

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

**INITIAL COMMENTS OF
THE MT. HOOD CABLE REGULATORY COMMISSION
ON BEHALF OF THE CITY OF PORTLAND; MULTNOMAH COUNTY; AND
THE CITIES OF FAIRVIEW, GRESHAM, TROUTDALE, AND WOOD
VILLAGE, OREGON**

The Mt. Hood Cable Regulatory Commission (“MHCRC”)¹ submits these comments in response to the Commission’s Declaratory Ruling² and Notice of Proposed Rulemaking in the above-captioned proceedings.³

¹ The MHCRC (www.mhcr.org) was formed in 1992 by Intergovernmental Agreement (“IGA” www.mhcr.org/iga.htm) among six Oregon local governments to carry out cable regulation and administration on behalf of Multnomah County and the cities of Gresham, Fairview, Portland, Troutdale, and Wood Village (“the Jurisdictions”). In addition to administering the applicable cable franchise agreements, the MHCRC also, per IGA §1, advises the Jurisdictions on cable-related legal and regulatory issues, and represents the Jurisdictions in regional, state, and national cable communications policy matters.

² *Internet Over Cable Declaratory Ruling (“Declaratory Ruling”)* and *Notice of Proposed Rulemaking In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities* (“NPRM”), GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, released March 15, 2002.

³ The MHCRC has been a party to this matter since inception, having filed both initial and reply comments (December 5, 2000 and January 10, 2001, respectively) jointly with other local franchising authorities (“LFA’s”) and local government organizations. *See* Comments of the National Association of Telecommunications Officers and Advisors et al; *In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, (“Cable Modem NOI”).

I. INTRODUCTION

As a threshold matter, the MHCRC wishes to note its substantial agreement with the Commission's stated overall principles and policy goals in this proceeding to:

- (1) *Encourage the ubiquitous availability of broadband access to the Internet to all Americans;*
- (2) *Ensure that broadband services exist in a minimal regulatory environment that promotes investment and innovation; and*
- (3) *Develop an analytical framework that is consistent, to the extent possible, across multiple platforms.*

As the facts set forth in these comments will show, the MHCRC not only agrees with the general principles expressed, but has taken or recommended numerous steps within our own local franchise areas to translate these broad goals into specific and recognizable actions.

While agreeing with these goals in the abstract, however, the MHCRC must respectfully take exception to the Commission's substantive decision in the *Declaratory Ruling* categorizing cable modem service an information service. We must also respectfully differ with several of the tentative conclusions announced by the Commission in its *Declaratory Ruling*.

Based on our direct experience in cable franchise administration at the local level in connection with the substantial portion of the Portland, Oregon area cable market which is our responsibility, the facts underlying the development of cable modem and broadband services here, and the immediate and continuing impact of the Commission's categorization decision, it is not clear to us that the actions and tentative conclusions the

Commission has set forth in the *Declaratory Ruling* and NPRM clearly and consistently follow from, or support the goals articulated.

Bearing this in mind, we urge the Commission to utilize the information provided in these comments, together with the comments filed by other LFAs, to begin the process of reconsidering its classification decision within the factual context of franchising and cable system oversight at the local level, as carried out by LFA's consistent with our duties and responsibilities under applicable federal and state laws. Such context appears to us to be sorely lacking in the record underlying the Commission's *Declaratory Ruling*.

It is the purpose of this filing to help provide such factual context for the Commission's record of this proceeding, while at the same time providing comments as requested regarding several of the significant questions the Commission has raised, and tentative conclusions reached, in the NPRM.

II. THE ROLE OF LOCAL FRANCHISING AUTHORITIES IN REGULATING CABLE MODEM SERVICES. *NPRM paragraphs 72 and 96.*

The MHCRC with the direct and indirect agreement of its cable franchisees, has handled the development of broadband cable modem access to the Internet as a cable service.⁴ Indeed, until the Commission's *Declaratory Ruling*, the MHCRC as a practical matter handled the local aspects of cable modem service, for all practical purposes, in effect as a cable service subject to local oversight, including inclusion associated revenues in the franchise fee base⁵ and handling complaints⁶. Development and deployment of cable

⁴ This includes the period both before and after the "open access" litigation in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) ("*AT&T v Portland*"), reversing 43 F. Supp. 2d 1146 (D. Ore. 1999).

⁵ See Exhibit A, attached, MHCRC Letter dated January 24, 2001 to Jeanne Benecke, which discusses many of the related definitional issues. Shortly after receiving this letter, AT&T Broadband continued including cable modem revenue in its franchise fee payment computations.

modem service had already been identified as a key component of any ‘state of the art’ cable system, and was specifically included in local franchise requirements in recent instances where franchises have been updated, such as the TCI franchise on Portland’s west side.⁷

In connection with responding to citizen complaints regarding cable modem service, the MHCRC emphasizes the quandary presented by the classification scheme adopted by the Commission in the *Declaratory Ruling*. Due to the Commission’s classification of cable modem services as information services, it appears that no governmental entity (federal, state, or local) has any jurisdiction to respond to cable modem complaints from consumers. Even the Commission itself has recognized this, and continues to refer customer service complaints on cable modem services to local franchising authorities⁸.

The scope of the potential disruption arising from the Commission’s categorization is difficult to overstate. The Jurisdictions have charged the MHCRC with handling significant cable regulatory responsibilities on their behalf, including franchise administration, rate regulation, enforcement of cable customer service standards, receipt and resolution of cable customer complaints, collection and audit of franchise fees for street use, and completion and transmittal of reports and recommendations prior to any

⁶ See Exhibit B hereto, MHCRC cable customer service standards, as adopted in final form by MHCRC Jurisdictions, March 19, 2001.

⁷ See TCI Cablevision of Oregon franchise with City of Portland, Section 11A1(C), which provides: “In accordance with the Upgrade schedule provided for in Section 11A.3, upon completion of the Upgrade, the Cable System shall be fully Activated for Bi-directional operation throughout the Franchise Area. *This requirement obligates Franchisee to activate Bi-directional capability that can support two-way, high-speed Internet access via the Cable System.*” (emphasis supplied), Franchise available on the web at <http://www.mhcr.org/tcifran.htm> (visited 6-17-2002).

⁸ Customer Service for Cable Modem should continue to be handled by local governments according to Dane Snowden, Chief of the Consumer and Governmental Affairs Bureau at the FCC, in May 14, 2002 letter to Ken Fellman, Chair of the FCC’s State and Local Government Advisory Committee (“LSGAC”). Mr. Snowden’s letter is attached hereto as Exhibit C.

Jurisdiction final action on cable franchise issuance, termination, transfer, or renewal.

Many or most of these functions are called into question by the Commission's

Declaratory Ruling.

Most initial cable franchises in this area were awarded by MHCRC Jurisdictions in competitive franchising processes (generally during the period c. 1978-1983). The principal cable franchises now administered by the MHCRC have been renewed only relatively recently. All, however, have been renewed in a manner consistent with the lengthy formal and informal cable franchise renewal procedures established in federal law starting with the Cable Act of 1984.⁹ The franchises renewed by the Jurisdictions on the recommendation of the MHCRC include Portland's eastside cable franchise (1996)¹⁰, the east Multnomah County franchise (renewed by five MHCRC Jurisdictions in 1998)¹¹, and the amendment and extension of the then-older west Portland cable franchise (1998)¹² to incorporate certain provisions (e.g. I-net, upgrade, PEG Access, franchise

⁹ The cable franchise renewal process set forth in federal law, which can be made formally binding on the LFA at the option of the incumbent cable franchise-holder, can take up to three years to complete, requires ascertainment and documentation of cable-related community needs in connection with justifying the need for, e.g. an upgrade of cable system services or equipment, and in the event of a dispute between the LFA and the franchisee provides extensive substantive and due process protections for the incumbent, including a requirement that the LFA complete an extensive, quasi-judicial process prior to making any final decision not to renew an incumbent's cable franchise. The practical effect of the federal process has been to virtually guarantee renewal of the incumbent's cable franchise in most instances, even where considerable doubt may exist about the incumbent's performance during the term of the previous franchise (nationwide, less than a handful of cable franchises have been denied renewal since the federal process was established in Section 626 of the Cable Communications Policy Act of 1984 (47 U.S.C. §546 et seq).

¹⁰ AT&T Broadband East Portland franchise, available on the web at <http://www.mhcr.org/pdpxargn.htm> (visited June 17, 2002).

¹¹ AT&T Broadband East Multnomah franchise, available on the web at <http://www.mhcr.org/multfran.htm> (visited June 17, 2002).

¹² West Portland TCI Cablevision of Oregon franchise, available on the web at <http://www.mhcr.org/tcifran.htm> (visited 6-17-2002).

term) consistent with the eastside franchises in anticipation of all MHCRC cable franchises coming under common ownership (by AT&T Corp.) for the first time¹³.

The MHCRC's community ascertainment and subsequent negotiations which concluded the recent round of MHCRC cable franchise renewals and extensions increasingly began to reflect, particularly after 1996, a growing level of community interest and awareness of the robust potential of the cable platform in providing not only an enhanced menu of traditional analog cable channels, but also broader potential in providing enhanced cable communications services, such as an upgraded Institutional Network, that would enable MHCRC/Portland area schools and public entities to better utilize the potential of the hybrid fiber-coaxial cable design that was being deployed by the cable company as part of the system upgrade had been negotiated with the MHCRC on behalf of the Jurisdictions.

Community interest in cable's potential to provide broadband connections to the Internet, digital television packages, and alternatives to the incumbent telephone operator also began to become more and more evident. AT&T's national announcement (June, 1998) of its purchase of TCI appeared to crystallize what many Portland area citizens and cable subscribers had already surmised: cable was at last going to begin the process of utilizing its robust technology for communications applications above and beyond the one-way analog entertainment services which had been the industry's bread and butter for years.

¹³ AT&T Corp., which had already completed its acquisition of TCI Cablevision of Oregon (the West Portland and West Multnomah cable franchisee) later completed its purchase of the east Portland and east Multnomah cable franchises from Time Warner, and formally assumed ownership and operating control of the eastside franchises beginning June 1, 1999.

The actual and imminent adverse fiscal impacts of the *Declaratory Ruling* on the MHCRC Jurisdictions' are particularly significant, and merit special mention here.

AT&T Broadband, citing the Declaratory Ruling, notified the MHCRC on March 29 that the company would cease paying franchise fees on cable modem service effective as of March 15, 2002 (the date of issuance of the Commission's *Declaratory Ruling* and NPRM). The MHCRC responded to AT&T's unilateral decision in a letter dated May 9, 2002, attached as Exhibit D hereto.¹⁴

Based on relatively conservative cable modem penetration assumptions, the MHCRC has projected a loss of anticipated franchise fees (all MHCRC Jurisdictions combined) which escalates dramatically in FY 02-03¹⁵ to \$825,571, with the annual loss growing to more than \$1 million in FY 03-04, \$1.6 million in FY 04-05, \$1.8 million in FY 05-06, and \$2.1 million in FY 06-07. Based on cautious assumptions, all MHCRC Jurisdictions (combined) will forgo more than \$7.5 million in franchise fee revenue on cable modem services in the next five years.¹⁶ These are critical street use fees relied on by the City of Portland and other MHCRC Jurisdictions to support basic public services, including Police, Fire, and Parks.¹⁷ The revenues at stake are sufficiently substantial in terms of critical fiscal and franchising issues that a distinct possibility exists that these impacts at the local level might well tend to pull all concerned at the local level in

¹⁴ MHCRC Letter to Jeanne Benecke, May 9, 2002, attached hereto as Exhibit D.

¹⁵ The fiscal year ("FY") of the MHCRC and the Jurisdictions for budget and finance purposes begins each year on July 1st and ends June 30th of the subsequent year.

¹⁶ See Exhibit E., dated May 30, 2002, showing the baseline financial projections for the next five fiscal years (by FY) itemized for each MHCRC Jurisdiction, and showing the figures for all Jurisdictions combined. The projections have been prepared by the MHCRC's financial consultant KFA Services (Edmonds, Washington) and its principal Michael Katz mskatz@seanet.org.

¹⁷ As the City's second-largest source of discretionary revenue for basic services, the City of Portland relies on franchise and utility license fees, which reflect the fair market rental value of City ROW. See City of Portland budget for FY 2002-2003, at http://www.ci.portland.or.us/finance/ADOPTED/proposed_02-03.htm (visited June 17, 2002).

directions opposite or inimical to the overall principles and policies articulated by the Commission as guiding the Commission's further decision-making in this proceeding.

III. FCC requests comment on how local regulations may "discourage" investment in advanced facilities. NPRM Paragraph 99.

With respect, the MHCRC views the Commission's request for comment on this subject with a certain sense of resigned irony. One reason for this is that the language chosen by the Commission here and elsewhere assumes that a negative impact is the inevitable result of (seemingly) any level of local government involvement with respect to the national goal of rapid deployment of broadband and other advanced communications technologies and services. The reality, in the case of the MHCRC's regulatory goals and actions over the past decade, as well as separate efforts on the part of individual MHCRC Jurisdictions including the City of Portland, could not be further removed from the Commission's apparent assumptions in this regard.

With respect to the City of Portland, the City has separately and aggressively encouraged and pursued the deployment of advanced technology, including both open platform and facilities-based competition, wherever and whenever possible. The movement promoting 'open access' to the cable modem platform, it should not be forgotten, was launched primarily to promote competition and competitive choice, for the benefit of both businesses and consumers.¹⁸ Although not widely known, the City of Portland itself in 1999 issued a Request for Qualifications (RFQ) for facilities-based, competitive broadband providers willing to 'overbuild' the incumbent cable

¹⁸ See David C. Olson, "Open Access" on Internet High Seas: Where the FCC is Loathe to Sail" [Journal of Municipal Telecommunications](http://munitelcom.org/v1i1/Olson.html), Vol. 1 No. 1, April 1999, <http://munitelcom.org/v1i1/Olson.html> (visited June 17, 2002).

and telephone operators here, and received more than a dozen credible responses.¹⁹

Indeed, the MHCRC has vigorously promoted cable upgrades, state of the art facilities, and aggressive deployment of telecommunications and broadband, in many instances over the recalcitrance and objections of the cable operators themselves²⁰.

The MHCRC itself, to this day, despite the difficult economic times in the technology sector, continues to promote rapid deployment of broadband as a critical local infrastructure issue, going so far as to include language to that effect in its own workplan:

Encourage development and deployment of broadband services using cable system technology, including high speed internet access, on an open, accessible and nondiscriminatory basis throughout the franchise areas.
---MHCRC Adopted Goals and Objectives, FY 2001-2002, Section II ¶9²¹

Ultimately, the MHCRC respectfully submits, and the facts in the MHCRC Portland/Multnomah County cable franchising area support, the proposition that little if any further governmental action is necessary to promote cable modem broadband deployment. According to a May 21, 2002 article in *The Oregonian*:

¹⁹ See Exhibit F, attached: City Of Portland, Oregon - *Request For Qualifications For Facilities-Based Provider Of Residential Open-Platform Broadband Internet Access, And Competitive Voice, Video & Data Services In Portland, Oregon*, issued by Portland City Commissioner Erik Sten, October 4, 1999

²⁰ See, e.g. Cable System Upgrade requirement, Section 11, and provision for Technology Assessment to ensure cable system remains “state of the art”, Section 11.5, East Portland franchise <http://www.mhcr.org/pdxpargn.htm> (visited June 17, 2002). These and similar provisions in the other MHCRC franchises were subject to intense negotiations and tradeoffs in the franchise renewal process, with the MHCRC consistently prodding the operator to encourage advanced communications technology and applications. Ultimately, the costs of the upgrades in the east Portland and east Multnomah systems were accounted for in local cable rates, and paid by the cable subscribers, pursuant to both local as well as federal regulatory requirements. The eastside cable systems in the MHCRC area were formerly held by Time Warner, and remain subject to the upgrade/rate recovery mechanisms of the Time Warner Social Contract, approved by the Commission, which allowed Time Warner to charge cable rates in excess of those otherwise allowed, in order to fund, *inter alia*, an upgrade of the eastside cable system. *In the Matter of Social Contract for Time Warner Cable*, FCC 95-336.

²¹ All adopted MHCRC Goals and Objectives are posted on the MHCRC website at <http://www.mhcr.org/goals.htm> (visited June 17, 2002).

*“Residential high-speed Internet use in the area grew 105 percent from April 2001 to last month, according a study released Monday by Nielsen/NetRatings, an Internet research firm. The Portland area's growth rate was among the highest in the nation and nearly twice the national average of 58 percent.”*²²

In considering this level of growth, among the highest in the country, the MHCRC also would observe that this growth is proceeding despite a lengthy delay in broadband deployment occasioned by the AT&T v. Portland court case, and ensuing appeal, since AT&T Broadband by its own volition had refused to launch high speed modem service in MHCRC areas while the case was proceeding.²³

Indeed, not only is the rate of growth is significant, the MHCRC sees evidence not in the Portland area and nationwide that cable modem buildout is proceeding apace. The cable industry itself acknowledges this, and the cable industry is by every estimate the undisputed dominant player in broadband.²⁴ The cable industry, in a recent report to the National Telecommunications Information Administration (“NTIA”) projected that 90% of cable households will be wired for broadband Internet access by the end of this year. The industry itself, in that filing, made no mention of any existing or perceived need for governmental ‘encouragement’²⁵

²² Jeffrey Kosseff, “Residential broadband use surges in Portland”, The Oregonian, May 21, 2002, URL: http://www.oregonlive.com/business/oregonian/index.ssf?/xml/story.ssf/html_standard.xml?base/business/1021982492141750.xml (visited June 17, 2002).

²³ See footnote 4, *infra*, and case summary at <http://www.techlawjournal.com/courts/portland/Default.htm> (visited June 17, 2002).

²⁴ The NPRM stated that then-current FCC figures indicated that broadband was available to 75-80% of US homes, that cable continued to have a substantial lead in broadband subscribership (68% cable modem, 29% DSL, 3% wireless), and that cable’s lead over DSL had grown in the past year. NPRM ¶9.

²⁵ According to the National Cable & Telecommunications Association: “The availability to residential consumers of cable system-provided broadband Internet access has grown dramatically in recent years. According to a report issued several months ago by Morgan Stanley Dean Witter (“Morgan Stanley”), “Industry Overview: Broadband Cable Second Quarter Review,” by mid-2001 cable companies had made broadband Internet access available to 66,148,000 subscribers, or approximately 64% of homes. . . . More importantly, Morgan Stanley projects that by year-end 2002, cable systems will offer broadband service to 95,184,000 homes, or more than 90% of their potential subscriber base. . . . If these projections remain on track, the completion of the cable industry’s wiring of America for broadband Internet access is within sight. Indeed, according to Morgan Stanley’s estimates, deployment will be substantially completed for seven of the eight largest cable MSOs by the end of 2002.” Comments of the National Cable &

In fact, compared to the relatively anemic growth (1-3%) in basic cable subscribership in Portland/MHCRC areas, the double-digit growth in cable modem subscribership, both locally and nationally, stands out even more starkly.²⁶

IV. SHOULD RE-CLASSIFICATION OF CABLE MODEM SERVICES AS “INFORMATION SERVICES” ALLOW CABLE FRANCHISEES TO CONTINUE TO USE PUBLIC RIGHTS-OF-WAY UNDER THEIR EXISTING GRANTS OF AUTHORITY? NPRM Paragraph 102.

This query, set forth in NPRM ¶102, by its very phrasing and assumptions reflects in a remarkably compact manner two significant potential areas of federal/local conflict and misunderstanding. First, it reflects a substantial misunderstanding of the fundamental, legitimate legal and fiduciary duty of local governments to responsibly manage and hold public property, including ROW, on behalf of the taxpaying public. It reflects as well as a significant, but all too common, lack of understanding of the role of local governments (including LFA's) in managing and coordinating multiple, often conflicting uses of, and demands for, the public rights of way by both public and private entities and individuals.

The MHCRC's basic response to the Commission's query is “No.” Cable operators are issued franchises to provide cable services. To the extent that reclassification creates the possibility or likelihood that a cable franchisee is providing non-cable services, then appropriate authorization must be obtained, and, to the extent

Telecommunications Association, *In the Matter of Deployment of Broadband Networks and Advanced Telecommunications*, National Telecommunications and Information Administration (“NTIA”), Docket No. 011109273-1273-01, December 19, 2001), pp 12-13, available on the Internet at http://www.ncta.com/pdf_files/NTIA011109273.pdf

²⁶ In MHCRC areas, AT&T Broadband's west Portland subscribership increased by only about 3% in 2001, its east Portland subscribership increased by only 1%. This contrasts dramatically with the double digit growth in cable modem subscribership (footnote 20). Year end market penetration (basic subscribers divided by homes passed by the cable system) remained essentially unchanged at 59% (37,039 basic subscribers) on Portland's west side (where topography interferes with broadcast reception) and 49% penetration (125,872 subscribers) for the east side. Both are below overall industry average penetrations.

consistent with applicable state law, local taxpayers should receive some commensurate benefit for the increased value of the resource ((ROW) being provided. This benefit should be derived in a manner and at a level consistent with similarly situated providers utilizing similar public resources.

However, the classification adopted by the Commission March 15th tendentiously defies most of the normative classifications and procedures used by LFA's. By its very nature, the "free pass" extended by the "information services" classification will in our view inevitably begin to 'shift' other previously well-understood 'non-exempt' "cable services" down a slippery slope. Wherever possible, basic business acumen would encourage assertion of an "information services" theory based on its obvious economic return, inasmuch as the category purports to shield the revenue stream from payments otherwise owed for use of public property and ROW. This bears a remarkable similarity to business and corporate behaviors which may otherwise be seemingly illogical but for their positive correlation to certain IRS tax rules. The process seemingly already has begun, and at local level, we are already beginning to read and hear references to certain other future cable services, e.g. Video on Demand ("VOD") as "information services" rather than ancillary or evolving cable services. Thus begins the inexorable process of 'category creep', now made possible, and indeed fiscally desirable (at LFA and taxpayer expense), as a proximate consequence of the Commission's *Declaratory Ruling*. The Commission has itself in the NPRM only begun to recognize the coming storm: insoluble conundrums of categorization await all in connection with the imminent growth of streaming video, IP telephony, and the like.

Summary of financial results for calendar year 2001, Letter to David Olson from KFA Services, May 29, 2002.

At bottom, the *Declaratory Ruling*'s invitation to 'category drift' will further exacerbate (to the level of conflict instead of dialogue) the already-escalating tension between the proper boundaries of legitimate federal oversight pursuant to universally-agreed national policy objectives, versus longstanding, legitimate LFA duties and responsibilities arising under state and local law. These are duties and responsibilities which the parties to the local cable franchise agreement (the LFA and cable operator) might have reasonably assumed were already well understood and properly allocated at the local level where they rightfully belong. Local cable franchise agreements often reflect very well the needs and interests of the parties, and many are finally concluded only after lengthy negotiations and considerable community ascertainment and public input, which in a renewal context can stretch over periods of up to two or three years.

The MHCRC urges the Commission to reconsider the array of conflicts, ambiguities, and uncertainty which the *Declaratory Ruling* has already introduced into the previously much less ambiguous roles and duties of LFA's, such as ascertaining cable-related community needs in connection with franchise renewals, providing for Public, Educational, and Governmental ("PEG") Access channels and services in the local community, and negotiating and enforcing cable Institutional Network commitments, which often catalyze critical connections for public sector users of modest means to cost-effectively connect to local governments, schools, public safety agencies, and other public users.

Indeed, the MHCRC would urge the Commission to consider the difficulties already afoot due to the *Declaratory Ruling* in connection with how LFA's can, under such shifting circumstances, meaningfully ascertain and enforce---going forward---existing or

future requirements in local franchises pertaining to upgraded, or ‘state of the art’ cable system facilities and services.²⁷ This is a particular concern when such facilities or services may necessarily implicate or necessitate utilization of the same high speed data or cable modem capability which the Commission seeks to wall away, despite its inextricable technical and engineering integration with cable system and technology upgrades implemented, planned, and substantially paid for from the rates of cable subscribers²⁸. The issue is similarly presented in connection with technically integrated, but still-evolving services offered on, or by means of, an existing, upgraded “HFC” (or “hybrid fiber-coaxial”) cable system.²⁹

The classification imposed by the Commission is only at the larval stage of its potential impact as a regulatory pathogen. Doubt has now been introduced regarding the proper treatment of evolving services developed for the robust cable technical platform. Such uncertainty will continue to threaten (at least), and may seriously cloud (at worst) the linchpins of Title VI authority---relied upon as the critical foundation of LFA authority to negotiate and enforce upgraded cable system technical capacities, services, and capabilities identified and actively sought by our communities--- including the high speed Internet platform which increasingly dominates residential broadband deployment. Until now, these were capabilities and services which all parties could handle with some predictability under the known mechanisms subsumed within the regulatory regime set

²⁷ See footnote 20.

²⁸ It is worth noting that the cable Institutional Network planned under the east Portland and east Multnomah franchises at various times was planned to rely on cable modem technology to serve low capacity Institutional Network sites. Would that technical configuration, heretofore considered legitimate, and duly negotiated under Title VI, now become suspect or undoable due to the *Declaratory Ruling*?

²⁹ Examples of evolving ‘hybrid’ services which are or may become available on the cable system include digital cable tiers, VOD or “video on demand”, IP telephony (a service application already beginning to gather steam as technical challenges are resolved), high definition television, and other developing services whose regulatory classification is less clear than ever as a result of the Commission’s Declaratory Ruling.

forth in Title VI of the Communications Act, as embodied in the cable franchise agreements overseen by the MHCRC on behalf of its Jurisdictions and the nearly 200,000 subscriber households within the MHCRC-administered cable franchise areas, all of them without any genuine, facilities-based alternative to the marketplace power of the incumbent cable operator. The MHCRC, in the meantime, finds itself with the unenviable task of attempting ‘after the fact’ to place before the Commission a sufficient and accurate recounting of myriad local facts, context, issues, and distinctions implicated by the *Declaratory Ruling*, some of which might have suggested feasible alternative paths if opportunity for dialogue on the classification issue had been afforded before, rather than after the event.³⁰

In any case, we remain hopeful that resolution of these issues will not precipitate a protracted, internecine struggle fought over constitutional takings issues, or the propriety of federal expropriation of local public property for the benefit of favored classes of users. Such a struggle will do nothing whatsoever to promote broadband deployment, and could well have the opposite effect.

IV. CONCLUSION

The MHCRC urges the Commission to reflect and, wherever possible, take action to mitigate the inevitable conflicts, ambiguities, and impediments which the *Declaratory Ruling* has introduced into a previously relatively straightforward regulatory

³⁰ The lack of such analysis, as well as the absence of an adequate record, and of a reasonable opportunity for affected LFA’s to provide orderly comment in advance of the Commission’s classification decision as set forth in the *Declaratory Ruling*, compels us to join with Commissioner Copps in expressing “serious misgivings about not just the propriety, but the wisdom of the Commission proceeding directly from a general Notice of Inquiry to the adoption of such far-reaching conclusions in so important an area of **national policy**.” Dissenting Statement Of Commissioner Michael J. Copps, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Order Proceeding Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities* GN No. 00-185 (emphasis supplied)

classification system of services offered on the cable platform. The MHCRC, like many of our LFA colleagues, is concerned regarding the reverberating complications of the *Declaratory Ruling*, the seeming dearth of a factual nexus, at least in our own local franchise areas, lending any degree of credence to the Commission's assumption that cable modem deployment has either been retarded by local government regulation in the first instance, or else will be demonstrably hastened beyond the current rapid pace of deployment by the information services classification, in the second instance.

In the meantime, the MHCRC will attempt to carry on with ordinary franchising and regulatory tasks, such as, e.g., ascertaining community needs in connection with franchise renewals, continuing to provide for Public, Educational, and Governmental ("PEG") Access channels and services in the local community, overseeing system upgrades and cable Institutional Networks commitments, and handling consumer complaints despite the doubts that have been raised.

However, we remain uncertain regarding the manner in which we can monitor and enforce, going forward, existing or future "upgrade" or "state of the art" requirements in renewed or transferred cable franchises---particularly where such requirements inevitably implicate the integrated broadband technical platform engineered into the system with our strong support and encouragement.³¹

The task, however, has certainly not been made any more transparent by the *Declaratory Ruling*. And we remain very concerned regarding the substantial and unwarranted negative fiscal consequences of the *Ruling*, arriving as it does in our metropolitan area, still deeply mired in recession. Those fiscal consequences will

³¹ See footnote 20..

continue to adversely affect the ability of MHCRC Jurisdictions to sustain critical public services. The impact will only grow more larger with the passage of time.

In conclusion, the MHCRC respectfully urges the Commission, in considering further proceedings on this matter, to remain cognizant of our longstanding federal/local partnership and the substantial degree of commonality that persists in the goals and objectives, if not means, that we continue to share in cable regulatory matters. A good working relationship, and mutual respect, between the Commission and local franchising authorities on cable matters was established decades before the first federal statute on cable was enacted in 1984, and there is no reason to believe that the relationship is any less important today.

We continue to share the Commission's commitment to the deployment of advanced communications networks, and we hope and trust that we can continue to work together, even when we occasionally disagree, in a manner befitting governmental partners with common goals and the public interest uppermost in mind.

DATED June 17, 2002

Respectfully submitted,

MT. HOOD CABLE REGULATORY COMMISSION

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LIST OF EXHIBITS

EXHIBIT A - MHCRC Letter dated January 24, 2001 to Jeanne Benecke

EXHIBIT B - MHCRC cable customer service standards, as adopted in final form by MHCRC Jurisdictions, March 19, 2001

EXHIBIT C - Dane Snowden, Chief of the Consumer and Governmental Affairs Bureau at the FCC, in May 14, 2002 letter to Ken Fellman, Chair of the FCC's State and Local Government Advisory Committee ("LSGAC").

EXHIBIT D - MHCRC Letter to Jeanne Benecke, May 9, 2002, attached hereto as Exhibit D.

EXHIBIT E – Baseline cable modem franchise fee projections for MHCRC, dated May 30, 2002, showing projections of franchise fees which MHCRC Jurisdictions will forgo for the next five fiscal years (by FY) as a result of FCC *Declaratory Ruling* and AT&T Broadband action, itemized for each MHCRC Jurisdiction, and showing the figures for all Jurisdictions combined.

EXHIBIT F - City Of Portland, Oregon - *Request For Qualifications For Facilities-Based Provider Of Residential Open-Platform Broadband Internet Access, And Competitive Voice, Video & Data Services In Portland, Oregon*, issued by Portland City Commissioner Erik Sten, October 4, 1999