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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
Internet Over Cable Declaratory Ruling
Appropriate Regulatory Treatment For
Broadband Access To The Internet Over
Cable Facilities

GN Docket No. 00-185
CS Docket No. 02-52

INITIAL COMMENTS OF THE PUBLIC CABLE TELEVISION AUTHORITY
("PCTA"); CITY OF BERKELEY, CALIFORNIA ("BERKELEY"); CITY OF
ESCONDIDO, CALIFORNIA ("ESCONDIDO"); CITY OF GLENDALE, CALIFORNIA
("GLENDALE"); CITY OF HAWTHORNE, CALIFORNIA ("HAWTHORNE"); CITY
OF INDIAN WELLS, CALIFORNIA ("INDIAN WELLS"); CITY OF IRVINE,
CALIFORNIA ("IRVINE"); CITY OF LAGUNA BEACH, CALIFORNIA ("LAGUNA
BEACH"); CITY OF LA QUINTA, CALIFORNIA ("LA QUINTA"); CITY OF
MORENO VALLEY, CALIFORNIA ("MORENO VALLEY"); CITY OF SAN
CLEMENTE, CALIFORNIA ("SAN CLEMENTE"); CITY OF SAN DIEGO,
CALIFORNIA ("SAN DIEGO"); CITY OF SAN JUAN CAPISTRANO, CALIFORNIA
(SAN JUAN CAPISTRANO); CITY OF SANTA CRUZ, CALIFORNIA ("CITY OF
SANTA CRUZ"); AND COUNTY OF SANTA CRUZ, CALIFORNIA ("COUNTY OF
SANTA CRUZ")

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Cable And Other Facilities; Internet Over Cable Declaratory Ruling;
Appropriate Regulatory Treatment For Broadband Access To The Internet Over
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3 Witkin, *Cal. Procedure* (3rd ed. 1985),
Actions, §§ 423-424, pp 456-45824

1 The PCTA, Berkeley, Escondido, Glendale, Hawthorne, Indian Wells, Irvine,
2 Laguna Beach, La Quinta, Moreno Valley, San Clemente, San Diego, San Juan Capistrano,
3 City of Santa Cruz, and the County of Santa Cruz (collectively, the "California Franchising
4 Authorities") hereby submit the following comments in response to the Commission's
5 above-captioned Declaratory Ruling and Notice of Proposed Rulemaking ("DR/NPR").

6 I. SUMMARY OF ARGUMENTS.

7 A. Cable modem service has thrived pursuant to the existing "structural
8 dualism" regulatory approach whereby local government has employed regulations in the
9 area of mandatory deployment, customer service, and public right-of-way usage fees. The
10 deployment of cable modem service has grown exponentially in the face of active local
11 regulation. In fact, in many cases local regulation has spurred or accelerated the
12 deployment of cable modem service or caused that service to be offered to citizens who
13 would have been disenfranchised in a completely free marketplace environment.

14 B. The Commission possesses limited, if any, jurisdiction to preempt local
15 government's regulation of the use of public rights-of-way to site facilities which provide
16 non-cable services. Local government possesses historic authority grounded in state law to
17 regulate the use of its public rights-of-way for all purposes including the franchising of
18 various forms of communication services. Any federal preemption must be express in that
19 the law does not infer preemptive authority over local control of public rights-of-way due
20 to the constitutional limitations of the Fifth and Tenth Amendments to the United States
21 Constitution. Federal law does not create local regulatory rights but simply recognizes
22 their existence. It limits those rights only in certain express situations. Congress
23 attempted to strike a careful balance between the rights of local government and the federal
24 government in developing the Communications Act of 1934 and its subsequent
25 amendments. Congress recognized that local government possessed the inherent authority
26 to franchise, regulate, and impose reasonable and non-discriminatory fees upon
27 communication users of public rights-of-way with minimal federal intervention or
28 interference. Neither Title II nor Title VI of the Communications Act of 1934 grants

1 regulatory authority to local government since this authority would exist in the absence of
2 that legislative scheme. To the extent that Congress specifically envisioned the retention
3 of preexisting local rights in relation to public right-of-way regulation, the Commission
4 cannot undo this carefully balanced “structured dualism” regulatory scheme by utilizing
5 vague and undefined “ancillary powers”. Thus, local government possesses the inherent
6 and unbridgeable right based upon existing statutory law to require cable operators to
7 obtain a separate franchise to use and occupy the public rights-of-way to provide non-cable
8 services. Local government can impose reasonable fees in the nature of rent for use and
9 occupancy of public rights-of-way to provide non-cable services. Finally, local
10 government may regulate the provision of non-cable services subject to the express
11 limitations and conditions imposed by Congress.

12 C. The Commission cannot “forbear” so as to preclude local government from
13 applying Title II regulatory provisions to the extent that cable modem services are deemed
14 to be a “telecommunications service” within the Ninth Circuit. Forbearance authority is
15 limited in application to the Commission’s own regulatory enactments and cannot be
16 utilized to interfere with specific regulatory powers which have been retained by local
17 government pursuant to express provisions of the Communications Act of 1934.

18 D. The Internet Tax Freedom Act does not prohibit local government from
19 collecting franchise fees or other fees relating to the use of public rights-of-way from cable
20 operators providing non-cable services due to the fact that public right-of-way usage fees
21 are not deemed to be “taxes” for the purposes of that statutory enactment.

22 II. IDENTIFICATION OF THE PARTIES.

23 The PCTA constitutes a joint powers authority created pursuant to California law
24 vested with the responsibility to franchise and regulate cable television within the
25 jurisdictional limits of the Cities of Fountain Valley, Huntington Beach, Stanton, and
26 Westminster, all located in Orange County, California.¹ The remaining members of the

27
28 ¹ The PCTA was formed in the 1970’s to provide a regional approach to the franchising
and regulation of cable television in four contiguous Orange County cities. The PCTA is
governed by a Board of Directors which contains an elected representative of each of its

1 California Franchising Authorities constitute government entities formed pursuant to
2 California law which possess the authority and responsibility to franchise and regulate
3 cable television operations within their jurisdictional boundaries.² Collectively, the
4 California Franchising Authorities represent approximately 725,000 cable television video
5 subscribers and approximately 14,000 cable modem subscribers.³ The California
6 Franchising Authorities regulate a diverse group of cable operators including Adelphia
7 Communications Corporation (“Adelphia”), TWC, AT&T Broadband (“AT&T”), Charter
8 Communications, Inc. (“Charter”), and Cox.⁴ The California Franchising Authorities are
9 located in Alameda County, Los Angeles County, Orange County, Riverside County, San
10 Diego County and Santa Cruz County and clearly constitute a representative cross-section
11 of local government in California.⁵

12 Most of the California Franchising Authorities have undergone cable television
13 rebuilds within the last several years.⁶ Based upon their rebuild experience, each of the
14

15 member cities. The sole function of the PCTA is to provide regulatory supervision over
16 cable operations within the jurisdictional boundaries of its member cities. All cable
17 regulatory responsibility has been delegated by its member cities to the PCTA.

18 Local government is authorized by California statute to franchise and regulate cable
19 television pursuant to California Government Code Section 53066, *et seq.* Cable television
20 does not constitute a public utility in California (*Television Transmission, Inc. v. Public
21 Utilities Com.*, 47 Cal.2d 82, 301 P.2d 862 (1956)) and thus the California Public Utilities
22 Commission (“CPUC”) exercises no jurisdiction over cable television except in relation to
23 certain cable television construction practices which affect other utility infrastructure.

24 The cable modem subscriber count is based upon the last information made available to
25 the California Franchising Authorities by their respective cable operators. Unfortunately,
26 as some cable operators in California, such as Cox Communications, Inc. (“Cox”) and
27 AOL Time Warner Cable (“TWC”), ceased reporting and paying cable modem franchise
28 fees starting in 2000-2001, several of the California Franchising Authorities have not been
provided current or accurate information regarding cable modem subscriber counts once
reporting pursuant to franchise fee collection ceased.

29 In addition to granting a cable television franchise to Charter, Glendale has received an
overbuild application from Altrio Communications, Inc.

30 Cable modem service has been available throughout the bulk of the California
Franchising Authorities for several years. However, cable modem service has only been
recently introduced into the Cities of Indian Wells, La Quinta, and Moreno Valley, which
are located in the somewhat less densely populated areas of Riverside County, California.
Cable modem service is not available in the City of Santa Cruz and available and only in a
small portion of the County of Santa Cruz.

31 A major rebuild required by franchise was underway in Moreno Valley. However, it
has been halted based upon the financial implosion of Adelphia. However, Adelphia has
launched “enhanced services,” such as cable modem service, upon a node-by-node
activation basis.

1 California Franchising Authorities have personal knowledge regarding the impact of
2 modern hybrid fiber coaxial ("HFC") rebuild architecture upon public rights of way
3 ("PROW"). In addition, most of the California Franchising Authorities have received, in
4 some cases for several years, franchise fees upon cable modem services. Likewise, most
5 of these jurisdictions have regulated cable modem service, in almost all cases without
6 objection of the cable operator, pursuant to the same operational standards as other forms
7 of cable service in terms of customer service, telephone response, and otherwise.⁷ Thus,
8 the experiences set forth herein of the California Franchising Authorities are real and
9 personal based upon the construction of cable modem ready systems and the provision of
10 cable modem services within their boundaries.

11 III. INTRODUCTION AND SUMMARY OF ISSUES.

12 In the DR/NPR, the Federal Communications Commission (the "Commission")
13 seeks comment upon a variety of issues relating to regulatory treatment of cable modem
14 service as an "interstate information service." The major categories of solicited comments
15 relate to the following:

- 16 (1) The scope of the Commission's jurisdiction to regulate non-cable
17 services including whether there are any constitutional limitations on the exercise of
18 that jurisdiction;
- 19 (2) Whether it is necessary or appropriate at this time to require the cable
20 operators to provide unaffiliated ISPs with the right to access cable modem service
21 customers directly; and
- 22 (3) The role of local government in regulating non-cable services.

23 *(In The Matter Of Inquiry Concerning High Speed Access To The Internet Over Cable And*
24 *Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory*

25
26 ⁷ In some of these communities, the cable system was upgraded to HFC architecture
27 allowing significant broadband deployment without specific franchise requirements or an
28 excess of specific franchise requirements relating thereto. In most other cases, the rebuild
which allowed or at least facilitated the provision of cable modem service was done
pursuant to franchise requirement. In the City of Santa Cruz and the most of County of
Santa Cruz, AT&T is not currently required to rebuild its plant and hasn't done so.

1 *Treatment For Broadband Access To The Internet Over Cable Facilities*; FCC 02-77; GN
2 Docket No. 00-185; CS Docket No. 02-52; Declaratory Ruling And Notice Of Proposed
3 Rule Making, Released March 15, 2002 (the "DR/NPR"), ¶ 72.)

4 The Commission has requested comments upon numerous sub-issues of the three
5 major issues described above. All of those sub-issues identified by the Commission are
6 relevant, important, and merit significant comment and analysis. However, the California
7 Franchising Authorities will focus upon the following areas of concern in their comments
8 before the Commission today:

9 (1) The scope of the Commission's authority to promulgate regulations
10 over non-cable services in the absence of explicit statutory authority;

11 (2) Whether the provision of cable modem service in the Ninth Circuit
12 constitutes a "Telecommunications Service" subject to Title II of the
13 Communications Act of 1934 or an "interstate information service" subject to Title
14 I of the Communications Act;

15 (3) Whether the Commission can and should preempt local regulation of
16 non-cable services;

17 (4) Whether the Commission can and should "forebear" from the
18 imposition of Title II common carrier regulation upon cable modem service
19 assuming the cable modem service is properly classified as a Telecommunications
20 Service in the Ninth Circuit;

21 (5) Whether or not the Commission can and should assert jurisdiction
22 under the Communications Act of 1934 to preclude local government from
23 regulating non-cable services and facilities in particular ways;

24 (6) Whether or not the provision of non-cable services imposes additional
25 burdens on PROW over and above that which would be imposed in the absence of
26 facilities designed to deliver non-cable services;

27 (7) Whether or not local government should be able to impose reasonable,
28 competitively neutral, and non-discriminatory fees upon the provision of non-cable

1 services; and

2 (8) Whether or not local government should be able to establish and
3 enforce customer services requirements applied to non-cable services.

4 IV. LIMITATIONS UPON COMMISSION AUTHORITY TO PREEMPT LOCAL
5 REGULATION OF THE USE OF PROW TO PROVIDE NON-CABLE
6 SERVICES.

7 A. Preemption Of Local Authority Over Non-Cable Services, And Those
8 Facilities Which Provide Non-Cable Services, By The Commission Must Be
9 Narrowly Focused And Based Upon Concrete, Measurable And Explainable
10 Evidence.

11 It is axiomatic that a reviewing court may not substitute its judgment for that of the
12 Commission. (*Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91
13 S.Ct. 814, 28 L.Ed.2d 136 (1971).) However, judicial review of the Commission decision
14 must be “searching and careful,” *Id.*, and must ensure both that the Commission has ade-
15 quately considered all relevant factors and that it has demonstrated a “rational connection
16 between the facts found and the choice made.” (*Burlington Truck Lines, Inc., v. United*
17 *States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962).) Although the
18 standard of review is deferential, it may not be uncritical. When an administrative agency,
19 such as the Commission, reverses prior long standing practice (i.e., non-preemption of
20 local regulation of cable modem service), the agency must provide a reasoned analysis
21 indicating that prior policies and standards are being deliberately changed and not casually
22 ignored. (*People of State of California v. FCC*, 39 F.3d 919, 925 (9th Cir. 1994); *Motor*
23 *Vehicle Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29,
24 43-44, 103 S.Ct. 2856, 2867, 77 L.Ed.2d 443 (1983).) If the record reveals that the
25 Commission “‘failed to consider an important aspect of the problem’ or has ‘offered an
26 explanation for its decision that runs counter to the evidence before [it],’”, the court must
27 find the Commission in violation of the Administrative Procedures Act (“APA”).

28

1 (*California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990)).⁸

2 In reviewing decisions of constitutional dimension, such as the Commission's
3 intrusion upon state and localities' rights pursuant to the Fifth and Tenth Amendments,
4 substantial deference pursuant to *Chevron U.S.A. v. Natural Resources Defense Counsel*,
5 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984) is inappropriate since it raises
6 serious constitutional questions. (*Rust v. Sullivan*, 500 U.S. 173, 190-91, 111 S.Ct. 1759,
7 114 L.Ed.2d 233 (1991); *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. &*
8 *Constr. Trades Council*, 485 U.S. 568, 576-76, 108 S.Ct. 1392, 99 L.Ed.2d 645 (1988);
9 *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999).) When faced with a
10 statutory interpretation that "would raise serious constitutional problems, the [courts] will
11 construe the statute to avoid such problems unless such construction is plainly contrary to
12 the intent of Congress." (*DeBartolo Corp.*, 485 U.S. at 575, 108 S.Ct. 1392.) Any action
13 of the Commission preempting local authority over PROW use, regulation of cable modem
14 service, or the regulation of facilities which provide cable modem service presents serious
15 constitutional questions, and thus the Commission is owed no deference even if said
16 regulations are reasonable. Rather, the rule of constitutional doubt is applied. (*U.S. West,*
17 *Inc. v. FCC*, 182 F.3d at 1231.)

18 B. The Authority Of The Commission To Preempt State And Local Regulation
19 Of Non-Cable Services, Whether Characterized As An Interstate Information
20 Service Or A Telecommunications Service, Is Extremely Limited And Must
21 Be Based Upon A Showing That The Absence Of Said Preemption Would
22 Interfere, In A Concrete And Demonstrable Manner, With Clearly
23 Articulated Federal Objectives.

24 Any final decision made by the Commission regarding its own power to preempt
25

26 ⁸ In reviewing Commission action, a court can only consider grounds set forth by the
27 Commission in its action and cannot create permissible bases for affirmates in the absence
28 of the Commission's articulation thereof. (*National Cable Television Association, Inc. v.*
FCC, 914 F.2d 285, (D.C. Cir. 1990); *North Western Indiana Tl. Cl. v. FCC*, 824 F.2d
1205, 1210 (D.C. Cir. 1987), cert. denied, ___ U.S. ___, 110 S.Ct. 575, 107 L.Ed.2d 773
(1990).)

1 local regulation is reviewable de novo by the United States Courts of Appeal. (28
2 U.S.C.A. § 2342(1)). The Supreme Court has refused to accord any special weight to the
3 Commission's determination that certain state regulations were preempted and has
4 rejected, based upon an absence of compelling evidence, the Commission's contention that
5 preemption was necessary to fulfill its statutory obligation. (*Louisiana Public Service*
6 *Commission v. FCC*, 476 U.S. 355, 374-75, 106 S.Ct. 1890, 1902, 90 L.Ed.2d 369 (1986)).

7 As the Fifth Circuit has stated:

8 "It is well established that courts need not refer an issue to an agency when
9 the issue is strictly a legal one, involving neither the Agency's particular
10 expertise nor its fact-finding prowess; the standards to be applied in
11 resolving the issue are within the conventional competence of the courts and
12 the judgment of the technically expert body is not likely to be helpful in the
13 application of these standards to the facts of the case." (*Columbia Gas*
14 *Transmission Corp. v. Allied Chemical Corp.*, 652 F.2d 503, 519 n.15 (5th
15 Cir. 1981).

16 The bulk of the Commission's organic authority is provided pursuant to Title II
17 (Telecommunications), Title III (Broadcasting), and Title VI (Cable Television) of the
18 Communications Act of 1934 (the "Communications Act"). In addition, the Commission
19 has general regulatory jurisdiction over "all interstate and foreign communications by wire
20 or radio . . . and . . . all persons engaged within the United States in such communication
21 [except for communications in the Canal Zone]." (*Id* at § 152(a)). However, the
22 Commission's general jurisdiction over interstate communication and persons engaged in
23 such communications "is restricted to that reasonably ancillary to the effective
24 performance of [its] various responsibilities" under Title II, III, and VI of the Act. (*United*
25 *States v. Southwestern Cable Co.*, 39 U.S. 157, 178, 88 S.Ct. 1994, 2005, 20 L.Ed.2d 1001
26 (1968); *see also*, *FCC v. Midwest Video Corp.*, 440 U.S. 689, 99 S.Ct. 1435, 59 L.Ed.2d
27 692 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649, 92 S.Ct. 1860, 32
28 L.Ed.2d 390 (1972)). Although the Commission's ancillary powers may or may not be
expansive under the Act depending on the circumstances, those ancillary powers do not
include the "untrampled freedom to regulate activities over which the statute fails to
confer, or expressly denies, Commission authority." (*National Association of Regulatory*

1 *Utility Commissioners v. FCC*, 533 F.2d 601, 617 (D.C. Cir. 1976)).

2 Cable modem service has developed under the watchful regulatory eye of local
3 government since its inception. At a minimum, such events occurred with the tacit
4 knowledge and approval of the Commission.⁹ Although the California Franchising
5 Authorities do not dispute the notion that the Commission has authority to change its
6 regulatory mind, it is incumbent upon the Commission in doing so to demonstrate that it
7 has examined the relevant data and articulated a satisfactory explanation for its action
8 based upon the merits. (*People of State of California v. FCC*, 905 F.2d 1217, 1230 (9th
9 Cir. 1990). A Commission decision will be overturned if the Commission has “failed to
10 consider an important aspect of the problem” or has “offered an explanation for its
11 decision that runs counter to the evidence before the Agency.” (*Motor Vehicle*
12 *Manufacturers Association v. State Farm Mutual Auto Insurance Co.*, 463 U.S. 29, 43, 103
13 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983)). Even the traditional deference granted
14 Commission actions does not allow speculation to form the basis for critical Commission
15 action. (*People of State of California v. FCC, Id.* at 1235).¹⁰

16 Judicial review of Agency decisions is particularly critical when the Commission
17 attempts to trample upon traditional domain of local government. Even when Congress
18 preempts an entire field of regulation, “every state statute that had some indirect effect [on
19 that field] . . . is not preempted.” (*Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 308,
20 108 S.Ct. 1145, 1155, 99 L.Ed.2d 316 (1988), Federal Energy Regulatory Commission has
21 exclusive jurisdiction over rates and facilities of natural gas companies, but not every law
22

23 ⁹ The Commission itself has addressed the upgrade of cable systems to specifically
24 provide cable modem service in the various “Social Contracts” by which it required cable
25 operators to invest in system upgrades which permit the offering of broadband Internet
26 access, in exchange for certain Title VI rate concessions. Thus, the Commission has
27 acknowledged a linkage between Title VI regulation and local government’s interests in
28 both expanding and regulating cable modem service. See *Development of Advanced*
Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, CC
Docket No. 98-146, Report, 15 FCC Rcd 20913 (2000) (“Second Report”), 20953, n. 126.
¹⁰ Unlike “minimum rationality” review under the due process and equal protection
clauses, “arbitrary and capricious” review of Commission actions pursuant to the APA
does not permit a reviewing court to impute reasons to the Agency and uphold its actions if
it has any conceivable rational basis. (*People of State of California v. FCC, Id.* at 1238).

1 that effects rates and facilities preempted). The ultimate question, which must be based
2 upon evidence in the administrative record, is whether local government's regulatory
3 impact upon the deployment of non-cable services is sufficient to force the conclusion that
4 Congress must have intended to preempt, or provided the Commission with authority to
5 preempt, the type of local regulations in question. (*Cable Television Association v.*
6 *Finnerman*, 954 F.2d 91, 101 (2nd Cir. 1992)). The Commission may not utilize its general
7 jurisdiction to fill a legislative gap where Congress has expressly created said gap or no
8 gap is deemed to reasonably exist. (*American Civil Liberties Union v. FCC*, 823 F.2d
9 1554, 1571 (D.C. Cir. 1987)). Where an area of regulation falls traditionally within the
10 domain of local government, local authority is provided deference. (*People of State of*
11 *California v. FCC, Id.* at 1239-1240).

12 Title I does not constitute an independent source of regulatory authority; rather, it
13 confers on the Commission only such powers as is ancillary to the Commission's specific
14 statutory responsibilities. (*United States v. Southwest Cable Co., Id.*, 392 U.S. 157, 178
15 (1968)). Thus, the Commission must show a strong nexus between any asserted Title I
16 authority and other independent grants of authority pursuant to the Communications Act.
17 ("The system of dual regulation established by Congress cannot be evaded by the
18 talismanic implication of the Commission's Title I authority." (*People of State of*
19 *California v. FCC, Id.*, at 1240-41, n. 35.)

20 The Commission may only preempt local regulation of telecommunications carriers
21 which involve both interstate and intrastate communications pursuant to what is referred to
22 as the "impossibility" exception carved out of Section 2(b)(1) of the Communications Act
23 in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355, 106 S.Ct. 1890, 90
24 L.Ed.2d 369 (1986). Thus, where it can be demonstrated that state regulations cannot
25 feasibly co-exist with the Commission's validly adopted interstate regulations, state
26 regulations may be preempted. However, the "impossibility" exception is a limited one.
27 The Commission may not justify a preemption order merely by showing that some of the
28 preempted state regulation would, if not preempted, frustrate Commission regulatory

1 goals. Rather, the Commission bears the burden of justifying its entire preemption order
2 by demonstrating the order is narrowly crafted to preempt only those state regulations as
3 would negate valid Commission regulatory goals. (*People of State of California v. FCC*,
4 *Id.* at 1243.) As the D.C. Circuit has held, “a valid FCC preemption order must be limited
5 to [state regulations] that would necessary thwart or impede” the Commission’s goals.
6 (*National Assn. of Regulatory Utility Commissioners v. FCC*, 880 F.2d 422, 430 (D.C. Cir.
7 1989).) Thus, where state and local regulations are protected by Title II, Title VI, or
8 otherwise within the Communications Act, the Commission possesses a heavy burden of
9 demonstrating that its regulation of the interstate aspects of a particular service or series of
10 services would “necessarily be frustrated by all possible forms of related state and local
11 regulations.” (*People of the State of California v. FCC*, *Id.* at 1243-44.) An argument that
12 the local regulation will negate federal purposes in “many” cases does not suffice to justify
13 the preemption of all local regulation in an area. The “impossibility” exception to Section
14 2(b)(1) is a narrow one that may be invoked only when state and federal regulations cannot
15 feasibly co-exist. (*People of the State of California v. FCC*, *Id.* at 1244.)

16 V. CABLE MODEM SERVICE HAS THRIVED PURSUANT TO THE EXISTING
17 “STRUCTURED DUALISM” REGULATORY REGIME.

18 A. Local Regulation Of Cable Modem Service Has Not Retarded Its
19 Deployment.

20 The Commission has expressed its concern, and thus at least implicitly requested
21 comments, upon the issue “. . . if state and local regulations limit the Commission’s ability
22 to achieve its national broadband policy goals . . . to promote the deployment of advanced
23 telecommunications capability to all Americans in a reasonable and timely manner, . . .to
24 promote the continued development of the internet and other interactive computer services
25 and other interactive media . . . and to preserve the vibrant and competitive free that
26 presently exists for the internet and other interactive computer services, unfettered by
27 federal or state regulations.” (DR/NPR, ¶ 98.) One must recognize that cable modem
28 service has developed over the past years in an atmosphere of tripartite federal-state-local

1 regulatory auspices. Not only has cable modem service developed during this regime, it
2 has, based upon the Commission's own most recent evidence, thrived and flourished
3 notwithstanding, or perhaps due to, the shared jurisdictional regulatory approach which has
4 existed since the inception of this service.

5 In its recently issued *Third Report in the Matter of Inquiry Concerning the*
6 *Deployment of Advanced Telecommunications Capability to All Americans in a*
7 *Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment*
8 Pursuant to Section 706 of the Telecommunications Act of 1996, FCC 02-33, CC Docket
9 98-146, Third Report, released February 6, 2002 (the "*Third Report*"), the Commission
10 sets forth the following conclusions:

- 11 • "Comparison with data on high speed subscribership included in the Second
12 Report suggests that there has been appreciable growth in the deployment of
13 high speed services to residential and small business consumers in the past
14 18 months. Moreover, these figures reveal that high speed services are
15 available in many parts of the country and suggest that certain factors -- such
16 as population density and income -- continue to be highly correlated with the
17 availability of high speed services at this time." (*Third Report*, p. 5.)
- 18 • "Subscribers to high speed services were reported in each of the 50 states,
19 the District of Columbia, Puerto Rico, and the Virgin Islands and in 78% of
20 all of the zip codes in the United States. Our data further indicates that 97%
21 of the country's population lives in those zip codes where high speed
22 subscribership was reported." (*Third Report*, p. 5.)¹¹
- 23 • "...growth in subscribership for residents and small business is consistent
24 with the high level of availability indicated by the Commission's data.
25 Results of the Commission's data collection show that there were a total of
26 approximately 7.8 million high speed residential subscribers, as of June 30,
27 2001. We estimate that approximately 4.3 million of these residential
28 subscribers subscribe to services that meet the Commission's definition of
advance services. By comparison, we stated in the Second Report that there
were approximately 1.8 million high speed residential subscribers at the end
of 1999. We estimated that approximately 1.0 million of these residential
subscribers subscribed to services that meet the Commission's definition of
advanced services. As a result, penetration of advanced services quadrupled
from 1.0% of households at the end of 1999 to 3.8% at the end of June 2001.
Looking more broadly at all high speed services (i.e., not only advanced
services), the residential penetration rate was 7.0% at the end of June 2001."

¹¹ Based upon the reporting methodology utilized by the Commission in its Third Report, the Commission did not require providers to report the number or type of high speed services subscribers in each zip code but only to identify zip codes in which they had at least one high speed service subscriber. Thus, Commission data does not indicate the full extent to which the presence or lack thereof, of high speed services are available in any geographic area. (*Third Report*, ¶ 25, p.14.)

1 (Footnote omitted.) (*Third Report*, ¶ 30, p.16.)

- 2 • “At the end of June 2001, of the 7.8 million residential customers who
3 subscribed to high speed services, approximately 5.0 million subscriber
4 services using hybrid fiber-coaxial (HFC) technology, such as cable modem
5 service, approximately 2.5 million subscribe to ADSL services, while the
6 balance subscribe to other media, including satellite and fixed wireless
7 services.” (*Third Report*, fn. 69, p. 16.)
- 8 • “Of the 4.3 million residential and small business subscribers to advanced
9 services [at the end of 1999], there were approximately 3.1 million
10 residential customers subscribed to cable-based services and approximately
11 0.9 million residential customers subscribed to ADSL, with the balance
12 subscribing to other media. These figures show cable companies increasing
13 their residential advanced services subscribership by 261% in 18 months and
14 local exchange carriers increasing their residential DSL subscription to
15 advanced services by 683%.” (*Third Report*, fn. 70, p. 16.)
- 16 • “Combining our data with publicly-available sources about the availability of
17 cable modem plan, the 5.2 million cable high speed lines reported represents
18 a penetration rate of approximately 8% of cable modem capable homes as of
19 mid-year 2001. By contrast, in the Second Report, we reported a cable
20 modem penetration rate of approximately 3% as of the beginning of 2000.”
21 (Footnotes omitted.) (*Third Report*, ¶ 45, p. 21.)
- 22 • “. . . about 75% of households will have high speed internet access available
23 from either DSL or cable modem service by the end of 2001, up from 60% in
24 2000. Another analyst estimates as of the first quarter of 2000, that 81% of
25 households had available DSL or cable modem service. The analyst further
26 estimates that 94% of households will have available DSL or cable modem
27 service by 2005.” (Footnote omitted.) (*Third Report*, ¶ 61, p. 26.)
- 28 • “. . . investment in infrastructures to support high speed and advanced
services has increased dramatically since 1996.” (*Third Report*, ¶ 62, p. 27.)
- “Recent investment in cable infrastructure has been significant. In 2000, the
cable industry spent a total of \$15.5 billion on the construction of new plants,
upgrades, rebuilds, new equipment, and the maintenance of new and existing
equipment. This represents a 45.9% increase over the \$10.6 billion spent in
1999. Analysts expect that operators will have spent an estimated \$14.7
billion in 2001. Moreover, it appears that the amount invested in cable
infrastructure has remained at high levels over the past several years and has
resulted in increased availability of cable modem service. As of year end
2000, cable modem service was available to 58.5 million homes, as
compared to 35.5 million in 1999. In 2001, cable modem services are
estimated to be available to 77.5 million homes. Recent progress in network
upgrades has allowed cable operators to provide two-way service to the vast
majority of cable modem ready homes. One analyst predicts that by 2003
investment spending is expected to result in the upgrade of substantially all
of the U.S. cable infrastructure (more than 99.9 million homes) to enable the
delivery of new bandwidth-intensive services.” (Emphasis added.)
(Footnotes omitted.) (*Third Report*, ¶ 65, pp. 28-29.)
- “Subscribership to cable modem service is also increasing. At the end of
2000 there were approximately 3.9 million cable subscribers. By year end
2001, an industry analyst estimates that cable modem subscriptions will

1 almost double to 7.5 million subscribers. In addition, that same analyst
2 expects that over the next five years, cable modem subscriptions will
3 continue to increase dramatically, reaching an average estimate of 28-30
4 million by 2006 and forecasts penetration rates for cable modems to increase
5 to 40% by 2006.” (Footnotes omitted.) (*Third Report*, ¶ 66, p. 29.)

6 • “Based upon our analysis, we conclude that the deployment of advanced
7 telecommunications ability to all Americans is reasonable and timely. We
8 find that there is continued and rapid growth in subscription to high-speed
9 services on a nationwide basis, which is indicative of the increased
10 availability of advanced services.” (*Third Report*, ¶ 89, p. 38.)¹²

11 Even as we speak, cable modem subscribership is increasing and continues to widen
12 its lead over DSL services. Reports recently released by major cable operators demon-
13 strated that AT&T, TWC, Comcast, Cox , and Charter collectively added 767,000 cable
14 modem subscribers in the first quarter of 2002 as compared to 729,000 in the first quarter
15 of 2001 and 738,000 in the fourth quarter of 2001. Cable modem subscribership was up
16 5% for the major MSO’s on a year-to-year basis and for 4% quarter-to-quarter according to
17 numbers surveyed by Multichannel News. (Multichannel News, Online Edition, “Cable
18 Appears to Widen Data Lead”, May 6, 2002.) On May 13, 2002, Multichannel News
19 reported that “. . . year over year growth for cable modem services up 12%, while DSL has
20 experienced a 3% decline.” (Multichannel News, Online Edition, “Bilotti to Cable: Ignore
21 Streets Pressure”, May 13, 2002.)

22 Real world empirical data constitutes a reasonable and relevant measure of the
23 success or failure of a regulatory regime. (“. . . a regulatory scheme that can boast a
24 competitive capital spending over a four year is not easily described as an unreasonable
25 way to promote competitive investment in facilities.” (*Verizon Communications v.*
26 *Federal Communication Commission*, 535 U.S. ___ (2002), slip opinion, p. 46)).

27 B. Local Regulation Of Cable Modem Service Has Accelerated Its Deployment.

28 Cable systems were upgraded pursuant to franchise requirements to a level capable
of providing cable modem service in Berkeley, Glendale, Indian Wells, La Quinta, Moreno
Valley, and a small portion of the County of Santa Cruz. But for those franchise-imposed

¹² The Commission’s Press Release issued February 7, 2001 summarized the statistical
results of the Third Report.

1 requirements, those communities would, in all likelihood, not enjoy the benefits of cable
2 modem service today since the cable operators did not voluntarily agree to system
3 upgrades. Likewise, in the City of Santa Cruz and the vast majority of the County of Santa
4 Cruz, no cable modem service is available because of the lack of a franchise requirement
5 and the unwillingness of the cable operator, in that case AT&T, to "belly up to the bar"
6 and institute a voluntary rebuild. Although the economic incentive to upgrade cable plant
7 to provide enhanced services, including but not limited to cable modem service, has
8 certainly increased over the past several years given the technological availability of these
9 services, their consumer acceptance, and the limited competitive options being provided by
10 alternative providers such as direct broadcast satellite ("DBS"), the California Franchising
11 Authorities believe that the absence of local regulation manifested through the inability of
12 local government to mandate the deployment of cable modem service would have not only
13 retarded its deployment over the past five years, but will, on a going forward basis,
14 preclude many areas from ever receiving the advantages of cable modem service. Cable
15 operators possess minimal incentive to upgrade plant, at least to the extent necessary to
16 provide cable modem service, in low income areas, rural communities, inner cities, and
17 other areas where the economics are not as attractive as they typically are in high-end
18 densely populated suburbia. The Commission itself recognized the lack of sufficient
19 market-induced incentives by providing the predecessors to TWC and Media One, Inc.,
20 now a portion of AT&T, with a direct economic incentive to invest in upgrades and
21 provide cable modem service by way of the Commission approved "Social Contracts"
22 which traded plant upgrades and cable modem service deployment for Title VI rate relief.
23 The combination of the regulatory efforts of local government and the Commission's own
24 economic inducement programs, both pursuant to Title VI of the Communications Act,
25 *have done far more to accelerate the deployment of cable modem service than a free and*
26 *unregulated market would have induced during the same timeframe.*

27
28

1 VI. THE COMMISSION CANNOT AND SHOULD NOT PREEMPT OR
2 FOREBEAR LOCAL FRANCHISING AND REGULATION OF FACILITIES
3 LOCATED IN PROW WHICH PROVIDE NON-CABLE SERVICES.

4 A. Legal Authority To Regulate PROW, And Those Facilities Which Utilize
5 PROW To Provide Any Form Of Communication Services, Is Grounded In
6 State Constitution, Statute, And Policy And Does Not Arise From The
7 Communications Act.

8 Local authority to franchise and regulate communication users of PROW does not
9 emanate from Title VI or any other provisions of the Communications Act. As a general
10 matter, with a few limited exceptions, neither Title II nor Title VI is a grant of authority to
11 state or local government. Rather, long before Title II and Title VI of the Communications
12 Act was enacted, states and local government possessed the right to franchise entities who
13 sought to use and occupy PROW to provide both intrastate and interstate services. In most
14 cases, the Communications Act constitutes a limitation upon local regulatory authority and
15 not the grant thereof. Title VI, relating to cable television, imposes specific limits upon
16 local authority but recognizes, in such provisions as section 617 relating to transfers as
17 well as other salient provisions, that the foundation of local authority is state law which
18 exists without any form of concomitant federal authorization. Thus, it is improper to
19 conclude that localities need any form of federal authorization to require a franchise to use
20 and occupy PROW to provide cable or non-cable services.

21 Likewise, localities do not need specific or general federal authority to charge fees
22 for the use and occupancy of PROW to provide cable or non-cable services. Congress has
23 created a delicate balance between the federal government and states and localities which
24 is premised upon limited federal preemption of an area of law which confers broad
25 authority on states or localities based upon use of PROW. This regime of "structural
26 dualism" constitutes a carefully drafted legislative balance whereby important areas of
27 traditional local concern, such as franchising and the receipt of compensation for PROW,
28 was specifically intended by Congress to reside in the hands of state and local government.

1 In reality, it was the Commission's whose authority was limited, contoured, and defined by
2 the Communications Act in these areas as opposed to the authority of state and local
3 government. The Commission cannot, pursuant to its purported ancillary powers, alter the
4 balance that Congress intended when it adopted Titles II and VI of the Communications
5 Act. In the absence of Title VI of the Communications Act, local government could still
6 franchise cable systems utilizing PROW, collect franchise fees or other forms of rent for
7 the use of PROW, specify certain operational and construction standards, impose customer
8 service safeguards, and ultimately regulate cable operators in much the same way the state
9 and local governments have been regulating other uses of PROW such as electric utilities,
10 gas utilities, pipeline utilities, and other uses of PROW for well over 150 years.

11 Thus, the vacuum of authority as to a particular use of the PROW, such as the
12 provision of interstate information services, does not require or even justify the conclusion
13 that Congress implicitly preempted local control in this area or intended to provide the
14 Commission the authority to do indirectly what Congress did not do directly. Such is true
15 whether or not the services provided by a Title VI regulated cable system or otherwise.
16 There are numerous provisions of Title VI which contemplate the local regulation of the
17 provision of non-cable services by cable operators using coterminous cable plant and the
18 local regulation thereof. (*See, e.g.*, § 541(d)(1) (state may require information tariff for
19 intrastate communication services other than cable services); § 543(a) (limiting state
20 regulation of cable service prices, but not state regulation of non-cable service prices);
21 § 544(b)(2) (franchising authority may enforce requirements for broad categories video
22 programming or other services contained in a franchise); § 544(b)(1) (facilities
23 requirements made as to both cable services and other services may be enforced);
24 § 546(c)(1)(B) (renewal may be denied if the quality of the cable operator service, but
25 without regard to the mix of quality of cable service or other services provided over the
26 system, has been reasonable); § 551 (applying privacy provisions to any service provided
27 by a cable operator, and providing that nothing in the cable act prevents the locality from
28 enacting consistent laws for the protection of subscriber privacy); § 554 (city may enforce

1 EEOC requirements irrespective of nature of service); § 552 (locality may establish
2 customer service and build out schedules of the cable operator; customer protection laws
3 are protected unless “specifically preempted”).)

4 The fact that Congress intended to allow local government to exercise regulatory
5 authority, and collect fees, upon all types of communication services utilizing PROW is
6 made clear in the legislative history of the Telecommunications Act of 1996 (P.L. No. 104-
7 104) (“TCA”). For example, the House Report demonstrates that Congress intended local
8 government to possess the inherent flexibility to increase fees over some form of services
9 to offset fees that might be eliminated or reduced based upon the non-discriminatory fee
10 requirements imposed by Section 253(c). (*House Report No. 104-204*, July 24, 1995, p. 70
11 (hereinafter “*House Report*”). 4 U.S. Code Cong. and Admin. News, 104th Congress 2nd
12 Session, 1996, pps. 35-36). Congress expressly manifested its intent that local authority to
13 impose PROW fees be maintained, which authority obviously cannot be circumvented by
14 Commission preemption pursuant to its purported “implied authority.” (“... this Section
15 does not otherwise limit the right of local governments to impose fees and other charges
16 pursuant to Section 201(c)(3)(D), or limit the rights of local government with respect to
17 franchise obligations applying to cable service.”) (*House Report*, Id. at 94, U.S. Code
18 Cong. and Admin. News 60.) Given the fact that Congress concluded that local
19 government should retain its implicit authority to impose PROW fees in relation to cable
20 services and telecommunications services, it is impossible to conclude that the Congress
21 could have intended that the Commission could provide “interstate information services” a
22 free ride, especially when provided upon facilities which provide a bundling of cable
23 services, telecommunications services, and information services. Even when
24 telecommunications services are provided upon the same facility (i.e., cable system) as are
25 cable services, Congress considered the issue and resolved it in favor of local imposition of
26 fees upon the combination of services. (“... telecommunications services provided by a
27 cable company shall be subject to the authority of a local government to manage its public
28 rights-of-way in a non-discriminatory and competitively-neutral manner and to charge fair

1 and reasonable fees for its use.” (*House Report*, Id. at 179-80, 4 U.S. Code Cong. and
2 Admin. News 193).)

3 Federal authority to preempt local regulation of PROW users is limited by the
4 express and implied provisions of the Communications Act. (*See Communications Act of*
5 1934 (“Communications Act”) 47 U.S.C. § 152(b), TCA § 601(c).) Adjunct to its clear
6 Title VI authority to regulate cable services, Congress has specifically envisioned local
7 enforcement of franchise requirements relating to the provision of both cable services and
8 “other services” which presumptively include not only information services but any other
9 type of communication service pursuant to franchise requirements. (§ 544(b).)

10 B. State Laws of Nuisance Prohibits Unauthorized Uses of PROW.

11 The rule is well settled that no person can acquire the right to make a special or
12 exceptional use of PROW, not common to all citizens of the State, except by grant from
13 the sovereign power. (*Municipal Corporations, McQuillin*, § 34.10.) Franchises, licenses,
14 permits, or some other form of authorization must be obtained prior to utilization of
15 PROW and other public property for purposes other than travel or the enjoyment of
16 benefits common to all citizens. (*Municipal Corporations, McQuillin, supra*, at § 34.10;
17 *Schoenfeld v. Seattle*, 265 F. 726 (1920).) If any entity, including a public service
18 company, is not granted the right to utilize the streets of a municipality by a federal statute,
19 the state constitution, a state statute, or by its own charter, it has no right to utilize such
20 streets unless the host governmental entity consents to that use. (*Municipal Corporations,*
21 *McQuillin, supra*, at §34.10.10; *Potter v. Calumet Elec. St. R. Co.*, 158 F. 521 (1908).)

22 A cable operator in California can potentially look to three sources for authorization
23 to utilize PROW for the provision of commercial non-cable services such as cable modem
24 service. Those sources of authority are as follows:

- 25 (1) Cable television franchise agreement;
- 26 (2) Cal. Public Utilities Code Section 7901 which authorizes “Telephone
27 Corporations” to utilize PROW for the installation of “Telephone Lines”; and
- 28 (3) Section 253(a) of the Telecommunications Act of 1996 (the “TCA”)

1 which bars state and local government from taking any action which directly or
2 indirectly “prohibits” the provision of a Telecommunication Service.

3 Assuming that cable modem service is not cable service, none of these sources
4 provides authority to the cable operator to utilize PROW for the provision of cable modem
5 service.

6 A cable franchise authorizes a cable operator to occupy PROW for the purpose of
7 installing a cable television system for the provision of “cable service.” Most broadband
8 systems were constructed pursuant to the authority conferred by this document. Given the
9 fact that a cable operator’s primary authorization to occupy PROW lies within the “four
10 squares” of its cable franchise, it is important to understand the appropriate interpretation
11 and authorization of that document.

12 California law specifically recognizes the authority of cities and counties to grant
13 franchises for construction of public utilities and other matters. (See Cal. Government
14 Code § 26001; Cal. Government Code § 39732; Cal. Government Code § 53066; Cal.
15 Constitution, Article XII, § 8; *Southern Pacific Pipelines, Inc. v. City of Long Beach*, 204
16 Cal. App. 3d 660, 666, 251 Cal. Rptr. 411 (1998).) As the California Supreme Court has
17 stated:

18 “No principle of law is better settled than that corporate privileges, which are
19 not ordinarily and necessarily an incident of the corporate franchise, can be
20 held to prevail over public rights only when it plainly and explicitly appears
that such privileges have been, in fact, granted.” (*Simons Brick Co. v. City of
Los Angeles*, 182 Cal. 230, 232 (1920).)

21 A California cable franchise, like all other franchises, must be “. . . strictly
22 construed in favor of the public, and the agency to which the power is delegated.” (*City of
23 Salinas v. Pacific Telephone & Telegraph Co.*, 72 Cal. App. 2d 494, 498 (1946).) The
24 doctrine of strict construction, as applied to California franchises, is “a proposition too
25 well settled to call for discussion.” (*Wichmann v. City of Placerville*, 147 Cal. 162, 164,
26 81 P. 537 (1905).) “No argument of convenience nor even of necessity justifies an
27 unauthorized obstruction on or unauthorized interference with the free use by the public of
28 one of its highways, and all such arrangements are to be addressed to the law making

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 proceeding 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 (4th Cir. 1911).)¹³

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 ¹³ *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
17 those specifically mentioned within the scope of franchise:

18 “A miscellany of decisions have held that a gaslight company was not
19 authorized to lay electric wires; to holder of a franchise for artificial gas
20 could supply natural gas; a permit to pipe gas to a named plant could not be
21 regarded as authority to supply gas to others; the right to lay pipes did not
22 include the right to erect poles and stretch wires for the conveyance of
23 electricity; the right to lay gas pipes did not include the right to erect lamp
24 posts at street crossings; the right to lay pipes for transportation of oil and
25 gas did not authorize its use for the transportation of water; the right to lay
26 pipes did not give the right to supply water; an electric light company’s right
27 to use streets for conduits gave it the right to lay them under the sidewalks; a
28 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
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
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
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;
and a street railway system could operate sightseeing buses.

“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
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 (3rd ed. 1985) Actions,
10 §§ 423-424, pp. 456-458.)¹⁴ 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).)¹⁵

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 ¹⁴ 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, 3rd ed., Nuisances, § 3 (2001).)

27 ¹⁵ 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).)