

1 power.” (*Sacramento v. Pacific Gas & Electric Co.*, 173 Cal. 787, 789 (1916).) The rule  
2 of strict construction applies equally to statutory and constitutional grants. (*Madera*  
3 *Waterworks v. City of Madera*, 185 F. 281, 287, 289 (1910).)

4 The ability to grant or withhold franchises includes the ability to condition said  
5 grant, absent statutory interference, and to extract fees when appropriate. (*People ex rel.*  
6 *Flournoi v. Yellow Cab Co.*, 31 Cal. App. 3d 41, 46, 106 Cal. Rptr. 874 (1973).) Fees paid  
7 for franchises are not taxes, user fees, or regulatory licenses, but rather compensation for  
8 the special privilege granted thereby. (*Santa Barbara County Taxpayers Association v.*  
9 *Board of Supervisors*, 209 Cal. App. 3d 940, 950, 257 Cal. Rptr. 615 (1989).)

10 The sum of two established doctrines of law that franchises must be strictly  
11 construed and that no authorization exists to utilize PROW for special purposes except that  
12 granted by constitution, statute, or franchise, has consistently produced judicial opinions  
13 limiting the use of PROW to the purposes set forth in the constitution, statute, or franchise.  
14 For example, a statute entitling a long distance telephone company to erect lines over and  
15 across streets and alleys for the purpose of providing long distance service does not  
16 sanction the construction of lines, or the use of said lines, for the provision of local  
17 telephone service. (*Hooks Tel. Co. v. Town of Leary*, 352 S.W. 2d 755 (1961), permanent  
18 injunction affirmed as modified, 370 S.W.2d 749 (Texas Civil Appellate (1961).) A  
19 change in the nature of the service provided from that expressly or implicitly authorized in  
20 the franchise precludes use of the PROW for the expanded purpose. (*Hooks v. Town of*  
21 *Leary, supra*, 352 S.W.2d 755, 756.)

22 A survey of California and out-of-state cases demonstrates that the utilization of  
23 PROW to provide services other than those specified in the franchise is unauthorized even  
24 if the actual occupation of the PROW is properly authorized and the additional use  
25 produces no significant additional burden. For example, in *Consolidated Water Company*  
26 *v. City of Talco*, 116 S.W.2d 411, 1938 Tex. App. Lexis 563 (Court of Civil Appeals of  
27 Texas, 1938), the court held that an ordinance granting permission to lay pipeline for the  
28 purpose of transporting oil or gas from oil wells within the city does not authorize the use

1 of that pipeline to transport water. As the Court stated:

2 “The transporting of water through their pipelines into the City of Talco  
3 under a privilege or franchise permitting them to transport oil and gas  
4 amounted to a wrongful use of said privilege. In Abbott on Municipal  
5 Corporations, Vol. 3, p. 2120, § 907, it is said: ‘the contract between a  
6 public corporation and the one supplying water, light or power, determines  
7 the relative rights of the parties in respect to a change of or an increase in the  
8 number of commodities furnished. The rule of strict construction applies as  
9 stated in a preceding section and where, therefore, a grant of the right to use  
10 the public rights-of-way for the purpose of supplying either water, light, or  
11 power is not general in terms, but describes in specific language the  
12 particular business which can be legally carried on by the grantees of the  
13 right, that grantee cannot lawfully engage in supplying another commodity  
14 resulting in the same benefit or put the articles which it is authorized to  
15 supply for a designated purpose to another purpose; neither can the grantee  
16 of such license or contract increase the number of commodities supplied by  
17 him though in a general way the business of furnishing them is similar in  
18 character. The application of these rules forbids a company authorized to  
19 supply electric light from furnishing an electric current for power though  
20 generated by the same plant and conveyed by the same wires or some of  
21 them. Neither can a company authorized to supply water or light alone  
22 engage in the business of furnishing both water and light. The rule also  
23 prevents a corporation organized for the purpose of manufacturing and  
24 selling artificial gas from using natural gas for the same identical purposes,  
25 and one authorized to furnish gas from supplying electricity.” (*Appeal of  
26 Scranton Electric Light and Heat Co.*, 122 Pa. 154, 15 A. 446, 1 L.R.A. 285,  
27 9 Am. St. Rep. 79 (*Consolidated Water Co. v. City of Talco, supra*, 116  
28 S.W.2d at 413-14.)

16 There are numerous examples of cases where a court has refused to sanction the  
17 unilateral expansion of the franchise grant to provide additional services or commodities.  
18 A franchise to construct and operate an intra-city street railroad cannot be lawfully  
19 expanded, without the consent of the city, to allow the street railroad company to transport  
20 passengers into and out of the city. (*City of Aurora v. The Elgin Aurora and Southern  
21 Traction Co.*, 227 Ill. 485, 81 N.E. 544, 1907 Ill. Lexis 3393 (1907).) A permit from a city  
22 to a street car company to string electric wires along a street for the purpose of providing  
23 power to the rail cars does not authorize the company to utilize such wires to distribute  
24 power to private consumers. (*Chicago General Street Railroad Co. v. Ellicott*, 88 F. 941,  
25 942-43 (1898).) A franchise to construct and operate a gas pipeline to transport gas to a  
26 specific location does not authorize the use of said pipeline, even without an expansion of  
27 the occupation of the rights-of-way, to provide gas to other customers without the further  
28 consent of the City. (*Citizens Pipeline Company v. Twin City Pipeline Company*, 178 Ark.

1 309, 10 S.W.2d 493, 1928 Ark. Lexis 436 (Arkansas Supreme Court 1928.) The grant of  
2 an exclusive franchise for the carriage of manufactured gas does not prohibit the grant of a  
3 franchise for natural gas in that the original exclusive franchise was limited to  
4 manufactured gas and did not entail the provision of natural gas which was deemed to be a  
5 different commodity. (*Cumberland Gaslight Co. v. West Virginia and Gas Co.*, 188 F.  
6 585, 591 (4<sup>th</sup> Cir. 1911).)<sup>13</sup>

7 The occupation and/or utilization of PROW for a purpose other than authorized by  
8 constitution, statute, or franchise constitutes a public nuisance under California law. (“...  
9 if... the defendant’s use of the streets for the purposes and in the manner in question is  
10 unauthorized by law, it sufficiently appears that it amounts to a public nuisance.” (*City of*  
11 *San Diego v. Southern Cal. Tel. Co.*, 92 Cal.App.2d 793, 807, 208 P.2d 27 (1949); *Hill v.*  
12 *City of Oxnard*, 46 Cal.App. 624, 189 P. 825 (1920).) Unauthorized utilization of PROW  
13 sanctions the removal of the encroachments and obstructions which constitutes the essence

14  
15 <sup>13</sup> *McQuillin* cites numerous examples of situations where franchises were strictly  
16 construed to prohibit the use of PROW to provide commodities and services other than  
those specifically mentioned within the scope of franchise:

17 “A miscellany of decisions have held that a gaslight company was not  
18 authorized to lay electric wires; to holder of a franchise for artificial gas  
could supply natural gas; a permit to pipe gas to a named plant could not be  
19 regarded as authority to supply gas to others; the right to lay pipes did not  
include the right to erect poles and stretch wires for the conveyance of  
20 electricity; the right to lay gas pipes did not include the right to erect lamp  
posts at street crossings; the right to lay pipes for transportation of oil and  
21 gas did not authorize its use for the transportation of water; the right to lay  
pipes did not give the right to supply water; an electric light company’s right  
to use streets for conduits gave it the right to lay them under the sidewalks; a  
22 telephone company could place a local exchange in the street; the right to  
erect telephone poles did not justify the erection of broken and unsightly  
23 poles; the right to operate a bus line within the city did not authorize the  
operation of buses beyond the corporate limits; the right to lay tracks  
intended that they shall conform with street grade; a railroad company’s  
24 authority to cross a street with its tracks was subordinate to a street railway’s  
use of the street; a streetcar company’s permit to string electric wires along a  
25 street did not give it the right to distribute power to private customers; a  
street franchise did not authorize the erection of a single tower in the street;  
26 and a street railway system could operate sightseeing buses.

27 “A grant to a telegraph or telephone company of the right to run and  
maintain wires ‘over and through’ the street does not authorize the laying of  
28 wires underground . . .”

(Municipal Corporations, *McQuillin*, § 34.45.10 (footnotes omitted).)

1 of that use. (*Vanderhurst v. Tuholcke*, 113 Cal. 147, 45 P. 266 (1896); *Laura Vincent Co.*  
2 *v. City of Selma*, 43 Cal.App.2d 473, 111 P.2d 17 (1941); *City of San Diego v. Southern*  
3 *Cal. Tel. Co.*, *supra*, at 807.) The public nuisance doctrine has been specifically applied to  
4 a telecommunications carrier's occupation of PROW without sufficient authorization. (See  
5 *City of San Diego v. Southern Cal. Tel. Co.*, *supra*; *Spar v. Pacific Bell*, 235 Cal.App.3d  
6 1480, 1484-85, 1 Cal.Rptr. 2d 480 (1991).) In fact, "the clearest case of a permanent  
7 nuisance or trespass is one where the offending structure or condition is maintained as a  
8 necessary part of the operations of a public utility." (*Spaulding v. Cameron*, 38 Cal.2d  
9 265, 267, 239 P.2d 625 (1952); see also, 3 Witkin, Cal. Procedure (3<sup>rd</sup> ed. 1985) Actions,  
10 §§ 423-424, pp. 456-458.)<sup>14</sup> The fact that the unlawful occupation or utilization of the  
11 PROW is done for a quasi-public character or purpose does not relieve the occupier of its  
12 nuisance. (*Voorheis v. Tidewater Southern Ry. Co.*, 41 Cal.App. 315, 319 (1919).)<sup>15</sup>

13 C. A Cable Operator In California Is Not Authorized By Constitution, Statute,  
14 Or Franchise To Provide Cable Modem Service Within The Jurisdictional  
15 Boundaries Of The California Franchising Authorities Absent A Further  
16 Authorization.

17 As previously indicated, the potential authority of any cable operator to occupy and  
18 utilize public rights-of-way for the provision of cable modem service could potentially be  
19 found in the cable television franchise agreement, Cal. Public Utilities Code Section 7901,

20 \_\_\_\_\_  
21 <sup>14</sup> The unlawful occupation and/or utilization of PROW most likely also constitutes a  
22 trespass. Trespass is an invasion of a party's interest in the exclusive possession of his or  
23 her land while nuisance is an interference with his or her use and enjoyment of it. Liability  
24 for nuisance does not require proof of damage to the plaintiff's property. Proof of  
25 interference with plaintiff's use and enjoyment of the property is sufficient to establish a  
26 valid nuisance claim. Liability for trespass generally requires some proof of damage.  
(California Jurisprudence, 3<sup>rd</sup> ed., Nuisances, § 3 (2001).)

27 <sup>15</sup> Cal. Civil Code § 3482 provides that nothing which is done or maintained under the  
28 express authority of a statute can be deemed a nuisance. However, statutory immunity is  
only available where the acts complained of are authorized by the express terms of the  
statute under which the justification is made, or by necessary implication from the powers  
expressly conferred in that statute so that it can be fairly said that the Legislature  
contemplated the doing of the very act that occasioned the injury. (*Hassell v. City and*  
*County of San Francisco*, 11 Cal.2d 168, 78 P.2d 1021 (1938).) Thus, although an activity  
authorized by statute cannot be a nuisance, the manner in which the activity is performed  
may or may not constitute a nuisance depending upon the facts. (*Bright v. Eastside*  
*Mosquito Abatement Dist.*, 168 Cal.App.2d 7, 335 P.2d 527 (1959).)

1 or Section 253(a) of the TCA.

2 None of these authorizing sources permit the occupation and/or utilization of  
3 PROW to provide cable modem services, assuming it is not a cable service, without the  
4 further authorization of local government. First, it would seem obvious that the cable  
5 operator cannot rely upon its cable franchise as source authority given the Commissioner's  
6 determination cable modem service does not constitute a cable service. Second, Cal. Pub.  
7 Utilities Code § 7901 does not sanction the occupation and/or utilization of PROW for the  
8 provision of cable modem services. Given the Commission's determination that cable  
9 modem service is not a Telecommunications Service, it is not subject to CPUC authority.  
10 Although Cal. Pub. Utilities Code § 7901, originally adopted as Cal. Civil Code Section  
11 536 in 1905, does not draw any distinction between the type of protected activities or  
12 services but rather draws the distinction between telephone lines and non-telephone lines,  
13 the California Telecommunications Infrastructure Development Act (the "California  
14 Infrastructure Act"), adopted by the California Legislature in 1996 subsequent to the  
15 adoption of the TCA, conditions protection upon a determination that the user "has  
16 obtained all required authorizations to provide *Telecommunications Services* from the  
17 Public Utilities Commission and the Federal Communications Commission." (Emphasis  
18 added; Cal. Gov't Code § 50030). A review of the legislative history of the California  
19 Infrastructure Act indicates that the California Legislature was aware of the existence of  
20 the TCA and the need to coordinate the federal and state legislative schemes. In addition,  
21 because the California Infrastructure Act was expressly characterized as a statement of  
22 existing law, it is reasonable to assume that Cal. Pub. Utilities Code § 7901 would draw  
23 the same distinction between a protected and non-protected activity.<sup>16</sup>

24 Like the Commission, the CPUC and the California courts have recognized that the  
25 jurisdiction of the CPUC is limited to "public utility" activities which involve a  
26

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27 <sup>16</sup> Such a distinction is sensible given the nexus between the scope of Cal. Pub. Utilities  
28 Code § 7901 and the jurisdiction of the CPUC. If a particular activity is not subject to the  
jurisdiction of the CPUC based upon its lack of common carrier identity, is not logical to  
infer legislative intent to grant preferred right-of-way status to that activity.

1 commitment to provide a service on a non-discriminatory basis.<sup>17</sup> The CPUC has found  
2 that individualized private negotiations between a provider, whether of telephone services  
3 or other type of traditional public utility service, can preclude a finding of dedication to  
4 public use for the purposes of establishing CPUC jurisdiction. *In the Matter of So Cal.*  
5 *Edison Co., supra*, at 22-23; *People v. Orange County Farmers & Merchants Assoc.*, 56  
6 Cal. App. 205, 210-211 (1922). California's Supreme Court has recognized the essen-  
7 tiality of common carrier regulation as a prerequisite to CPUC jurisdiction. (*Television*  
8 *Transmission, Inc. v. Public Utilities Com.*, 47 Cal.2d 82, 88, 301 P.2d 862 (1956).)<sup>18</sup>

9 Third, Section 253(a) of the TCA does not affirmatively authorize the occupation  
10 and/or utilization of PROW for the provision of cable modem service even if it constitutes  
11 a Telecommunications Service in the Ninth Circuit. First, Section 253(a) does not  
12 constitute a federal affirmative grant for the use of PROW but simply constitutes a  
13 limitation upon the authority of state and local government to prohibit certain types of  
14 protected services. (*City of Abilene v. FCC*, 164 F.3d 49 (D.C. Cir., 1999).) Even in the  
15 case of protected "Telecommunications Services," which may or may now not include  
16 cable modem service, PROW occupation is still subject to franchising and reasonable entry  
17 restrictions. (*TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6<sup>th</sup> Cir., 2000).) Thus a  
18 cable operator cannot look to Section 253(a) for initial access authority to utilize PROW  
19 for the provision of cable modem service.

20 D. Commission Preemption Of Local Franchising Is Unlawful.

21 In *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5<sup>th</sup> Cir. 1999) ("*Dallas*"), the Fifth

22 <sup>17</sup> Whereas Federal law utilizes the "common carrier" vs. "non-common carrier"  
23 nomenclature, California law relies upon the notion of whether the entity has held out its  
24 facilities for "public use". *In the Matter of So. Cal. Edison Co.*, California Public Utilities  
25 Commission, 4 CPUC 2d 195, 1980 Cal. PUC Lexis 1053, Decision No. 92115, Case No.  
26 59268, August 19, 1980, p. 22.

27 <sup>18</sup> The California Attorney General has determined that not all types of wire  
28 communication, even if owned by a statutory telephone corporation, constitute a telephone  
line within the meaning of Cal. Pub. Utility Code Section 7901. Rather, one must look at  
the end use of the facility to determine whether or not it constitutes a "telephone line" and  
the use of that line to provide video services as opposed to telephone services render the  
line not protected pursuant to Cal. Pub. Utility Code Section 7901 notwithstanding its  
ownership by a statutory Telephone Corporation. (46 *Cal. Ops. Atty. Gen.* 22, 23-24  
(1965)).

1 Circuit struck down the Commission's preemption of local franchising of open video  
2 system ("OVS") operators as being in excess of its jurisdiction. In *Dallas*, the  
3 Commission attempted to preempt all local and state franchising of OVS operators pur-  
4 suant to Section 653(c)(1)(C) of the TCA which states that, with a few exceptions, Parts III  
5 and IV of Title VI shall not apply to OVS operators. (See 47 U.S.C. § 573(c)(1)(C).) The  
6 Commission reasoned that included in the Title VI provisions that do not apply to OVS  
7 operators is § 621(b)(1), which provides that, with some minor exceptions, "a cable opera-  
8 tor may not provide cable services without a franchise." (47 U.S.C. § 571(b)(1)). Based  
9 upon the interplay of these statutory provisions, the Commission reasoned that "any state  
10 or local requirements . . . that seek to impose Title VI 'franchise-like' requirements on an  
11 open video system operator would directly conflict with Congress' express direction that  
12 open video system operators need not obtain local franchises as envisioned by Title VI"  
13 and thus preempted state and local franchising. According to the Commission, once an  
14 OVS operator has been certified by the Commission, that entity had an enforceable right to  
15 access the PROW without any further state and local consent. (*See Implementation of*  
16 *§ 302 of the Telecommunications Act of 1996, 2<sup>nd</sup> Report and Order, FCC 96-249*  
17 *(Released June 3, 1996) ("Rule Making Order") p. 211, on Reconsideration, 3<sup>rd</sup> Report and*  
18 *Order, FCC 96-334 (Released August 8, 1996) ("Reconsideration Order") p. 193.)*

19 The *Dallas* court applied *Chevron, U.S.A., Inc. v. Natural Resources Defense*  
20 *Counsel, Inc.*, 476 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) ("*Chevron*") as the  
21 appropriate review standard. (*Id.* at 346.) Notwithstanding the deferential standard of  
22 *Chevron*, the Fifth Circuit held that Section 653(c)(1)(C) simply eliminated the federal  
23 requirement that a local franchise be obtained but did not preempt or extinguish the  
24 inherently local authority of state and local governments to require certain forms of  
25 authorizations for access to PROW. As the Court states:

26 "Section 621 states that a cable operator may not provide cable service  
27 without a franchise. This amounts to a federal requirement that a cable  
28 operator obtain a franchise from a local authority before providing service.  
Eliminating Section 621 results in the deletion of the federal requirement that  
cable operators get a franchise before providing service; it does not  
eviscerate the ability of local authorities to impose franchise requirements,

1 but only their obligation to do so. Consequently, simply stating that Section  
2 621 shall not apply to OVS operators does not expressly preempt local  
franchising authority, as Section 601(c)(1) requires.” (Original emphasis.)

3 (*Id.* at 347.) Once again, the Fifth Circuit relied upon the fact that PROW franchising  
4 constitutes “a power traditionally exercised by a state or local government” in holding that  
5 any preemption authority of the Commission in relation to these types of activities must be  
6 grounded in “. . . unmistakably clear . . . language of the statute.” The actual words of the  
7 court are instructive:

8 “The FCC’s broad reading of preemption authority also conflicts with  
9 Supreme Court precedent. In *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct.  
10 2395, 115 L.Ed.2d 410 (1991), the court held that if Congress intends to  
11 preempt a power traditionally exercised by a state or local government, ‘it  
must make its intention to do so “unmistakably clear in the language of the  
statute.”’”

12 (*Id.* at 460, 111 S.Ct. 2395 (quoting *Will v. Michigan Department of State Police*, 491 U.S.  
13 58, 65, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989)).

14 In *Dallas*, the Court found that Congress did not provide the clear statement that  
15 *Gregory* required. Because Section 601(c)(1) and *Gregory* prohibit implied preemption,  
16 and because Section 653(c)(1)(C) expressly preempts only the federal requirement of a  
17 local franchise, not the locality’s freedom to impose franchise requirements as they see fit,  
18 the Commission erred in ruling that Section 653 prohibited local authorities from requiring  
19 local OVS operators to obtain a franchise to access the locally maintained rights-of-way:

20 “. . . there are persuasive dicta supporting the contrary view that Section 621  
21 merely codified and restricted local governments independently-existing  
22 authority to impose franchise requirements. Moreover, the legislative history  
23 of the 1984 Cable Act contradicts the Commission’s claim that the Act  
contradicts the Commission’s claim that the Act established Section 621 as  
the sole source of franchising authority. According to the House Report on  
H.R. 4103, whose terms were later incorporated into S. 66 to become the  
1984 Cable Act.

24  
25 Primarily, cable television has been regulated at the local government level  
26 through the franchise process . . . . H.R. 4103 establishes a national policy  
27 that clarifies the current system of local, state, and federal regulation of cable  
television. This policy continues the lines on the local franchising process as  
a primary means of cable television regulation, while defining and limiting  
28 the authority of the franchising authority may exercise through the franchise  
process.”

1 (*Id.* at 347-48.)

2 Federal law may not intrude into areas of traditional state and local sovereignty  
3 unless the clear language of the federal law compels the conclusion. (*Gregory v. Ashcroft*,  
4 501 U.S. at 460, 111 S.Ct. 2395; *Commonwealth of Virginia v. EPA*, 105 F.3d 1397, 1410,  
5 (D.C. Cir. 1997), partial rehearing granted, 116 F.3d 499 (D.C. Cir. 1997); *City of Abilene*,  
6 *Texas, v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).) The power to franchise PROW is  
7 traditional and historically local. Said power should include the right to receive reasonable  
8 compensation for the use of the PROW by way of franchise fees or otherwise. (*See City of*  
9 *Dallas, Texas v. FCC*, 118 F.3d 393, 397-98 (5<sup>th</sup> Cir. 1997).)

10 The Commission possesses a far lesser degree of legal justification to preempt local  
11 franchising for the use of PROW for the provision of cable modem service than existed in  
12 *Dallas*. At least in *Dallas*, the Commission possessed colorable authority pursuant to  
13 Section 653(c)(1)(C).<sup>19</sup> In this case, the Commission appears to be relying on nothing  
14 more than its generalized authority to “promulgate regulations to effectuate the goals and  
15 accompanying provisions of the Act in the absence of explicit regulatory authority if the  
16 regulations are reasonably ancillary to existing Commission statutory authority.”  
17 (DR/NPR., ¶ 75.) The Commission identifies Sections 1 and 4(i) of the Communications  
18 Act as the “existing Commission statutory authority” from which expansive ancillary  
19 jurisdiction allegedly flows. However, it is reasonable to conclude that the statutory  
20 authority cited by the Commission in *Dallas* to preempt local franchising of OVS  
21 operators use of PROW was far more compelling than the extremely generalized language  
22 contained in Section 1 and 4(i) of the Communications Act. However, the Fifth Circuit in  
23 *Dallas* did not find even more arguably concrete authority contained within the  
24 Communications Act sufficient to justify the elimination of the historic power of local  
25 government to regulate access to their PROW through their legislative franchising  
26 processes.

27 \_\_\_\_\_  
28 <sup>19</sup> It is interesting to note that the Commission did not attempt to rely upon its general  
“ancillary jurisdiction” pursuant to either Title II or Title VI of the Communications Act to  
justify its wholesale disablement of local franchising of OVS operators.

1 E. Title VI Specifically Contemplates The Collection of Additional Fees  
2 Beyond Cable Franchise Fees From Cable Operators Utilizing PROW To  
3 Provide Services Other than Cable Services.

4 Title VI recognizes that not all fees are cable television franchise fees. A fee is not  
5 a franchise fee unless it is imposed upon the cable operator or cable subscriber “solely  
6 because of their status as such.” (§ 622(g)(1).) Taxes, fees, or assessments of general  
7 applicability (including any such tax, fee, or assessment imposed on both utilities and  
8 cable operators on their services . . . which is not unduly discriminatory against cable  
9 operators or cable subscribers “if specifically excluded” from the definition of “franchise  
10 fee”. (§ 622(g)(2)(A).) Title VI should not be “. . . construed to limit any authority of a  
11 franchising authority to impose a tax, fee, or other assessment of any kind on any person  
12 (other than a cable system for which charges are assessed to subscribers but not received  
13 by the cable operator). (§ 622(h)(1).) The Commission is specifically barred from  
14 regulating “. . . the amount of the franchise fees paid by cable operator, or regulate the use  
15 of funds derived from such fees, except as provided in [§ 622].” (§ 622(h)(1)(i).)

16 It seems obvious that Congress both contemplated and intended the potential  
17 imposition of fees upon cable operators in excess of the cable television franchise fees so  
18 long as said fee is not imposed upon the cable operator or the cable subscriber simply  
19 because of the status as the cable operator or cable subscriber. For example, without  
20 limitation, charges which are imposed upon utilities, such as telecommunications utilities,  
21 can be applied to cable operators providing equivalent services since they would not be  
22 imposed based upon “status”. Not only is federal preemption to be narrowly construed  
23 pursuant to Section 622(h)(1)(i), but the Commission is specifically barred from expanding  
24 its authority beyond those limitations upon local authority specifically set forth in Section  
25 622. (§ 622(h)(1)(i).)

26 F. Commission Preemption Of Local Franchising Is Ill Advised.

27 The construction of cable facilities capable of providing cable modem service  
28 constitute a significant and irreparable impact upon PROW. Local government is in the

1 best position to assess that impact and mitigate it by way of construction requirements,  
2 security requirements, access requirements, and PROW compensation requirements.  
3 Nothing in the DR/NPR demonstrates, or even credibly argues for, a contrary conclusion.

4 Cable television facilities capable of providing cable modem service and other non-  
5 cable services impose a materially greater impact upon PROW than do cable facilities  
6 which are designed simply to deliver video programming to subscribers. The experience  
7 of the California Franchising Authorities which have undergone rebuilds demonstrates this  
8 truism. First, the cable plant which is capable of providing cable modem service and other  
9 non-cable services tends to be different in design and construction than does cable plant  
10 not capable of providing this service. In fact, it is the experience of the California  
11 Franchising Authorities that many of the voluntary rebuilds which have occurred over the  
12 last five years were motivated, at least in part, by the desire to offer Internet and other  
13 "enhanced services". Most of the mandatory rebuilds required HFC architecture. As a  
14 result, PROW was significantly impacted through the replacement and, in some cases,  
15 removal of existing "trunk-branch" cable plant with much more facility intensive HFC  
16 architecture. As a result of its new cable design, not only was significant coaxial plant  
17 replaced with fiber but a significant amount of "street furniture," such as pedestals, nodal  
18 boxes, power supplies, and other facilities essential to the provision of cable modem  
19 service, which would not exist in most cases but for the provision of cable modem service,  
20 appeared in PROW. HFC architecture, with its accompanying fiber robust construction  
21 practices and necessary "street furniture," was clearly motivated by the cable operator's  
22 desire to access the Internet. Although cable subscribers enjoyed the benefits of such  
23 construction by way of the deployment of advanced services, the PROW, which in most  
24 cases is the single most valuable asset held by local government, suffered material and  
25 negative consequences.

26 The rebuild of cable systems to HFC architecture itself constitutes a disruptive  
27 activity to a community. Streets are cut, lanes are blocked, traffic is diverted, quiet is  
28 disturbed, and nerves are often frayed as a result of a community-wide HFC rebuild. In

1 many cases, as has been proven through numerous studies, trenching associated with cable  
2 construction, as well as any other form of underground utility construction, materially  
3 degrades the quality of the PROW resulting in reduced life span and accelerated capital  
4 replacement costs. Residents who had never seen an above-ground equipment installation  
5 are now faced with the sudden gestation of numerous pedestals and boxes housing the  
6 active electronics associated with a HFC rebuild. Because Internet capable cable plant  
7 requires a more robust fiber deployment and higher reliability than good old fashion  
8 analog and even digital video plant, streets are now littered with numerous type pedestals,  
9 boxes, and encasements, ranging from bread-box size pedestals to refrigerator size nodal  
10 boxes and power supply enclosures, based upon the desire of the cable operator to deploy  
11 advance high speed services. To argue that HFC cable plant does not impose a significant  
12 burden upon PROW and other public property is the paramount of naiveté.

13         Local government is in the best position to control this type of disruption and seek a  
14 balance, by way of fair market value rental payments, between the goal of deploying  
15 advanced services and the PROW and public property devoted to this proprietary use. By  
16 way of the franchise fee, local government is allowed to charge reasonable compensation  
17 for the use of PROW for the provision of cable services up to a maximum of 5% of  
18 revenues generated from said cable services essentially as market rent. (*Group W Cable,*  
19 *Inc. v. City of Santa Cruz*, 679 F.Supp. 977 (N.D. Ca., 1988)). Likewise, telecommuni-  
20 cation service providers must provide fair and reasonable compensation to local govern-  
21 ment for the use of its PROW in an amount which approximates fair market value which  
22 amount is not limited to the costs imposed upon the PROW based upon the provision of  
23 said telecommunication services. (*Qwest Corporation v. City of Portland, et al.*, Civil No.  
24 01-1005-JE (DC-Oregon, March 22, 2002); see also *TCG Detroit v. City of Dearborne*,  
25 206 F.3d 618, 624-25; *AT&T Communications of the Pac. Northwest v. City of Eugene*,  
26 177 Or. App. 379, 410, 35 P.3d 1029, 1046 (2001); *Bell South Telecommunications, Inc. v.*  
27 *City of Orangeburg*, 522 S.E.2d 804, 808 (1999).) There is no logical reason to treat cable  
28 modem services differently from cable services and telecommunication services in terms

1 of being required to pay their fair share of compensation for use of the PROW.

2 Preempting local control of cable modem service would also significantly dilute the  
3 rights of local subscribers to the customer service protection which has been afforded to  
4 them by local government pursuant to Title VI. Title VI sustains the consumer protection  
5 authority of local governments. Local government currently assumes responsibility for  
6 addressing or resolving consumer complaints involving both video and non-video services  
7 offered over the same cable platform. Consumers do not stop to question whether cable  
8 modem service might be an interstate information service, telecommunications, a common  
9 carrier telecommunication service, or a cable service before calling its municipality to  
10 complain about poor service being provided by the same cable operator that provides and  
11 bills, often in a single billing format, for analog video service, digital video services, and  
12 internet services. Local government retains significant legal authority to impose appro-  
13 priate customer service requirements on cable operators. (47 U.S.C. § 552). Statutory  
14 authority allows local government to establish and contour appropriate customer complaint  
15 resolution mechanisms appropriate to the size and other unique characteristics and  
16 problems of each community.

17 The experience of the California Franchising Authorities in relation to the  
18 deployment and provision of cable modem service is inconsistent but becoming more  
19 problematic. Many of its members are receiving an increasing number of customer  
20 complaints relating to the provision of cable modem service in such areas as  
21 interruptability, speed, billing, telephone response, and other areas which are consistent  
22 with the type of customer service problems plaguing cable operators in relation to the  
23 provision of video services.<sup>20</sup>

24  
25 <sup>20</sup> It is not surprising that the incidents of consumer complaints skyrocketed during the  
26 transition from Excite@Home to proprietary ISP services provided by many of the affec-  
27 ted cable operators. Although one can ascribe these problems to a unique circumstance  
28 (i.e., the bankruptcy of Excite@Home), the need for customer protection from such an  
event is not offset by the supposed nonfrequency of ISP bankruptcies. These consumers  
would have had no remedy whatsoever had they not been able to petition local government  
pursuant to the consumer protection provisions of Title VI. Deregulation by way of fed-  
eral preemption would have left disenfranchised consumers without any expedient remedy.

1 From a practical viewpoint, the provision of customer service protection by local  
2 government constitutes the most efficient and cost effective means of providing any form  
3 of customer protection. Based upon the Excite @Home bankruptcy, many cable operators  
4 have established their own proprietary networks. These networks are operated in  
5 conjunction with the rest of the cable system and are often staffed, from a customer service  
6 viewpoint, with CSRs and other professionals who likewise provide traditional video  
7 services. It seems nonsensical to impose customer service standards upon these entities  
8 and individuals when they provide some form of video service but allow them to take as  
9 long as they want to answer their phones or fix service disruptions if the service is cable  
10 modem as opposed to video even though we are often dealing with the same people and  
11 the same physical plant.<sup>21</sup>

12 The availability of competitive delivered advance services, primarily through DSL  
13 technology, is not sufficiently robust to assure high quality services at competitive prices  
14 without some form of governmental regulation. In several of the California Franchising  
15 Authorities, no DSL service is available. In other communities, DSL availability is spotty  
16 and inconsistent with wait-times, even when otherwise available, running from weeks to  
17 months. It is premature to conclude, based upon the evidence made available by the  
18 Commission in its *Third Report*, that competitive services are sufficiently available to  
19 eliminate, at this point in time, the need for some form of consumer protection regulation  
20 at the local level.<sup>22</sup>

21 \_\_\_\_\_  
22 <sup>21</sup> "Bundling," which constitutes the sale of cable services with other services including  
23 Internet services, makes the arguments for local compensation and customer service  
24 requirements even more compelling. By combining traditional video services with Internet  
25 services through bundled discounts, cable operators possess the flexibility to minimize  
26 even the Title VI franchise fees available to local government through disproportion  
27 allocations of discounts to the video as opposed to Internet side of the ledger. In addition,  
28 to the extent that cable modem subscribers possess no customer service remedy at the state  
or local level, such a subscriber is forced to choose between paying more for potentially  
regulated DSL services, assuming they are likewise not deregulated by this Commission,  
or accepting the bundled discount in exchange for a product which has no warranty of  
fitness enforceable at any level. Such a "Hobson's" choice seems inconsistent with  
subscriber protection.

<sup>22</sup> Competition for competition sake is not sufficient to justify public policy unless said  
competition is shown to have a benefit to the public. "Merely to assume the competition is  
bound to be of advantage, in an industry so regulated and so largely closed as this one, is

1 VII. THE COMMISSION SHOULD NOT AND CANNOT FOREBEAR  
2 ENFORCEMENT OF TELECOMMUNICATIONS SERVICE REGULATIONS  
3 AGAINST CABLE MODEM SERVICE AND CABLE SERVICE MODEM  
4 FACILITIES IN THE NINTH CIRCUIT.

5 The Commission acknowledges that the Ninth Circuit has held, perhaps in dicta and  
6 perhaps not, that cable modem service, at least in part, constituted a telecommunications  
7 service within the meaning of the TCA. The court in *AT&T v. City of Portland* concluded:

8 “@Home consists of two elements: . . . to the extent @Home is a  
9 conventional ISP, its activities are that of an information service. However  
10 to the extent that @Home provides a subscriber internet transmission over its  
cable broadband facility, it is providing a Telecommunications Service as  
defined in the Communications Act.”

11 (*AT&T v. City of Portland*, 216 F.3d 871, 878 (9<sup>th</sup> Cir. 2000) reversing 43 F.Supp.2d 1146  
12 (D. Ore. 1999).)

13 The Commission appears to chide the Ninth Circuit for adopting a regulatory  
14 classification based upon a record that that was “less than comprehensive.” (DR/NPR,  
15 ¶ 57.) The Commission further notes that it has developed a far more comprehensive  
16 record relating to the appropriate regulatory classification than had the Ninth Circuit  
17 (DR/NPR, ¶ 57) and that the Ninth Circuit did not have the benefit of the briefings by the  
18 party or the Commission on this issue. (DR/NPR, ¶ 58.) While such may or may not be  
19 the case, these facts in no way obliterate or even mitigate the legal effect of the Ninth  
20 Circuit’s ruling as to the appropriate classification of cable modem service in this circuit.

21 Recognizing its potential legal infirmity in overruling a decision of the Ninth

22 \_\_\_\_\_  
23 not enough.” (*Hawaiian Telephone Company v. FCC*, 498 F.2d 771, 775-76 (1974)  
24 quoting *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 96-97, 73 F.Ct. 998, 1005, 97  
L.Ed. 1470 (1953)). The Commission cannot “merely assert the benefits of competition in  
an abstract, sterile way.” (*Hawaiian Telephone Company v. FCC*, *id.* at 776-77). The  
words of the Court are particularly illuminating in this regard:

25 “The whole theory of licensing a regulation by government agencies is based  
26 on a belief that competition cannot be trusted to do the job of regulation in  
27 that particular industry which competition does in other sectors of the  
economy. Without in any way interrogating the merits of the competitive  
28 free enterprise system in the economy as a whole, we cannot accept the  
action of the FCC here in a tightly regulated industry, supported by an  
opinion which does no more than automatically equate the public benefit  
with additional competition.” (*Id.* at 777).

1 Circuit, the Commission further states that it possesses the legal authority to “forebear  
2 from Title II regulation (to the extent other jurisdictions seek to apply it)” and, in fact,  
3 tentatively concluded that such Title II regulation would not be appropriate and that the  
4 Commission should forebear. (DR/NPR, fn. 219; ¶ 94.) With all due respect, the  
5 California Franchising Authorities strongly argue that the Commission does not possess  
6 the legal jurisdiction to forebear in such a way as to preclude local government from  
7 applying Title II regulations to cable modem service to the extent said regulation is  
8 otherwise appropriate pursuant to Title II. (“[Section 10] . . . is not intended to limit or  
9 preempt state enforcement of state statutes or regulations.” *House Report*, p. 185, 4 U.S.  
10 Code Cong. & Admin. News 198.) In addition, even if the Commission does possess such  
11 legal jurisdiction, the robust development of cable modem service in the past and the need  
12 in the future to protect consumers from potential monopolistic or oligopolistic abuses in  
13 the delivery of this service precludes a finding in favor of regulatory forbearance.

14 The legal authority of the Commission to forebear from Title II regulation is limited  
15 by both case law and statute. Prior to the adoption of the TCA, Title II regulatory  
16 forbearance decisions of the Commission were voided by the courts on several occasions.<sup>23</sup>  
17 In *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995), the DC Circuit struck  
18 down the second of the Commissions attempts to relax the tariff filing requirements for  
19 non-dominant carriers. Notwithstanding the express direction of the Communications Act  
20 that “every common carrier . . . shall . . . file ‘tariffs with the FCC.’” 47 U.S.C. § 203(a),  
21 the Commission attempted to exercise discretion to forebear. In a series of cases, the DC  
22 Circuit found, that for numerous reasons, the FCC had no authority or discretion to change  
23 Congress’ clear demands. (*MCI v. FCC*, 765 F.2d 1186, 1191092 (D.C. Cir. 1985).) As  
24 the court stated in *Southwestern Bell Corp.*:

25 “This case primarily turns on one fundamental notion: Congress enacted the  
26 Communications Act and the mandates of the Act are not open to change by  
27 the Commission or the courts. If the Commission believes those mandates  
inadequate to the task of regulating the telecommunications industry in light  
of changed circumstances, the Commission must take its case to Congress..”

28 <sup>23</sup> Prior to the adoption of the TCA, forbearance decisions of the Commission were often  
expressed either in terms of “forbearance” or as “waiver.”

1 (Supra, 43 F.3d at 1519.)<sup>24</sup>

2 The statutory landscape changed, however, when Congress passed the TCA in 1996  
3 which added Section 10(a) (47 U.S.C. § 160) which required the Commission to forebear  
4 from applying any regulation or any provisions of this chapter to a telecommunications  
5 carrier or telecommunications service, or class of telecommunications carriers or  
6 telecommunications services, in any or some of its or their geographic markets, if the  
7 Commission determines that:

8 (1) “Enforcement of such regulation or provision is not necessary to  
9 ensure that the charges, practices, classifications, or regulations by, for, or in  
10 connections with that telecommunications carrier or telecommunications service are  
just and reasonable and are not unjustly or unreasonably discriminatory;

11 (2) Enforcement of such regulation or provisions is not necessary for the  
12 protection of the consumer; and

13 (3) Forbearance from applying such provision or regulation is consistent  
with the public interest.”

14 (47 U.S.C. § 160(a) (hereinafter, “Section 10”)). Forbearance decisions are analyzed  
15 pursuant to the analytical model of *Motor Vehicle Manufactures Association v. State Farm*  
16 *Mutual Automobile Insurance Co.*, supra, 463 U.S. 29. Although significant deference is  
17 granted, the Commission’s decision to change an existing regulatory regime must be made  
18 on the basis of “reasoned analysis.” (*Id.* at 43.) The Commission cannot rely upon its  
19 forbearance authority pursuant to Section 10 to change established policies without a well-  
20 reasoned and articulated record in basis for said departure. As the court stated in *AT&T*  
21 *Corp. v. FCC*, 236 F.3d 729, 736-37 (D.C. Cir. 2001):

22 “. . . No matter how reasonable it may be for the FCC to require market share  
23 data before evaluating an incumbent local exchange carrier’s market power,  
it is not reasonable for the Commission to announce such a policy without

24 <sup>24</sup> In a prior case involving a similar discretionary de-tariffing program, the Second  
Circuit reached a similar conclusion:

25 “In enacting §§ 203-05 of the Communications Act, Congress intended a  
26 specific scheme for carrier initiated rate revisions. A balance was achieved  
27 after a careful compromise. The Commission is not free to circumvent or  
28 ignore that balance. Nor may the Commission in effect rewrite this statutory  
scheme on the basis of its own conception of the equities of a particular  
situation.”

*MCI v. FCC*, 765 F.2d at 1195 (quoting *AT&T v. FCC*, 47 F.2d 865, 880 (2<sup>nd</sup> Cir. 1973).

1 providing a satisfactory explanation for embarking on this course when it has  
2 not followed such a policy in the past. The FCC 'cannot silently depart from  
3 previous policies or ignore precedent' as it has done here . . . . No matter  
4 how reasonable the FCC's position that market share data is necessary for a  
5 prime facie showing of market competition, the FCC's conclusory statements  
6 cannot substitute for the reasoned explanation that is wanted in this  
7 decision." (Citations omitted.)

8 Section 10 may or may not, depending upon the administrative record, sanction the  
9 Commission to forebear from applying its own regulations pursuant to Title II to cable  
10 modem service. Such a proposition could only be tested upon the factual showing which  
11 supports or does not support the factual findings essential to a Section 10 forbearance  
12 decision. However, Section 10 does not provide any authority for the Commission to  
13 forebear from the imposition of Title II regulation by local government, to the extent  
14 otherwise authorized by federal, state and local law, since forbearance, as set forth in  
15 Section 10, constitutes a self-imposed limit upon the exercise of the Commission's  
16 authority as opposed to a broad authorization to preempt the authority of other levels of  
17 government. The statutory language is clear and unambiguous.

18 In addition, Section 10 must be read in conjunction with other provisions adopted at  
19 the same time. For example, Section 601(c)(1) provides: "this Act of amendments made  
20 by this Act shall not be construed to modify, impair or supersede federal, state or local law  
21 unless expressly so provided in such act or amendment." ("This provision prevents  
22 affected parties from asserting that the bill impliedly preempts other laws." House  
23 Conference Report, *Id.* at 201, 4 U.S. Code Cong. & Admin. New 215.) There is an  
24 accompanying savings provision regarding the "modification, impairment, or  
25 supercession of, any state or local law pertaining to taxation." (*Id.* at § 602(c)(2).)

26 Section 253(c) provides a "safe harbor" affirming the longstanding authority of  
27 local government to manage its rights-of-way and require "fair and reasonable  
28 compensation from telecommunications providers, on a competitively neutral and non-  
29 discriminatory basis, for the use of public rights-of-way on a non-discriminatory basis if  
30 the compensation required is publicly disclosed by such government." (47 U.S.C.  
31 § 253(c).) The Commission cannot simply waive its "forbearance wand" and deprive state

1 and local government of the rights granted to them by express provisions of the TCA  
2 including, without limitation, Section 253(c).

3 VIII. THE INTERNET TAX NONDISCRIMINATION ACT DOES NOT PROHIBIT  
4 LOCAL GOVERNMENT FROM COLLECTING FRANCHISE FEES OR  
5 OTHER FEES RELATING TO THE USE OF PROW FROM CABLE  
6 OPERATORS PROVIDING NON-CABLE SERVICES.

7 The Internet Tax Freedom Act, as amended and extended by the Internet Tax  
8 Freedom Act (collectively, the “Internet Act”) limits the ability of state and local  
9 government to impose “taxes” upon the Internet or Internet users. The Internet Act defines  
10 a “tax” “to be . . . any charge imposed by any government entity for the purpose of  
11 generating revenues for governmental purposes, and is not a fee imposed for a specific  
12 privilege, service, or benefit conferred . . .” (§ 1104(a)(A)(i)). The term “tax” specifically  
13 excludes “. . . any franchise fee or similar fee imposed by a state or local franchising  
14 authority, pursuant to Section 622 or 653 of the Communications Act of 1934 (47 U.S.C.  
15 § 542, 573) or any other fee related to obligations of telecommunication carriers under the  
16 Communications Act of 1934.” (47 U.S.C. § 151 *et seq.*). Thus, the Internet Act draws a  
17 classic distinction between general revenue raising exactions and those imposed for a  
18 specific privilege, service or benefit. It is the predominant view that franchise fees and  
19 other fees imposed upon users of PROW constitute “user fees” or “regulatory fees” and not  
20 “taxes” for federal purposes. (*Quest Communications Corp. v. City of Berkeley*, 146  
21 F.Supp.2d 1081 (N.D. Ca. 2001); *AT&T Communications of Southwest, Inc. v. City of*  
22 *Austin*, 42 F.Supp.2d 708, 711 n.4(1998); *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5<sup>th</sup>  
23 Cir. 1997).) The Commission should not be led down the garden path of local preemption  
24 based upon a notion that the Internet Act already prohibits franchise-fee-like impositions  
25 upon cable operators providing cable modem service. In reality, the Internet Act clearly  
26 contemplates said impositions to the extent allowed by applicable state law.

1 IX. THE COMMISSION SHOULD NOT ASSERT JURISDICTION OVER THE  
2 TREATMENT OF FRANCHISE FEES PAID UPON CABLE MODEM SERVICE  
3 PRIOR TO THE EFFECTIVE DATE OF THE DR/NPR.

4 Franchise fees on cable modem services collected from cable operators prior to the  
5 effective date of the DR/NPR were imposed and collected in good faith and based upon the  
6 wide spread belief that cable modem service constitute a "cable service" subject to Section  
7 622 franchise fees. No public purpose is served by attempting to upset that determination  
8 on a retroactive basis.<sup>25</sup> The Commission's determination that cable modem service  
9 constitutes an "interstate information service" possesses no retroactive component. Its  
10 classification decision ran contrary to not only the basic assumptions of the cable industry  
11 and local government but flies in the face of prior Commission actions in which the  
12 Commission has implicitly determined (see discussion of Commission Social Contracts,  
13 fn. 9) that cable modem service either constituted a cable service or at least possesses a  
14 cable service component.<sup>26</sup>

15  
16 <sup>25</sup> The Commission has itself acknowledged that "the answer to this questions [is cable  
17 modem a 'cable service'] is far from clear. (Brief for FCC as *Amicus Curia*, in *AT&T*  
*Corp. v. Portland*, No. 99-35609, p. 19.)

18 <sup>26</sup> The Commission's determination that local government cannot collect a franchise fee  
19 on cable modem service revenues pursuant to Section 622 is based upon the Commission's  
20 implied determination that the 1996 amendments to Section 622 were intended by  
21 Congress to apply retroactively to preempt existing franchise provisions inconsistent  
22 therewith. (DR/NPR, ¶ 105, pp. 53-54.) In fact, many franchising authorities, including  
23 numerous members of the California Franchising Authorities, possess franchise agreement  
24 provisions which broadly define "gross revenues" to include all revenues generated from  
25 use of the cable system irrespective of the classification of the service provided.

26 Retroactive application of the 1996 amendment to Section 622 is disfavored (*Stevens v.*  
27 *Employer - Teamsters Joint Council No. 84 Pension Fund*, 979 F.2d 444 (6<sup>th</sup> Cir., 1992);  
28 *Jeffries v. Wood*, 114 F.3d 1484 (9<sup>th</sup> Cir. 1997) *cert. denied* 118 S.Ct. 586, 139 L.Ed. 2d  
423 (1997); *James Cable Partners, L.P. v. City of Jamestown, Tenn. by. Duncan*, 43 F.3d  
277 (6<sup>th</sup> Cir. 1995). The legislative history certainly demonstrates no intent on the part of

28 Congress to invalidate or preempt existing franchise agreement provisions which were  
bargained for between local government and cable operators in good faith. In fact, the  
legislative history contemplates little if any negative budgetary impact upon local  
government, thus evidencing no retroactive preemption intent. (*House Report*, Id., 4 U.S.

Code Cong. & Admin. News 35-36.) In many cases, the California Franchising  
Authorities bargained for extremely broad definitions of "gross revenue" so as to include  
all services offered upon the cable system as opposed to those services which are  
ultimately now determined to be "cable services". Given the fact that Congress did not  
expressly preempt these arrangements upon a retroactive basis. The Commission should  
not do what Congress expressly chose not to do.

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Dated: June 13, 2002

Respectfully submitted

RUTAN & TUCKER, LLP  
WILLIAM M. MARTICORENA

By: *William M. Marticorena*

William M. Marticorena  
ATTORNEYS FOR THE CALIFORNIA  
FRANCHISING AUTHORITIES

***CERTIFICATE OF SERVICE***

I, Valerie Bloom hereby certify that I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On June 13, 2002, I caused the within *INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY, CITIES OF BERKELEY, ESCONDIDO, GLENDALE, HAWTHORNE, INDIAN WELLS, IRVINE, LAGUNA BEACH, LA QUINTA, MORENO VALLEY, SAN CLEMENTE, SAN DIEGO, SAN JUAN CAPISTRANO, AND SANTA CRUZ, CALIFORNIA AND THE COUNTY OF SANTA CRUZ CALIFORNIA*; GN Docket No. 00-185, CS Docket No. 02-52, to be filed with the Office of the Secretary of the Federal Communications Commission via Federal Express as more particularly described on the attached Service List.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Valerie Bloom

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