the rights-of-way) even when it carries information services.⁷⁴ Title VI of the Cable Act expressly permits information services to ride on cable systems.⁷⁵ Moreover, LFAs are expressly forbidden under the Cable Act from regulating information services on cable systems. Section 624 provides that franchising authorities “may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with [Title VI],” and prohibits LFAs from establishing requirements for information services.⁷⁶

Cable-delivered Internet access is an information service that is typically part of the complement of services offered on cable systems (similar to interactive program guides). This

⁷⁴ *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 786-787 (2002).

⁷⁵ H. REP. NO. 98-934, 98th Cong., 2d Sess., at 44 (1984) (“[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose. . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.”). See also *Heritage Cablevision Assocs. of Dallas, L.P. v. Texas Utils. Elec. Co.*, 6 F.C.C.R. 7099 (1991), *recon dismissed*, 7 F.C.C.R. 4192 (1992), *aff'd*, *Texas Utils Elec. Co. v. FCC*, 997 F.2d 925, 930-931 (D.C. Cir. 1993)(quoting the House Report to the 1984 Cable Act to explain that Congress intended to define “cable system” broadly to include services other than cable services, such as information services).

⁷⁶ 47 U.S.C. §§ 544(a)-(b). In addition, no franchise may overrule existing federal law. See 47 U.S.C. § 541(a)(2) (“Any franchise shall be construed to authorize the construction of a cable system over public rights-of-way,” *without limitation on the services to be provided*).

information service cannot be regulated by LFAs. *LFAs may franchise systems but not services.* Whatever may be said for the proper scope of state or local regulation of telephony, it is clear that “information services” are a normal part of the services offered over a cable system, without the need for an additional franchise. Any local regulation requiring otherwise is contrary to the national policy of promoting a deregulatory broadband environment. If there is any confusion, the Commission could expressly hold that cable operators have the authority to provide information services (as it did in granting blanket domestic Section 214 authority for competitive access providers),⁷⁷ and that cable operators have authority to use the local rights-of-way pursuant to their cable franchises. Indeed, under their franchises, cable operators have installed their facilities subject to municipal rights-of-way management regulations (*e.g.*, construction, excavation, safety, and other legitimate regulations). Thus, there can be no claim that cable modem service needs separate franchising in order to permit municipal “management” of the public rights-of-way. A Commission finding to these effects would affirmatively clarify that no further local authorization is necessary.

Such a ruling would be consistent with a long pattern of decisions. Before there was a federal Cable Act, the courts held that telephone companies did not need new franchises to

⁷⁷ 47 C.F.R. § 63.01 (providing that “[a]ny party that would be a domestic interstate communications common carrier is authorized to provide domestic, interstate services to any domestic point and to construct or operate any domestic transmission line as long as it obtains all necessary authorizations from the Commission for use of radio frequencies”). Regardless of state franchises, any carrier wishing to provide domestic interstate competitive access was granted a blanket federal construction and operation permit under Section 214. Beginning in the late 1970s, the Commission sought to promote competition between new entrants and dominant common carriers. This policy resulted in the adoption of the blanket Section 214 authority to competitive access providers. *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 98 F.C.C.2d 1191, 1203 (1984) (revising rule 63.07, which was later redesignated as rule 63.01).

provide “lease-back” cable service.⁷⁸ They concluded that the passage of electronic signals over previously-authorized wires does not constitute an “occupation” of the public rights-of-way giving rise to the power of local authorities to “franchise” these new services as though the service required the installation of new pipes. Rather the “power to franchise is directed not to the use of the streets for the transmission of electricity but to the use of the streets for pipes through which electricity is transmitted.”⁷⁹ The Commission reached the same conclusion for Video Dial Tone and for video delivered over pre-existing LEC facilities.⁸⁰ Considered in conjunction with the clear trend in the courts and legislatures to scale back LFA jurisdiction over the deployment of broadband and advanced services,⁸¹ it is clear that the provision of cable

⁷⁸ See, e.g., *NY v. Comtel*, 57 Misc. 2d 585 (NY Sup. Ct. 1968), *aff'd*, 30 A.D.2d 1049 (N.Y. App. Div. 1st Dept 1968), *appeal granted by*, 1969 N.Y. LEXIS 2144 (1969), *motion granted by*, 1969 N.Y. LEXIS 2417 (1969), *aff'd*, 1969 N.Y. LEXIS 1060 (1969) (holding that the transport of video signals by a telephone company in a lease-back arrangement did not require a municipal franchise from the telephone company). The Comtel court relied on earlier case law holding that a company providing security alarm services was not required to obtain a local franchise in order to lease lines from a telephone company. *Id.* at 601 (discussing *Owl Protective Co.*, 3 A.D. 2d 340 (1957)).

⁷⁹ *Id.* at 591-92.

⁸⁰ *NCTA v. FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994) (finding that “[r]egulation [of the local telephone carrier offering video dialtone services] as a cable system would be duplicative because common carrier regulation incorporates the same concerns about public safety and convenience and use of public rights-of-way which provide a key justification for the cable franchise requirement”); *City of Austin v. Southwestern Bell Video Services, Inc.*, 193 F.3d 309 (5th Cir. 1999) (holding that no Title VI franchise was necessary for the provision of video services analogous to video dialtone for the company that had equipment located on private property, or for the second company whose lines provided transport and who had a telecommunications franchise from the city); see also *City of Chicago v. FCC*, 199 F.3d 424, 430 (7th Cir. 1999), *cert. denied*, 531 U.S. 825 (2000).

⁸¹ See e.g., *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (9th Cir. 2001); *TCG Detroit v. City of Dearborn*, 977 F. Supp. 836 (ED Mich. 1997), *aff'd*, 206 F.3d 618 (6th Cir. 2000); *Bell Atlantic Maryland, Inc. v. Prince George’s County*, 49 F. Supp. 2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F. 3d 863 (4th Cir. 2000), *on remand*, 155 F. Supp. 2d 465 (D. Md. 2001) (striking down county ordinance on Maryland state law); *AT&T Communications of Southwest, Inc. v. City of Dallas*, 8 F. Supp. 2d 582 (N.D. Tex. 1998), *vacated as moot*, 2001 U.S. App. LEXIS

modem service creates no basis for LFAs to impose additional franchise obligations on cable operators.

2. The Commission Should Clarify That LFAs Are Prohibited From Taxing Cable Modem Service Revenues.

The Commission should affirm that local authorities are prohibited from including cable modem revenues in cable franchise fee determinations or otherwise. There should be no question that the Commission has jurisdiction over the assessment of cable franchise fees on cable modem services. Historically, the Commission exercised jurisdiction over franchise fee

3890 (5th Cir. 2001). The trend to scale back local government authority was supported by the Commission in *TCI Cablevision of Oakland County, Inc.*, 12 F.C.C.R. 21396, ¶ 102 (1997) (“While Congress mandated a role for the Commission and the states in the regulation of telecommunications carriers, we are concerned that Troy and other local governments may be creating an unnecessary ‘third tier’ of regulation that extends far beyond the statutorily protected interests in managing the public rights-of-way.”). *See also* Michigan Metropolitan Extension Telecommunications Rights-Of-Way Oversight Act, 2002 Mich. Pub. Acts 48 (Senate Bill 880) (eliminating local taxes and fees on telecommunications providers, and creating a state-administered fee structure that explicitly excludes cable modem service revenues); TEX. LOC. GOV'T CODE ANN. §§ 283.052; 283.053; 283.055; 283.056 (2000) (limiting municipal rights-of-way fees assessed on telecommunications providers to a per-access line charge calculated in the statute, and requiring municipalities to “promptly” process requests to construct facilities in municipal rights-of-way); Mo. Rev. Stat. §§ 67.1830(5), (6); 67.1832(2); 67.1836(3); 67.1840; 67.1842 (2001) (limiting fees municipalities may impose on telecommunications providers, prohibiting in-kind obligations, restricting municipal oversight of telecommunications providers to rights-of-way management, and requiring municipalities to process rights-of-way permits “promptly, but not longer than thirty-one days.”).

Congress has clearly indicated a desire to scale back on state and local authority over cable operators. 47 U.S.C. § 521(1) (“The purposes of this title are to...establish a national policy concerning cable communications.”); H.R. REP. NO. 98-934, at 19 (1984) (“H.R. 4103 establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television.”); S. REP. NO. 98-67 at 7 (1983) (“It is not in the public interest for the States to replace the regulation that has been consciously abandoned at the Federal level with their own regulatory scheme. Federal deregulation is not intended to allow assertion of regulation by another branch of Government, it is intended to allow cable to compete in the marketplace with other providers of comparable services.”).

matters prior to the 1984 Cable Act.⁸² After the 1984 Act, the Commission continued to resolve franchise fee issues to the extent that they involved matters of national policy.⁸³ The Commission's March 15, 2002 ruling had the effect of prohibiting local governments from including revenues from cable modem services in franchise fee calculations, because the Cable Act caps franchise fees at 5% of "cable services."⁸⁴

It also would be most helpful in resolving the hundreds of new demands advanced by LFAs for the Commission to remind LFAs that various "end runs" around the Cable Act are similarly impermissible.

First, no "franchise agreement" may supercede the Commission's ruling in the *Cable Modem Order and NPRM*. Both the Commission and the courts have held that neither a cable operator nor a franchising authority may waive the mandatory sections of the Cable Act, and that the franchise fee provisions specifically cannot be waived.⁸⁵ Therefore, LFA claims that an

⁸² See, e.g., *City of Miami*, 56 Rad. Reg. 2d (P&F) 458 (1984); *Warner Cable Corp. of Pittsburgh*, 53 Rad. Reg. 2d (P&F) 991 (1983); *General Electric Cablevision Corp.*, 51 Rad. Reg. 2d (P&F) 603 (1982); *Teleprompter Cable Communications Corp.*, 39 Rad. Reg. 2d (P&F) 1206 (1977); *Sammons Communications, Inc.*, 61 F.C.C.2d 452 (1976); *University City Television Cable Co.*, 60 F.C.C.2d 1344 (1976), modified, 62 F.C.C.2d 975 (1977); *Arlington Telecommunications Corp.*, 53 F.C.C.2d 757 (1975); *Coastal Cable TV Co.*, 47 F.C.C. 2d 877 (1974).

⁸³ See *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum and Order, 104 F.C.C.2d 386, at ¶ 3 (June 5, 1986). See also *The City of Pasadena, California, The City of Nashville, Tennessee, and The City of Virginia Beach, Virginia Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 F.C.C.R. 18192 (2001)(recognizing that franchise fee pass-through and itemization are matters of national policy).

⁸⁴ See *Cable Modem Order and NPRM* at ¶¶ 7, 105 (finding that cable modem services are information services and that the revenues from this service would not be contained in the cable franchise fee cap determination).

⁸⁵ See, e.g., *Report and Order in MM Dkt No. 84-1296*, 58 Rad. Reg. 2d 1, 35 n. 91 (1985) ("Neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act"); *Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96-C-5962, 1997 U.S. Dist.

operator has contractually agreed to pay cable franchise fees on cable modem service revenues would be void as a matter of federal public policy.

Second, there is no independent basis in Title VI for an assessment of franchise fees on interstate information services. The Communications Act was amended in 1996 in an effort to limit fees to Title VI cable services. The Act sweeps “discriminatory” taxes—such as those assessed on cable modem but not on other information service providers—into the definition of franchise fees and therefore into the federal ceiling on such fees.⁸⁶

Third, efforts to assess new taxes on cable modem service would frustrate federal and state policies of advancing broadband services in a deregulatory environment.⁸⁷ Like the federal policy embodied in the ITFA, some states have imposed limits on the ability of local governments to tax Internet services.⁸⁸ Federal constitutional concerns also support a ban on taxes that discriminate against cable operators among all information service providers.⁸⁹ In a

LEXIS 11511 (N.D. Ill. 1997) (the franchise fee cap may not be waived or released because waiver would contravene the statutory policy Congress sought to effectuate through the enactment of the statute).

⁸⁶ See 47 U.S.C. § 542(g)(2) (stating that a fee that is discriminatorily imposed on a cable operator will be included in the cable franchise fee definition).

⁸⁷ The Commission’s action is crucial, as some states and municipalities have already imposed ordinances that tax, regulate or otherwise constrain cable modem service deployment. See, e.g., R.S. Mo. § 67.1840 (2001); City of Overland, Mo., Communications and Cable Services Right-of-Way Management Code (2001); City of Decatur, Ala., Multichannel Service Provider Regulatory Ordinance (1998).

⁸⁸ For example, California has enacted legislation that is “intended to impose a moratorium on new taxes imposed on Internet access and Online Computer Services.” Cal. Rev. & Tax Code § 65002(f). The California legislation expressly does not preclude the “imposition or collection of new or existing taxes of general application that are imposed or assessed in a uniform and nondiscriminatory manner without regard to whether the activities or transactions taxes are conducted through the use of the Internet, Internet access, or Online Computer Services.” *Id.*

⁸⁹ Traditionally, the regulation of cable operators implicates the First Amendment. See, e.g., *Turner Broadcasting Sys. v. FCC*, 512 US 622, 636 (1994); *Leathers v. Medlock*, 499 US 439, 444 (1991); *Los Angeles v. Preferred Comm.*, 476 US 488, 494 (1986); *Comcast Cablevision of*

single stroke, the Commission could advance these policies, and avoid the need for litigating every fee in every market, every time. The Commission need only exercise its Title I preemptive authority to preclude all taxes, fees, and assessments on cable modem services.

Broward County v. Broward County, 124 F. Supp. 2d 685, 690-691 (S.D. Fla. 2000). In addition, as ISPs, cable operators engage in First Amendment speech and are entitled to First Amendment protection. *See Reno v. ACLU*, 521 U.S. 844, 863 (1997) (“The Internet is ‘the most participatory form of mass speech yet developed . . . [and] is entitled to the highest protection from governmental intrusion.’”)(quoting *ACLU v. Reno*, 929 F. Supp. 824 (E.D. Pa. 1996)); *see also PSINET, Inc. v. Chapman*, 167 F. Supp. 2d 878, 881 (W.D. Va. 2001)(stating that “plaintiffs . . . including Internet service providers . . . use the Internet to communicate, disseminate, display, and seek access to a broad range of speech.”); *Comcast*, 124 F. Supp. 2d at 690-691 (recognizing that in the context of cable modem open access, it is “well established that regulation of cable operators implicates both the Free Speech and Free Press clauses of the First Amendment,” that cable operators circulate speech as Internet access providers, and the “liberty of circulating is as essential to [freedom of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value”).

Discriminatorily taxing cable modem providers negatively impacts such providers’ ability to speak, singles out a portion of the press and accordingly, would be prohibited under strict scrutiny. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936) (holding that when a tax applies to a single constituency, the regulation could inappropriately censor speech); *Leathers*, 499 U.S. at 446 (stating that “a tax limited to the press raises concerns about censorship of critical information and opinion.”); *Comcast*, 124 F. Supp. 2d at 692 (stating, in the context of an open access ordinance, that the ordinance “operates to impose a significant constraint and economic burden directly on a cable operator’s means and methodology of expression. The ordinance singles out cable operators from all other speakers and discriminates further against those cable operators who choose to provide Internet content.”). As the court in *Leathers* confirmed, the strict scrutiny requirement articulated in its previous decisions states “[a]bsent a compelling justification, the government may not exercise its taxing power to single out the press.” 499 U.S. at 446 (citing *Minneapolis Star & Tribune Co.*, 460 U.S. 575, 585 (1983)); *see also Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 231 (1987). A tax imposed specifically on information services provided over cable would require only cable operators to bear the burden of this tax. In most municipalities, only one cable operator exists. Thus, the tax would be imposed on a single entity. *Id.* (stating that a tax “is also suspect if it targets a small group of speakers.”). Furthermore, raising additional revenue is not a sufficient government purpose to withstand strict scrutiny. “The raising of revenue . . . is critical to any government. Standing alone, however, it cannot justify the special treatment of the press” *Minneapolis Star*, 460 U.S. at 586.

3. Title VI Customer Service Rules Do Not Apply To Cable Modem Service.

The Commission should clarify that its classification of cable modem service as an “interstate information service” in the *Cable Modem Order and NPRM*⁹⁰ means that Title VI customer service requirements do not apply to cable modem service.⁹¹ Section 632, enacted in the 1984 Cable Act and revised in 1992, governs customer service and consumer protection matters related to the provision of *cable services*. In Section 632, Congress required the Commission to establish certain standards for customer service,⁹² which are now found in Part 76 of the Commission’s rules.⁹³ Section 632 also provides that LFAs “may establish and enforce” customer service requirements,⁹⁴ while preserving consumer protection laws of states and LFAs to the extent consistent with Title VI.⁹⁵ The inapplicability of the Title VI customer

⁹⁰ *Cable Modem Order and NPRM* at ¶ 33 (“We conclude that cable modem service as currently provided is an interstate information service, and that there is no separate telecommunications service offering to subscribers or ISPs.”).

⁹¹ See *Cable Modem Order and NPRM* at ¶ 108 (wherein the Commission requested comment regarding consumer protection and customer service issues surrounding cable modem service).

⁹² 47 U.S.C. § 632(b) (providing that “[t]he Commission shall, within 180 days of enactment of the Cable Television Consumer Protection and Competition Act of 1992, establish standards by which cable operators may fulfill their customer service requirements”).

⁹³ See 47 C.F.R. § 76.309 (listing the Commission’s cable customer service requirements, including installations, service calls and service interruptions); 47 C.F.R. § 76.1602 (requiring cable operators to provide certain information at the time of installation and annually to subscribers, including prices for programming services and instructions on how to use cable services); 47 C.F.R. §§ 76.1603 (requiring customer notification for, among other things, “changes in rates, programming services or channel positions.”); 47 C.F.R. § 76.1619 (requiring certain information to be included in subscriber bills).

⁹⁴ 47 U.S.C. § 632(a)(1) (providing that “[a] franchising authority may establish and enforce . . . customer service requirements of the cable operator.”).

⁹⁵ 47 U.S.C. § 632(d)(1) (providing that “[n]othing in this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by this title.”)

service requirements to cable modem service is evident from the history of the relevant legislation and the language of the Commission's customer service rules.

State and local authorities recognize that state and local customer service rules do not appropriately apply to information services like cable modem service.⁹⁶ The Commission Guidelines called for by Congress and crafted by the Commission clearly apply to what was regarded as a video programming service that did not face effective competition. In 1992, cable modem service was not yet invented.⁹⁷ The Commission rules are drawn to apply to standard video offerings, with customary telephone response times in this core business. For example, Rule 76.1602 requires cable operators to provide certain information to subscribers upon installation and once annually thereafter, including “prices and options for *programming services*,” and “instructions on how to use the *cable service*.”⁹⁸ Rule 76.1603 requires operators to notify subscribers “of any changes in rates, *programming services* or *channel positions* as soon as possible in writing.”⁹⁹

⁹⁶ For example, the Executive Director of National Association of Telecommunications Officers and Advisors recently stated that the *Cable Modem Order and NPRM* has “‘created uncertainty for everyone,’ . . . ‘What magic wand is the local government supposed to use to enforce customer service on a service [, cable modem service,] the Commission says is no longer within our jurisdiction.’” *Localities Band To Fight FCC’s Cable Modem Classification Order*, COMMUNICATIONS DAILY (May 15, 2002).

⁹⁷ It was not until 1997 that cable operators began investing in the necessary network upgrades to offer cable modem service. *Cable Rushes The Net*, BUSINESSWEEK ONLINE, News: Analysis & Commentary (Apr. 5, 1999) (stating that “With a prod from William H. Gates III—who pumped \$1 billion in Philadelphia-based Comcast Corp. . . . **in 1997—they began to think of their new infrastructure as a route to the Internet**, rather than just a way to jam more TV programming into homes more reliably.”)(emphasis added) *at* http://www.businessweek.com/1999/99_14/b3623077.html.

⁹⁸ 47 C.F.R. § 76.1602(b) (emphasis added).

⁹⁹ 47 C.F.R. § 76.1603(b) (emphasis added).

In contrast, customer support for cable modem service very often involves lengthy assistance with the user's personal computer, and the length of that call may depend upon issues such as the experience level of the customer or the reboot time of his computer, that are not within the cable operator's control. The level of customer support also is shaped by the competitive offerings of DSL, dial-up providers, and the expectations of tech support provided by other application vendors. This tech support tends to be concentrated among specialized staff in centralized locations, rather than handled by typical Customer Service Representatives used in the provision of cable service customer support. Fault isolation in cable modem service also covers the entire national backbone, not just a local headend or neighborhood node. Having this regulated in a balkanized fashion by every LFA would be madness.

The Commission may readily address this concern by ruling that LFAs may not impose customer service ordinances on cable modem service, because such imposition would constitute an impermissible (and unilateral) regulation of an interstate information service which is best regulated outside of the Title VI franchise regime applicable to cable services.¹⁰⁰

4. State And Local Governments May Not Regulate Cable Modem Service Under Laws Disguised As "Consumer Protection" Measures.

In this same vein, states and LFAs may not pass laws or local ordinances that regulate cable modem service and attempt to justify such measures under the consumer protection measures in Section 632. Section 632(d)(1) preserves state and local consumer protection laws

¹⁰⁰ The Commission may reach this result either by reinterpreting Section 632 in accordance with an outstanding petition for reconsideration of the cable customer service rules, or by exercising its Title I preemptive authority.

“to the extent not specifically preempted by [Title VI].”¹⁰¹ The consumer protection laws to which section 632(d)(1) refers are generally applicable laws proscribing such things as fraud, misleading advertising, or other similar types of unfair or deceptive practices.¹⁰²

Congress required that consumer protection rules be consistent with the rest of Title VI. As the Commission correctly noted: “State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services.”¹⁰³ Congress has specifically stated, “[a] state or franchising authority may not, for instance, regulate the rates for cable service in violation of Section 623 of Title VI, and attempt to justify such regulation as a “consumer protection” measure.¹⁰⁴ Section 624 of the Cable Act expressly prohibits LFAs from regulating information services, including cable modem service.¹⁰⁵ Consequently, efforts by LFAs to directly regulate cable-delivered Internet access services through “consumer protection” measures are part of a campaign to circumvent the Commission’s efforts to promote broadband service through market mechanisms. Such state and local rules violate Sections 624 and 632. Accordingly, the Commission should hold that states and LFAs may not attempt to regulate cable modem service through laws cloaked as consumer protection measures.

5. The Commission Should Clarify That Local Ordinances And Regulations Regarding Consumer Privacy Would Disrupt The

¹⁰¹ 47 U.S.C. § 522(d)(1).

¹⁰² *In the Matter of Implementation of Sections of the Cable Television Consumer Protection Act & Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 F.C.C.R. 1226 at ¶ 111 (1994).

¹⁰³ *Cable Modem Order and NPRM* at ¶ 104.

¹⁰⁴ H. REP. NO. 98-934, 98th Cong., 2d Sess., at 79 (1984).

¹⁰⁵ 47 U.S.C. § 544(b)(1) (providing that LFAs “may not . . . establish requirements for video programming or other information services”).

Delicate Balance Established By The Cable Act, The Electronic Communications Privacy Act, And The Patriot Act.

The Cable Act, the Electronic Communications Privacy Act (“ECPA”)¹⁰⁶ and the Patriot Act¹⁰⁷ have established a delicate regulatory balance to protect subscribers’ privacy, and demonstrate Congress’ concern to provide for substantial privacy protections. Any local ordinance or regulation concerning subscriber privacy, particularly discriminatory ordinances that single out cable operators among all information service providers and all web sites, disrupt this balance and result in both uncertainty and costly litigation, thereby limiting the deployment of broadband services.¹⁰⁸ The Commission should clarify that local “privacy” ordinances and regulations, like those of Seattle, are inconsistent with its and Congress’ regulation of the information service field.¹⁰⁹

The Cable Act, ECPA and the Patriot Act demonstrate Congress’ intent to provide ample privacy protection to consumers, and more importantly, embody a delicate balancing of potentially conflicting obligations. First, the text of the Cable Act and its legislative history make clear that Congress intended (1) to protect cable operators from overreaching and over regulating LFAs; (2) to limit LFAs’ regulation of cable operators to matters of legitimate local interest such as the management of rights-of-way; and (3) to balance the need for responsiveness to community needs and interests against overburdening cable operators and stunting the growth

¹⁰⁶ The Electronic Communications Privacy Act, 18 U.S.C. § 2701 (2002).

¹⁰⁷ H.R. 3162, 107th Cong., 1st Sess. (Oct. 24, 2001).

¹⁰⁸ Some currently enacted and proposed local consumer privacy ordinances and regulations are creating uncertainty. *See, e.g.*, H.F. 3625, 82nd Leg., 1st Engrossment (Minn. 2002); Seattle, Wash., Ordinance 120775 (Apr. 22, 2002), amending SMC 21.60; H.B. No. 5774, 91st Leg., 2001-2002 Sess. (Mich.) (pending).

¹⁰⁹ The Commission requested comment on this issue of how Section 631 of the Cable Act affects providers of cable modem service. *See Cable Modem Order and NPRM* at ¶¶ 111-112.

and development of the cable industry.¹¹⁰ Thus, by preempting discriminatory local privacy regulations, the Commission would be acting consistently with the Cable Act.

Second, by enacting ECPA, Congress has demonstrated its intent to provide extensive privacy protection in electronic wire communications, including cable modem services.¹¹¹ Third, by adopting the 2001 USA Patriot Act,¹¹² which amended the Cable Act and ECPA in order to harmonize their subscriber privacy provisions, Congress made clear its intention to adopt a comprehensive, non-discriminatory set of rules for all ISPs.

Local privacy requirements and procedures currently being proposed and adopted by various city councils disrupt this delicate balance of obligations and procedures that federal law has achieved, and make it nearly impossible for a cable operator to comply with all the obligations it would face. In addition, if local authorities are permitted to establish their own

¹¹⁰ “The purposes of this title are to . . . establish a national policy concerning cable communications.” 47 U.S.C. § 521(1). “It is not in the public interest for the States to replace the regulation that has been consciously abandoned at the Federal level with their own regulatory scheme. Federal deregulation is not intended to allow assertion of regulation by another branch of Government, it is intended to allow cable to compete in the marketplace with other providers of comparable services. For that reason, a definitive jurisdictional framework is essential.” S. REP. NO. 98-67 at 7 (1983). “*Section 631. Protection of subscriber privacy.* Section 631 creates a nationwide standard for the privacy protection of cable subscribers by regulating the collection, use and disclosure by cable operators of personally identifiable information regarding cable subscribers. It creates a system of fair information practices, while at the same time not unduly restricting appropriate use and disclosure by the cable operator. . . .” H. REP. NO. 98-934, at 76, *reprinted in* 1984 U.S.C.C.A.N. 4655, 4713.

¹¹¹ Although the courts are not unanimous, some courts have concluded that ECPA precludes state laws on similar privacy matters. *See Muskovich v. Crowell*, 1995 U.S. Dist. LEXIS 5899 (S.D. Iowa 1995); 18 U.S.C. § 2708 (“The remedies and sanctions described in this chapter are the only judicial remedies and sanctions for nonconstitutional violations of this chapter.”). *But see, People v. Stevens*, 34 Cal. App. 4th 56, 1995 Cal. App. LEXIS 376 (Cal. App. 1995) (holding that the Wiretap Act as amended by ECPA does not preempt a provision of the California penal code that criminalizes interception of cordless telephone communications); Cal. Penal Code § 637.5(c).

¹¹² H.R. 3162, 107th Cong., 1st Sess. (Oct. 24, 2001).

privacy regulations, confusion and costly litigation similar to that experienced prior to the Patriot Act will result.¹¹³ Thus, a Commission declaration preempting local privacy ordinances and regulations pertaining to cable modem service would be consistent with the overall intent of the Cable Act, ECPA, and the Patriot Act.

6. There Is No Countervailing Intrastate Concern That Would Make Federal Preemption Of State And Local Regulation Of Cable Modem Service Unlawful.

Exercising Commission Title I authority in this manner would be fully consistent with federal policy and judicial standards for the exercise of this authority. To implement market-based policies under Title I, the Commission need only reasonably accommodate policies within the Commission's care.¹¹⁴ The preemption of state and local provisions may be judgmental and predictive in nature. The Commission is not required to delay its action "so as to be certain that the anticipated effect of [a] State's policy actually occur."¹¹⁵

Furthermore, cable modem service is an interstate information service. Provision of access to the Internet is unquestionably an interstate service because the Internet is world-wide in nature.¹¹⁶ Therefore, federal regulation and preemption of the field with a regulatory incubator is entirely appropriate.

¹¹³ See, e.g., *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 (D. Mass. 1999); *U.S. v. Kennedy*, 81 F. Supp. 2d 1103 (D. Kan. 2000); *In re United States*, 158 F. Supp. 2d 644 (D. Md. 2001).

¹¹⁴ *Crisp*, 467 U.S. at 708; see also *New York State Comm'n of Cable Television*, 749 F.2d at 811-12 ("Although the Commission does not have unbridled discretion to use the marketplace to regulate an industry beyond its control, the public interest touchstone of the Communications Act, beyond question, permits the Commission to allow the marketplace to substitute for direct Commission regulation in appropriate circumstances").

¹¹⁵ *New York State Comm'n on Cable Television*, 669 F.2d at 66 n.14.

¹¹⁶ See *Cable Modem Order and NPRM* at 1 n.2 (providing the definition of the Internet).

There are no countervailing intrastate policies, such as the need to accommodate franchise renewals or PUC authority over intrastate services, applicable here. Section 621(a)(2) already provides that *any franchise shall be construed to authorize the construction of a cable system over public rights-of-way,*” without limitation on the services to be provided.¹¹⁷ Nor does COMMISSION preemption intrude upon state PUCs’ jurisdiction over services that are provided over and affect the intrastate telephone network.¹¹⁸

V. WITH RESPECT TO OFFERINGS OF TELEPHONY OVER CABLE, THE COMMISSION SHOULD FORBEAR FROM REGULATING THE PROVIDER AND SERVICE.

In the NPRM, the Commission seeks comment on the appropriate treatment of telecommunications services offered over cable systems.¹¹⁹ Thus far, the Commission has refrained from imposing any regulatory requirements on providers of voice over Internet protocol (“VoIP”) platforms, and seems to have concluded that in at least some configurations, VoIP may be an information service.¹²⁰ At this very early stage in the VoIP market, the Commission has decided that it is better to await industry and technological developments to provide a more complete record on the matter prior to regulating VoIP services.¹²¹ Charter

¹¹⁷ See 47 U.S.C. § 521(a)(2); *cf. City of New York v. FCC*, 814 F.2d 720 (D.C. Cir. 1987)(concerning the Commission’s imposition of a federal regulatory vacuum over cable television technical standards which conflicted with the LFA’s statutory obligation to assess the technical ability of the cable operator at the time of franchise grant or renewal).

¹¹⁸ *Cf. Louisiana Public Service Comm’n v. FCC*, 476 U.S. 355 (1986)(finding that the Commission could not preempt state telephone depreciation rules because this preemption impeded upon the states’ Section 152 authority in the Communications Act); *see also NARUC v. FCC*, 880 F.2d 422, (D.C. Cir. 1989)(finding that the states’ power to regulate intrastate services must yield only when state regulation would thwart or impede operation of a free market).

¹¹⁹ See *Cable Modem Order and NPRM* at ¶¶ 93-95.

¹²⁰ *In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11501, ¶¶ 83-93 (1998).

¹²¹ *Id.* at ¶ 83.

encourages the Commission to continue with this flexible policy stance toward cable-delivered telephony, as part of its broader deregulatory and pro-competitive broadband policy.¹²² Given the Commission's desire to minimize regulation, (particularly on new entrants), to the extent the Commission chooses in the future to classify offerings of telephony over cable, such as those based on VoIP technologies,¹²³ it should consider classifying these services as information services.¹²⁴

¹²² If the Commission determines, nevertheless, that by virtue of providing VoIP, a cable operator is a telecommunications carrier or is providing telecommunications service, the Commission should forbear from regulating such operator and the VoIP service under Section 10 of the Act, codified at 47 U.S.C. § 160. In the 1996 Act, Congress expressly gave the Commission the authority to forbear from enforcing any provision of the Communications Act or any related regulations, if the Commission finds that forbearance is "consistent with the public interest" and that enforcement of relevant provisions or regulations is "not necessary to ensure that the charges, practices, classifications or regulations . . . are just and reasonable and are not unjustly or unreasonably discriminatory . . . [or that] enforcement of such regulation or provision is not necessary for the protection of consumers." 47 U.S.C. § 160(a)(1)-(3). As demonstrated in the factual record discussed above, there is no evidence that discriminatory practices exist in the cable broadband services industry. Furthermore, promoting competition among providers of telephony through deregulatory, market-based policies is in the public interest.

¹²³ VoIP is defined as "[t]he technology used to transmit voice conversations over a data network using the Internet Protocol." NEWTON'S TELECOM DICTIONARY 757 (17th ed. 2001).

The cable industry's research consortium, CableLabs, has developed a specification, called "PacketCable," that includes the ability to use Internet protocol-format data transmission over cable systems for voice-grade communications, including voice telephony, as an additional functionality for what is normally called "cable modem" service. Vendors have begun making equipment designed to implement the PacketCable specification available. See Description of PacketCable technology on CableLabs website, at <http://www.packetcable.com> (last visited June 12, 2002).

¹²⁴ See Comments of Charter Communications, Inc. in *Wireline NPRM* at n.23 (submitted May 3, 2002). A possible alternative regulatory framework for VoIP over cable networks might be to treat such services with preemptive streamlined rules, more like competitive facility-based wireless telephony providers than ILECs.

VI. CONCLUSION.

The state of the broadband market today demonstrates that federal regulation of any market participant, particularly cable modem service providers, would be premature. More importantly though, regulation of cable modem providers would be contrary to national law and policies regarding broadband deployment and intermodal competition, because such regulation would impede the development of cable modem services and the cable system platform for other competitive communications services. Furthermore, using its Title I authority to advance emerging competitive technologies, the Commission must preempt state and local regulation of cable-provided information services to incubate and advance this service. Local authorities are acting as discriminatory barriers to the deployment of cable modem services. Accordingly, these authorities must be constrained by federal directives that promote competitive broadband services for all Americans on all technology platforms.

Respectfully Submitted,

CHARTER COMMUNICATIONS, INC.

By: _____
Paul Glist
Laura Schloss Moore
Kristy Hall
Danielle Frappier
Attorneys for Charter Communications, Inc.
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue Suite 200
Washington, DC 20006
Telephone (202) 659-9750

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