

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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

**COMMENTS OF
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION, INSIGHT
COMMUNICATIONS CORPORATION, AND MEDIACOM COMMUNICATIONS
CORPORATION**

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SUMMARY

The Commission has correctly articulated a desire to create a "rational framework" for the regulation of cable modem services that is pro-deployment and pro-innovation. To best accomplish this goal, the Commission must extend the longstanding federal deregulatory stance towards information services to cable modem service. Market forces, unfettered by government regulation, should drive the deployment of cable modem services and other competing broadband Internet technologies. To date, market forces alone have successfully encouraged the deployment of a myriad of unique broadband technologies and service offerings, including cable modem service. The interposing of burdensome and unnecessary regulations at either the federal, state or local level would stifle further investment and innovation. Only through regulatory restraint can the Commission ensure the continuing development and rapid deployment of high speed Internet services offered over cable systems. Consistent with the foregoing, the Commission should address the issues raised in this rulemaking as follows:

The Commission should preempt any state and local efforts to impose "open access" requirements on cable operators. Preemption of state and local laws impacting cable modem service is well within the Commission's scope of authority because cable modem service is both interstate and an information service. More importantly, only through clear preemption can the Commission address its stated concern about a "patchwork of State and local regulations beyond matters of purely local concern." Such a patchwork would frustrate the goal of establishing a uniform national regulatory environment, key to maintaining investment in cable modem service. Only preemption will provide regulatory certainty, thereby ensuring that cable modem service continues to be deployed at a rapid pace. Moreover, there is no need for an access mandate since the availability of broadband is rapidly spreading and competition is flourishing.

The Commission should confirm that no other local authorization beyond the existing cable franchise is required for a cable operator to offer cable modem service. Cable operators' existing franchises provide the requisite authorization to construct and maintain distribution facilities and associated equipment used in connection with their cable systems. The provision of cable modem service over existing cable plant requires no additional facilities located in public rights-of-way and raises no legitimate public safety, convenience, or rights-of-way management concerns not already addressed by cable operators' existing franchises. Thus, to the extent that cable operators already possess the requisite authority to use the public rights-of-way via their cable franchises, any additional local authorization requirement would be unnecessarily duplicative and should therefore be preempted.

There is no valid legal or policy basis for allowing local franchising authorities to assess franchise fees, taxes, right-of-way rents, or other assessments on cable modem service revenue beyond the franchise fee ceiling contained in the Communications Act. The Commission has determined that cable modem service is not a "cable service", but rather an "interstate information service." The Communications Act limits the amount of franchise fees that a franchise authority may charge a cable operator to "5 percent of such cable operator's gross revenues derived in such period *from the operation of the cable system to provide cable services.*" Thus, since cable modem service is not a "cable service," the Communications Act places an effective ceiling on the franchise fees which can be imposed on cable modem service revenue. The Commission must also hold that such a ruling has no retroactive effect so that cable operators are not saddled with debilitating liability resulting from litigation over the collection of franchise fees for cable modem service. Cable operators collected these fees in

good faith compliance with federal law, their franchise agreements, and demands from franchising authorities, and should not be punished for their efforts.

Finally, the Commission should confirm that classification of cable modem service as an "information service" does not affect the enforceability of state consumer protection laws of general applicability, provided that they are enforced equally against all high speed Internet access service providers, whether DSL, cable modem, wireless, satellite or some other technology. Likewise, the Commission should confirm that local franchising authorities have no authority to adopt their own customer service regulations specifically applicable to cable modem service and not to other providers of high speed Internet service. Lastly, the Commission should confirm that its own customer service standards apply only to "cable service," and not cable modem service since it is an "information service."

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**COMMENTS OF
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION, INSIGHT
COMMUNICATIONS CORPORATION, AND MEDIACOM COMMUNICATIONS
CORPORATION**

The Arizona Cable Telecommunications Association ("ACTA"), Insight Communications Corporation ("Insight") and Mediacom Communications Corporation ("Mediacom") (collectively "Commenters") hereby submit their comments in the captioned rulemaking.¹ ACTA is the trade association which represents the cable television industry in the State of Arizona. Insight is the 9th largest largest cable television company in the country, serving approximately 1.4 million subscribers, principally in the states of Illinois, Indiana, Kentucky and Ohio. Mediacom is the 8th largest cable television company, serving approximately 1.6 million subscribers in 23 states.

I. INTRODUCTION

In the *NPRM*, The Commission has clearly articulated its desire to create a "rational

¹ See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, FCC 02-77, __ FCC Rcd __, 102 (rel. Mar. 15, 2002) ("*NPRM*").

framework" for the regulation of cable modem services that is pro-deployment and pro-innovation.² In both this and in a related proceeding, the Commission has correctly indicated that the most rational way to "encourage the ubiquitous availability of broadband to all Americans"³ is to craft public policies around the principle that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."⁴ Consistent with these goals, Chairman Powell has set forth guidelines for the Commission to follow: (1) limit the risk and uncertainty of regulation, (2) minimize the regulatory cost of bringing broadband services to the public, and (3) remove regulatory barriers to deployment.⁵

Such a policy of minimal regulation when it comes to broadband services is indeed the only regulatory stance consistent with Congressional pronouncements on broadband services and Internet access. Section 706 of the Telecommunications Act of 1996 ("*1996 Act*") charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment."⁶ New Section 230(a) of the Communications Act expressly endorses the "rapidly

² *NPRM* at ¶ 6.

³ *Id.* at ¶ 5; *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking, ¶ 3 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

⁴ *Id.* at ¶ 5.

⁵ *Id.*, Separate Statement of Chairman Powell.

⁶ Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706"). Section 706 defines "advanced telecommunications capability" "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology."

growing array of Internet and other interactive computer services."⁷ Under Section 230(b)(2) of the Act, the Commission must act "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."⁸ Thus, the Commission is certainly on the right path in stating that it seeks to remove "regulatory uncertainty that in itself may discourage investment and innovation" and asking "how best to limit unnecessary and unduly burdensome regulatory costs."⁹

The most important action the Commission can take in this proceeding is to reinforce the longstanding federal deregulatory stance towards all information services generally and cable modem service in particular. The deployment of cable modem services and other competing broadband Internet technologies should be driven by market forces, not government regulation. To date, market forces alone have successfully encouraged the deployment of a myriad of unique broadband technologies and service offerings, including cable modem service. In response to market forces, cable operators are offering their customers a wide variety of cable modem services, including in many cases, choice among multiple Internet service provider ("ISPs"). The interposing of burdensome and unnecessary regulations at either the federal, state or local level would stifle further investment and innovation.

The history of the explosion of cable service in the 1980s provides a valuable lesson in the benefits of regulatory restraint. Congressional directives relevant to this proceeding are directly analogous to the *1984 Cable Act*,¹⁰ which for the first time established a national framework for regulating cable television. The legislative history accompanying the *1984 Cable*

⁷ 47 U.S.C. § 230(a).

⁸ 47 U.S.C. § 230(b)(2).

⁹ *NPRM* at ¶ 5.

¹⁰ The Cable Communications Policy Act of 1984 ("*1984 Cable Act*"), Pub. L. 98-549, 98 Stat. 2780, amended the Communications Act of 1934, 47 U.S.C. § 151 et seq.

Act explains that prior to enactment there was no national policy to guide the development of cable television, resulting in an overly burdensome patchwork of state and local regulation, and thus relatively lethargic and uneven deployment of cable service.¹¹ A primary purpose of the *1984 Cable Act*, therefore, was to encourage the growth and development of cable systems "free of unnecessary and burdensome restrictions" imposed by state and local authorities.¹²

The *1984 Cable Act* was eminently successful in accomplishing Congressional goals. Over the next decade, cable systems became ubiquitous and achieved the financial stability necessary to drive development of an unparalleled diversity of video programming choices for consumers. This success was in large part due to the federalization, rationalization and uniformity of cable regulation, which made investment in cable system predictable and economically viable. Central to the success of the *1984 Cable Act* was the preemption of inconsistent state and local regulation.

Similarly, in the context of cable modem service, and particularly in light of the Commission's directive under Section 230(b)(2) of the Act "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation",¹³ the Commission should insulate cable modem service from unnecessary state and local regulation. Only through regulatory restraint at all levels of government can the Commission ensure the continuing development of high speed Internet services offered over cable systems.

¹¹ See H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 20-25 (1984).

¹² Id. at 40; Cable Telecommunications Act of 1983, S.R. Rep. No. 98-67, 98th Cong., 1st Sess. 17 (1983) ("*1984 Senate Report*").

¹³ 47 U.S.C. § 230(b)(2).

A. The Commission Has Ample Jurisdiction To Preempt State And Local Regulation Of All Interstate Information Service, Including Cable Modem Service

Preemption of state and local laws impacting cable modem service is well within the Commission's scope of authority because cable modem service is both interstate and an information service. The Commission clearly has primary and exclusive jurisdiction over all interstate communications, giving it the power to preempt state and local laws impacting such communications.¹⁴ The courts have also confirmed that the Commission has jurisdiction over information services under its Title I ancillary authority, and this jurisdiction specifically includes the ability to preempt state and local laws to preclude an inconsistent patchwork of local regulation from hindering the further development of services.¹⁵ Thus, both because cable modem service is both interstate and also an information service, the Commission has ample jurisdiction to preempt state and local regulation that stands as a barrier to fulfillment of national communications policy.

B. There Is No Basis To Alter The Traditional Unregulated Status Of Enhanced/Information Services.

For the past thirty years, the Commission has steadfastly held to a policy of regulatory

¹⁴ Congress has granted the Commission the power to promulgate regulations "as may be necessary in the execution of its functions. . . ." 47 U.S.C. § 154(i). The Commission was given "broad responsibilities" to exclusively regulate all aspects of interstate communications under Sec. 2(a) of the Communications Act. 47 U.S.C. § 152(a); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968). See also, *Federal-State Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 836 (1997) (Section 2(a) of the Communications Act "grants the Commission sole jurisdiction over interstate and foreign communications"); *Petitions of MCI Telecomms. & GTE Sprint*, Memorandum Opinion and Order, 1 FCC Rcd 270, ¶ 23 (1986) (Commission has "exclusive jurisdiction over interstate communications").

¹⁵ *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir. 1982), cert. denied 461 U.S. 938 (1983) (holding that the Commission has ancillary jurisdiction over enhanced services under Sections 152 and 153 of the Communications Act and may preempt state and local laws impacting such services. As described below, the Commission has determined that the pre-1996 definition of "enhanced services" means generally the same services covered by the post-1996 codified definition of "information services.").

restraint when it comes to its treatment of information services. This restraint has led to the explosive growth of information processing and delivery services, particularly the myriad ways for the public to access the Internet.

The Commission initially explored how to treat "enhanced services" (now labeled "information services") in the first Computer Inquiry ("*Computer I*").¹⁶ In the second Computer Inquiry ("*Computer II*"), the Commission determined that "enhanced services," those services that added computer processing capability to create "value-added" capabilities, should not be subject to common carrier regulation, but instead should be left unregulated to allow competition and innovation to flourish.¹⁷ In order to ensure that the states did not regulate in a manner to thwart this objective, the Commission used its ancillary jurisdiction to preempt state and local regulation of such services.¹⁸ In the third Computer Inquiry ("*Computer III*"), the Commission reaffirmed its earlier policies by refusing to impose regulation on enhanced services and again preempting the states from regulating in order to protect "the efficient utilization and full exploitation of the interstate telecommunications network."¹⁹

In the *1996 Act*, Congress preserved the unregulated nature of such services. First, it codified the basic concepts underlying the definition of "enhanced services" in the new defined term "information services." "Information service" is defined as "the offering of a capability for

¹⁶ *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Final Decision and Order, 28 FCC 2d 267 (1971).

¹⁷ *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 FCC 2d 384, (1980), modified on recon. 84 FCC 2d 50 (1981), *aff'd sub. nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied* 461 U.S. 938 (1983).

¹⁸ *Id.* at ¶¶ 113-114.

¹⁹ *Amendment of Section 64.702 of the Commission's Rules and Regulations, Report and Order*, 104 F.C.C. 2d 958, ¶¶ 343-348 (1986) ("[T]o permit application of inconsistent regulatory requirements to the provision of interstate and intrastate enhanced service offerings would be impracticable and would effectively negate federal policy.")

generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."²⁰ As mentioned above, Congress codified in Sections 706 and 230 an express federal policy that Internet services should be left as unregulated as possible in order that deployment and innovation not be hampered. Most importantly, nothing in the *1996 Act* indicated any Congressional intent to overrule the Commission's hands-off approach to enhanced/information services or to impose a new regulatory regime on such services.

The Commission has correctly interpreted the *1996 Act* to affirm the unregulated treatment of such services. For example, it ruled that the new "information services" definition in the *1996 Act* affirms the underlying policies of the Computer Inquiries by finding that the services formerly classified as "enhanced are now encompassed within the statute's definition of 'information services.'"²¹ The Commission has also reaffirmed that nothing in the *1996 Act* changes the longstanding federal policy that enhanced/information services should be left unregulated to the greatest extent possible.²² Finally, it reiterated that Internet access service is "interstate" in nature, reinforcing that federal and not state policies should guide the development of broadband services such as cable modem service.²³ All of these actions reinforce the long-

²⁰ 47 U.S.C. § 153(46).

²¹ *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, ¶ 102 (1996).

²² See, e.g., *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, ¶ 282 (1996).

²³ *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 52 (2001).

standing wisdom of keeping the Internet substantially unregulated. There is no reason now to treat cable modem service any differently.

Given the long-standing federal policy of refraining from regulation of information services, and given Congress' reaffirmation of this policy, it therefore logically follows that the Commission should now treat cable modem services in the same hands off manner as all other "information services."

II. MULTIPLE ISP CHOICE SHOULD BE ACHIEVED THROUGH MARKETPLACE COMPETITION, NOT REGULATORY FIAT

A. State And Local Access Requirements Should Be Preempted

The Commission should preempt any state and local requirements that purport to impose "open access" requirements on cable operators. Such requirements clearly conflict with the longstanding Commission policy of not allowing regulation of information services. Any state and local access requirements also conflict with Congress' stated policy in Section 706 "to promote the continued development of the Internet and other interactive computer services and other interactive media" and to "preserve the vibrant free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."²⁴ State and local access requirements, because they so pervasively restrict how a cable operator may use its plant to offer information services, and because they so directly impact how cable modem service may be marketed, can not in any manner be reconciled with this federal policy of minimal regulation.

Only through clear preemption can the Commission address its stated concern about a "patchwork of State and local regulations beyond matters of purely local concern"²⁵ and that

²⁴ See Section 706.

²⁵ *NPRM* at ¶ 97.

"State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services."²⁶ A hodge-podge of state and local access requirements would undoubtedly frustrate the goal of establishing a uniform national regulatory environment, key to maintaining investment in cable modem service. Preemption will provide regulatory certainty, thereby ensuring that cable modem service continues to be deployed at a rapid pace.

The Commission's successful actions in *Computer II* provide a germane analogy.²⁷ There, the Commission declined to impose regulations on the provision of enhanced services, because such services were available in a "truly competitive environment."²⁸ But more importantly, in order that state and local government action did not thwart the federal hands-off policy, the Commission used its ancillary jurisdiction under Title I to preempt state and local regulation of such services, thereby ensuring against a patchwork of state and local regulation.²⁹ This national policy has been an unquestionable success story. These same considerations apply equally today in the broadband services context: robust, facilities based competition and innovation are rampant and, accordingly, state and local regulation that might slow such forces should be preempted.

Of equal importance, there is no evidence of any countervailing economic justification for allowing state or local access requirements. In 1973, in *GTE Service Corp. v. FCC*, the D.C. Circuit struck down a Commission effort to impose regulations on data processing services, noting that the Commission "found that the computer service industry is one characterized by

²⁶ *NPRM* at ¶ 104.

²⁷ *Supra*, n.17.

²⁸ *Computer II* at ¶¶ 119, 124, 128.

²⁹ *Computer II* at ¶¶ 113-114.

'open competition' and 'relatively free entry'. . . these characteristics, in fact, provide a major basis for the conclusion that the Commission should not, at this point, assert regulatory authority over data processing, as such."³⁰ This rationale provides an equally compelling basis for preemption of state and local access obligations. It can not be denied that the current state of broadband is one of robust competition, diverse technologies and innovation. Absent preemption, all of these forces are put in jeopardy.

The Commission's own data and analysis clearly refute any suggested basis for imposing or allowing the states to impose access requirements on cable modem service providers. In its 2002 Section 706 report, the Commission analyzed the current state of competition in the broadband Internet service arena.³¹ Its findings, consistent with the findings in the previous two Section 706 reports, are a testament to the strength of facilities-based competition in the provision of high-speed Internet access service. According to the Commission's own findings, broadband services are characterized by (1) deployment in a reasonable and timely manner, (2) ever-increasing availability of diverse and innovative services, (3) increasing subscribership, and (4) resilient investment despite periods of economic downturn. The Commission's findings are devastating to any suggestion that there is some sort of competitive failure occurring that could justify imposing any access requirement at any level of government on cable modem service.³²

Indeed, consumers truly have a wide array of choices (cable modem service, DSL, narrowband dialup, satellite, and wireless) when it comes to Internet connectivity. In a world

³⁰ 474 F.2d 724, 735 (1973).

³¹ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, CC Docket No. 98-146, FCC 02-33, Third Report (rel. Feb. 6, 2002).*

³² *Id.* at ¶¶ 1, 61, 89-90, 99.

where broadband deployment is moving at a pace whereby 94% of the population will soon have access to a broadband wireline service, where a great majority of those will have ready access to at least two wireline services, and where other wireless and satellite delivered services are also widely available, there is simply no justification for saddling cable modem service with any access requirement (and certainly not hundreds of separate access requirements). Accordingly, because there is no justification for access requirements at any level of jurisdiction, and because the Commission has the power to preempt state and local regulation of cable modem service, the Commission should preempt all state and local access requirements.

To do so, the Commission should expressly confirm that any state and local access requirements applicable to cable modem service are preempted by Congress by the plain terms of the Communications Act. Section 624(a) states that no local franchising authority, whether state or local, may "regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."³³ Absolutely nothing in Title VI either explicitly or implicitly indicates that a local franchising authority may require cable operators offering cable modem service or any other information service to interconnect with other ISPs. Any attempt to do so would therefore violate the express limits of Section 624(a). Furthermore, Section 624(b) states that a franchising authority, in exercising its authority to grant a cable franchise, "may not . . . establish requirements for video programming or *other information services*."³⁴ Clearly, Congress has expressed a policy preference that local authorities may not use their franchising powers in a manner to dictate how a cable system offers non-cable and/or information services such as cable modem service except in a manner prescribed by federal law. The Commission

³³ 47 U.S.C. § 544(a).

³⁴ 47 U.S.C. § 544(b)(1) (emphasis added).

should therefore hold that the Communications Act expressly denies state or local authority to require access.

B. Access Conditions Imposed In The Franchise Transfer And Renewal Processes Should Also Be Preempted

Franchising authorities should also be barred from imposing access requirements on cable modem service as a condition of franchise transfer or renewal. It is not uncommon for franchising authorities to use the transfer and/or renewal processes as opportunities to extract an agreement from the franchisee to provide high speed Internet service.³⁵ In addition to the reasons set forth in Section II.A, *supra*, such attempts are prohibited by the Communications Act. Section 621(b) provides that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities ... as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of franchise."³⁶ Thus, a precondition to transfer or renewal that mandates that a cable operator provide raw transport service to unaffiliated ISPs, in essence making the cable system a common carrier platform, is invalid under Section 621(b) because it constitutes a requirement that a cable operator provide "telecommunications service." In *MediaOne Group, Inc. v. County of Henrico* the Fourth Circuit found that a local access precondition is a requirement that a cable operator provide "telecommunications facilities," and therefore invalid.³⁷ This same logic would even apply to a simple requirement that a cable operator provide high-speed Internet access service. Any such requirement would constitute a requirement that the cable operator provide "telecommunications facilities" and therefore be invalid under Section 621(b). Regardless of whether they are classified as requirements for

³⁵ See, e.g., *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000).

³⁶ 47 U.S.C. § 541(b)(3)(D).

³⁷ 257 F.3d 356, 363-365 (4th Cir. 2001).

"telecommunications services" or "telecommunications facilities", the Commission should clarify that any such requirements, when used as pre-conditions to renewal or transfer of a cable franchise, are prohibited by law.

In addition, although Section 626 allows a franchise authority to establish minimum requirements that a cable operator must include in its franchise renewal proposal,³⁸ this authority is expressly limited by Section 624(b) which states that franchising authorities "may not...establish requirements for video programming *or other information services*" in such a request.³⁹ Since cable modem service is an information service, such requirements are clearly intended to be prohibited as a condition of franchise renewal. The Commission should provide certainty in this area by declaring such pre-conditions impermissible.

III. STATE AND LOCAL REGULATION MUST BE KEPT TO A MINIMUM

A. Right-of-Way and Franchising Issues

Given the national policy objective of spurring broadband deployment, unnecessary state or local regulatory impediments to the provision of interstate information services cannot be countenanced. As the Commission has correctly observed, "[o]nce a cable operator has obtained a franchise for [a cable] system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."⁴⁰ The Commission should therefore confirm that no other local authorization beyond the existing cable franchise is required for a cable operator to offer cable modem service.

³⁸ 47 U.S.C. § 546(b)(2).

³⁹ 47 U.S.C. § 544(b) (emphasis added).

⁴⁰ *NPRM* at ¶ 102.

It is the cable system's "use" of the public rights-of-way upon which local franchising authority rests. In analyzing the meaning of "cable system," the Commission has stated that "[t]he dual federal-local jurisdictional approach to regulating cable television service is largely premised on the fact that cable systems necessarily involve extensive physical facilities and substantial construction upon and use of public rights-of-way in the communities they serve."⁴¹ In other words, "the cable franchise requirement of Section 621(b) is inextricably linked to the use of public rights-of-way."⁴²

Cable operators' existing franchises provide them with the requisite authorization to construct and maintain distribution facilities and associated equipment used in connection with their cable systems.⁴³ The fact that a cable system may also be used to transmit a non-cable service does not make the cable operator's facilities any less a "cable system."⁴⁴ The provision of cable modem service over existing cable plant requires no additional facilities located in, and imposes no additional burden on, public rights-of-way. The mere transmission of non-cable services over the existing cable system raises no legitimate public safety, convenience, or rights-of-way management concerns not already addressed by cable operators' existing franchises. Thus, to the extent that cable operators already possess the requisite authority to use the public

⁴¹ *Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14277, ¶ 52 (1998) ("*ECI Order*") (citing *Definition of a Cable Television System*, 5 FCC Rcd 7638 (1990), (subsequent history omitted)), *aff'd*, 18 CR 1044 (7th Cir. 2000).

⁴² *Id.*

⁴³ Pursuant to Section 621(a)(2) of the Communications Act, "[a]ny franchise shall be constructed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2).

⁴⁴ See *NCTA v. Gulf Power Co.*, 122 S. Ct. 782, 786 (2002) ("If one day [a cable operator's] cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'")

rights-of-way, as set forth in their cable franchises, any additional local authorization requirement would be unnecessarily duplicative.⁴⁵

The Commission has historically discouraged local attempts at duplicative regulation of communications providers that make use of public rights-of-way. In *NCTA v. FCC*, the D.C. Circuit accepted the Commission's refusal to subject video dialtone service that was already subject to common carrier regulation under Title II to regulation as a cable system as duplicative.⁴⁶ Similarly, in *Entertainment Connections, Inc.*, the Commission concluded that to require ECI, a video provider whose facilities themselves did not cross public rights-of-way and who instead relied on the facilities of another communications provider that possessed the requisite authorization to cross the rights-of-way, to obtain a franchise "would be needlessly duplicative."⁴⁷ Any attempt to require a separate information service franchise would contravene federal policy against duplicative regulation and unnecessary barriers to entry.

In addition, pursuant to Section 624(a) of the Communications Act, a "franchising authority may not regulate the services . . . provided by a cable operator except to the extent consistent with this title."⁴⁸ Notably, this restriction is not limited merely to *cable* services, but precludes LFA regulation of any services offered by a cable operator, including information services. Therefore, nothing in Title VI would allow LFAs to require that cable operators obtain separate information service franchises.

Insofar as franchising authorities' ability to regulate cable systems is inextricably tied to their use of the public rights-of-way, no sound policy reason exists to permit exercise of this

⁴⁵ See *ECI Order* at ¶ 62; *City of Austin v. Southwestern Bell Video Services, Inc.*, 193 F.3d 309 (5th Cir. 1999).

⁴⁶ 33 F.3d 66, 73 (D.C. Cir. 1994).

⁴⁷ *ECI Order* at ¶ 62.

⁴⁸ 47 U.S.C. § 544(a).

authority a second time because a cable operator wishes to provide cable modem services.

Changes in the competitive environment, clear Congressional intent to promote the deployment of broadband, the fact that there is no additional burden on the public rights-of-way, and the Commission's general disposition against needlessly duplicative regulation, all militate against allowing local authorities to require cable operators to obtain separate local authorizations to provide cable modem service.

B. Franchise Fees on Cable Modem Service Revenue

There is no legal or policy basis in Title VI for local franchising authorities ("LFAs") to assess franchise fees, taxes, right-of-way rents, or other assessments on cable modem service revenue, certainly not once the ceiling in the Cable Act has been reached. Section 622 of the Cable Act limits the amount of franchise fees that an LFA may charge a cable operator to "5 percent of such cable operator's gross revenues derived in such period *from the operation of the cable system to provide cable services*."⁴⁹ Accordingly, it cannot be any clearer that Title VI of the Communications Act does not permit LFAs to collect franchise fees in excess of 5 percent of "cable services" revenues. Thus, at a minimum, franchise fees cannot be imposed on cable modem service revenues where the franchise fee imposed by an LFA is already set at 5 percent.

Congress added the language italicized above in Section 622 as part of the *1996 Act*. Its purpose was to clarify that any revenue generated by cable operators from telecommunications or other non-cable services would not be subject to franchise fees, consistent with the overarching policy of the *1996 Act* to eliminate impediments to competition and broadband deployment.⁵⁰ Because the Commission has now determined that cable modem service is not a

⁴⁹ 47 U.S.C. § 542(b) (emphasis added).

⁵⁰ See H.R. Rep. No. 204, 104th Cong., 1st Sess. 93 (1995) (amendment "establishes that franchising authorities may collect franchise fees under Section 622 of the Communications Act

"cable service," revenue from this service may not be included in the franchise fee base for franchise fee ceiling calculation purposes.

As the Commission has correctly observed, "Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service."⁵¹ Section 622(g)(1) defines "franchise fee" to "include[] any tax, fee or assessment of any kind imposed by a franchising authority . . . on a cable operator . . . solely because of [its] status as such."⁵² Any fee imposed with respect to cable modem service, whether in reliance on Title VI or state or local law, would plainly be a fee imposed on a cable operator solely because of its status as a cable operator. Furthermore, as indicated above, Section 622(b) limits franchise fees to 5 percent of the cable operator's gross revenues from "cable services."⁵³ Because revenues from cable modem service are not revenues from "cable services," Section 622 can be read to preclude "any tax, fee, or assessment of any kind imposed by a franchising authority" with respect to such revenues. Thus, any local governmental attempts to impose fees, right-of-way rents, or other assessments on cable modem service should be preempted. Alternatively, if a fee on cable modem service is deemed a "franchise fee" under Section 622, such fees must be capped when total franchise fees reach 5 percent of "cable services" revenue.

Even if the Communications Act did not expressly prohibit local fees or assessments on revenues derived by cable operators from any services other than "cable service," there is no

solely on the basis of the revenues derived by an operator from the provision of cable service"); S. Rep. No. 23, 104th Cong., 1st Sess. 36 (1995) ("[t]his change is intended to make clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems.")

⁵¹ *NPRM* at ¶ 105.

⁵² 47 U.S.C. § 542(g)(1).

⁵³ 47 U.S.C. § 542(b).

policy basis for the Commission to permit LFAs to charge such fees, however labeled, for cable modem service. As the Commission recognized in its "Competitive Networks" inquiry, "state and local tax policies that impose excessive or unequal burdens on competitive service providers have the potential to inhibit the development of competitive facilities-based networks in local telecommunications markets."⁵⁴

In an analogous situation, the Commission chose in 1974 not to include revenues from pay cable channels (those with "per-program or per-channel charges") or other "ancillary services" in the definition of "gross subscriber revenues" for purposes of calculating franchise fees.⁵⁵ As the Commission then explained:

But for now, the monies derived from ancillary services are best used to support the development of those experimental and largely unprofitable services. We encourage experimentation in ancillary services. Any funds that can be freed to support those services will ultimately benefit the community of the system and aid our efforts at seeing these services develop nationwide.⁵⁶

That same policy should apply to the nascent provisions of broadband cable modem services, especially in light of the specific Congressional policy reflected in Section 706 to promote the nationwide deployment of broadband in all its forms, including cable modem service.

In the *NPRM*, the Commission cites the Internet Tax Freedom Act, noting "Congress' concern regarding new taxes on Internet access imposed for the purpose of generating revenues when no specific privilege, service or benefit is conferred and its concern regarding multiple or discriminatory taxes on electronic commerce."⁵⁷ According to the Commission, "[t]he Internet

⁵⁴ *Promotion of Competitive Networks in Local Telecommunications Markets*, Notice of Proposed Rulemaking and Notice of Inquiry, 14 FCC Rcd 12673, ¶ 81 (1999).

⁵⁵ *See Amendment of Part 76 of the Commission's Rules*, Notice, 46 FCC 2d 175, ¶ 95 (1974), citing 47 C.F.R. § 76.31(b) (repealed).

⁵⁶ *Id.* at ¶ 96.

⁵⁷ *NPRM* at ¶ 105 (citing Internet Tax Freedom Act, Pub.L.No. 105-277, Div. C, Title XI, §§

Tax Freedom Act imposed a moratorium on the ability of State or local governments to impose new taxes on Internet access. This moratorium has been extended through November 1, 2003."⁵⁸ There can be no doubt that cable modem service qualifies as "Internet access" under that statute.⁵⁹ Franchise fees lawfully imposed pursuant to Section 622 of the Communications Act are exempt from the Internet Tax Freedom Act's moratorium on taxation.⁶⁰ However, it has already been established that cable modem service is not a "cable service" subject to Section 622. Accordingly, LFAs cannot claim the benefit of the Internet Tax Freedom Act's exception; otherwise, as explained above, the fee would be preempted by Section 622(b).

While the Commission has correctly concluded that "Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service,"⁶¹ it also must recognize that the imposition of such a fee or other gross receipts assessment might well be void under the Commerce Clause as an unreasonable restraint on interstate commerce. On its face, the Commerce Clause provides that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."⁶² However, the Supreme Court long ago determined that "the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well. The Clause . . . 'by its own force' prohibits

1101(a), 1104.

⁵⁸ *NPRM* at n.350.

⁵⁹ *See* Internet Tax Freedom Act at § 1104(5) ("[t]he term 'Internet access' means a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to users. . . .")

⁶⁰ *Id.* at § 1104(8)(B); *see also NPRM* at n.350.

⁶¹ *NPRM* at ¶ 105.

⁶² U.S. Const., Art. I, § 8, cl. 3.

certain state actions that interfere with interstate commerce."⁶³ This "dormant" Commerce Clause prevents state and local governments from taking certain actions affecting interstate commerce even when Congress has not acted.⁶⁴ Moreover, courts have held that the "dormant" Commerce Clause prevents "state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment."⁶⁵

Gross receipts assessments on various communications services have been subject to Constitutional attack under the Commerce Clause for over 60 years. In 1936, the Supreme Court held that a state occupation tax based on the gross operating revenues of a broadcaster were invalid under the Commerce Clause, because it was an unconstitutional burden on interstate commerce.⁶⁶ In so holding, the Court determined that broadcasting, "[b]y its very nature . . . transcends state lines and is national in its scope and importance -- characteristics which bring it within the purpose and protection, and subject it to the control, of the commerce clause."⁶⁷

⁶³ *Quill Corp. v. North Dakota*, 504 U.S. 298, 309 (1992) (citing *Gibbons v. Ogden*, 9 Wheat 1, 231-32, 239 (1824); *South Carolina State Highway Dept. v. Barnwell Brothers, Inc.*, 303 U.S. 177, 185 (1938)); see also *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1254 (10th Cir. 2000) ("dormant" commerce clause denies states the power to discriminate against or burden unjustifiably the flow of interstate commerce); *American Library Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997) ("dormant" commerce clause restricts states' interference with the flow of interstate commerce in two ways: it prohibits discrimination aimed directly at interstate commerce, and it bars state regulations that, although facially nondiscriminatory, unduly burden interstate commerce); *Storer Cable Communications v. City of Montgomery, Ala.*, 806 F. Supp. 1518, 1551 (M.D. Ala. - N. Div. 1992).

⁶⁴ See *Storer*, 806 F. Supp. at 1551; see also Burk, Dan L., "How State Regulation of the Internet Violates the Commerce Clause," *The Cato Journal*, Vol. 17, No. 2 ("dormant" Commerce Clause limits the ability of states to impede the flow of interstate commerce).

⁶⁵ *American Library Ass'n*, 969 F. Supp. at 169, 181-82 (citing *Wabash, St. Louis & Pacific Ry. Co. v. Illinois*, 118 U.S. 557 (1886); *Gibbons v. Ogden*, 22 U.S. 1, 9 Wheat (1824)). In *American Library Ass'n*, the court determined that the Internet was an area of commerce that demanded national treatment "to protect users from inconsistent legislation that, taken to its most extreme, could paralyze development of the Internet altogether." *Id.* at 169.

⁶⁶ *Fisher's Blend Station, Inc. v. State Tax Comm'n*, 297 U.S. 650 (1936).

⁶⁷ *Id.* at 655.

Similarly, in the early years of cable television, before the imposition of franchise fees were expressly authorized by federal law, city ordinances that attempted to impose a gross receipts tax on proceeds from cable television service were held invalid under the Commerce Clause as an undue burden on interstate commerce.⁶⁸

The imposition of a franchise fee based on a cable operator's gross revenues for the provision of cable services was expressly permitted by the Commission in 1972,⁶⁹ and eventually codified by Congress when it passed the *1984 Cable Act*.⁷⁰ The passage of the *1984 Cable Act* eviscerated "the suggestion that local cable ordinances [were to be] subject to two rounds of preemption scrutiny, first under the Cable Act and next directly under the commerce clause."⁷¹

The *1984 Cable Act*:

accommodates a sophisticated interaction of federal, state, and local authority. The purposes of the Act are not only to "establish a national policy concerning cable communications" but also to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."⁷²

⁶⁸ See *Wonderland Ventures, Inc. v. City of Sandusky*, 423 F.2d 548 (6th Cir. 1970) (city ordinances imposing a gross receipts tax on CATV held invalid because they taxed proceeds from interstate commerce in violation of the commerce clause); *Lamb Enterprises, Inc. v. City of Toledo*, 437 F.2d 59 (6th Cir. 1971) (city ordinance imposing a gross receipts tax on proceeds of anyone operating a CATV system within the city held invalid as undue burden on interstate commerce in violation of the commerce clause); see also *City of Owensboro v. Top Vision Cable Co. of Kentucky*, 487 S.W.2d 283 (Ky. 1972) (cable television franchise containing provision for franchise fee of 26% of cable operator's gross income held invalid because 26% franchise fee was an unreasonable burden on interstate commerce).

⁶⁹ *Amendment of Part 74, Subpart K of the Commission's Rules and Regulations Relative to Community Antenna Television Systems*, Report and Order, 36 FCC 2d 143, 24 RR 2d 1501 at ¶ 185 (1972) ("*Cable Television Report and Order*") at ¶ 186.

⁷⁰ See 47 U.S.C. § 542.

⁷¹ *Storer*, 806 F. Supp. at 1552-53.

⁷² *Storer*, 806 F. Supp. at 1553 (quoting 47 U.S.C. § 521).

Thus, where Congress has expressly permitted LFAs to charge a franchise fee, such fees are not found to be an unreasonable restraint on commerce under the Commerce Clause as long as they are within the statutory cap. Conversely, where Congress has not expressly allowed a gross receipts assessment, or other revenue-raising fees, a local ordinance or statute imposing such a fee on an interstate communications service is subject to attack under the Commerce Clause.⁷³

The Commission has already determined that cable modem service is not cable service, but rather, an interstate information service.⁷⁴ Cable modem service is, therefore, outside the regulatory purview of Title VI of the Communications Act of 1934. Given that Congress has not granted express authority to state and local governments to impose assessments on revenues derived from interstate information services,⁷⁵ such as cable modem service, such assessments would be subject to Commerce Clause analysis under *Wonderland Ventures* rather than under *Storer*. Under *Wonderland Ventures*, a gross receipts tax on a business engaged in interstate commerce (*i.e.*, cable modem service) is an unreasonable burden on interstate commerce in violation of the Commerce Clause.⁷⁶

Congress' stated purpose in limiting franchise fees to five percent of gross revenues from the provision of cable service was to avoid unjust enrichment to cities unrelated to their authority over local rights-of-way, at cable subscribers' expense. As the legislative history to the *1984 Cable Act* indicates:

⁷³ See *Wonderland Ventures*, 423 F.2d 548; *Lamb Enterprises*, 437 F.2d 59; *Fisher's Blend Station*, 297 U.S. 650.

⁷⁴ *NPRM* at ¶¶ 7, 59.

⁷⁵ Indeed, Congress has expressly directed that state and local governments may not impose any requirements that would have the effect of restricting, prohibiting or conditioning the provision of interstate information services. See *Internet Tax Freedom Act*, *supra*, n.59, § 1101(a); Section 706.

⁷⁶ *Wonderland Ventures*, 423 F.2d at 551.

without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors. This would clearly place cable operators at a competitive disadvantage and thus be detrimental to the public.⁷⁷

In fact, a dozen years before the *1984 Cable Act* capped local franchise fees, the Commission itself recognized the need for limitations. In its original 1972 rulemaking establishing the first rules governing cable television, the FCC concluded:

While we have decided against adopting a two percent limitation on franchise fees, we believe some provision is necessary to insure reasonableness in this respect. First, many local authorities appear to have extracted high franchise fees more for revenue-raising than for regulatory purposes. Most fees are about five or six percent, but some have been known to run as high as 36 percent. The ultimate effect of any revenue-raising fee is to levy an indirect and regressive tax on cable subscribers. Second, and of great importance to the Commission, high local franchise fees may burden cable television to the extent that it will be unable to carry out its part in our national communications policy. Finally, cable systems are subject to substantial obligations under our new rules and may soon be subject to congressionally-imposed copyright payments. We are seeking to strike a balance that permits the achievement of federal goals and at the same time allows adequate revenues to defray the costs of local regulation.⁷⁸

Accordingly, the Commission generally limited cable franchise fees to three percent of gross subscriber revenues.⁷⁹ Subsequently, Congress provided for a franchise fee limit of up to five percent of gross subscriber revenues "from the operation of the cable system to provide cable services."⁸⁰ Cable operators typically pay the full five percent franchise fee in the great majority of the communities they serve. Therefore, LFAs are already fully compensated for the use of their rights-of-way by cable operators. As the Commission recognizes in the *NPRM*,

⁷⁷ S. Rep. No. 98-67, 98th Cong., 1st Sess. 25 (1983); *see also* 129 Cong. Record S8253 (June 13, 1983) (statement of Sen. Goldwater) ("The overriding purpose ... was to prevent local governments from taxing private cable operators to death as a means of raising local revenues for other concerns. This would be discriminatory and would place the private owners/operators at a disadvantage with respect to their competitors.")

⁷⁸ *Cable Television Report and Order* at ¶ 185.

⁷⁹ *Id.* at ¶ 186.

⁸⁰ 47 U.S.C. § 542(b).

cable modem service does not increase the use of public rights-of-way, since the same wires and facilities that provide cable service can be used to provide cable modem service.⁸¹ Because cable modem service places no added burdens on public rights-of-way, there is no policy basis for LFAs to reap a windfall by assessing fees, taxes or rents, whether labeled as franchise fees or otherwise, on cable operators' provision of cable modem service. As the Commission recognized 30 years ago, such efforts would be "more for revenue-raising than for regulatory purposes," and would result in "an indirect and regressive tax on cable subscribers."⁸²

Finally, the Commission seeks "comment on whether disputes regarding franchise fees based on cable modem service implicate such a national policy," and specifically, "whether it is appropriate to exercise our jurisdiction under Section 622 to resolve the issue of previously collected franchise fees based on cable modem service revenues or whether these issues are more appropriately resolved by the courts."⁸³ The Commission has exercised its authority to interpret Section 622 on numerous previous occasions.⁸⁴ The issue of liability for cable modem service-based franchise fees remitted in the past is at least as important and national in scope as the issues resolved in the FCC decisions cited above. Furthermore, unless the Commission now resolves this issue, class-action lawsuits will likely proliferate around the country.

⁸¹ *NPRM* at ¶ 102 ("Once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service.")

⁸² *Cable Television Report and Order* at ¶ 185.

⁸³ *NPRM* at ¶ 107.

⁸⁴ See, e.g., *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 FCC 2d 386, ¶¶ 27-28(1986); *Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando, Florida*, Memorandum Opinion and Order, 14 FCC Rcd 7678, ¶ 12 (1999).

Commenters believe that the Commission should resolve this issue by ruling that cable operators and LFAs are not liable for previously paid franchise fees on cable modem service revenues. Commenters' experience in a number of cable communities has been just as described by the Commission, *i.e.*, they have been exposed to potential litigation either because they collected such fees and passed them on to LFAs, or because they have now discontinued doing so, all in a good faith attempt to comply with rapidly evolving law.⁸⁵ This potential litigation could have a chilling effect on cable operators even offering cable modem service in the first place, or expanding deployment of cable modem service that they have begun. Moreover, it could place a cloud over cable operator efforts to obtain financing for the purchase of millions of cable modems and to cover other significant costs involved in offering or expanding cable modem service.

The Commission can resolve this uncertainty and ensure that cable operators are not saddled with liability by holding that its Declaratory Ruling has no retroactive effect. Given the potentially significant legal and financial uncertainty over the continued deployment of cable modem service, and Congress' clear policy to promote this service, Commenters believe that the current situation cries out for the Commission to remove the specter of litigation from the collection of fees for cable modem service that cable operators undertook in good faith compliance with federal law, their franchise agreements, and demands from LFAs.

As a further ground for resolving this issue the Commission can and should find that Section 623 of the Communications Act precludes private litigants from seeking to recover franchise fee payments collected from subscribers.⁸⁶ Section 623 and the Commission's

⁸⁵ In just the few months since Commenters discontinued payment of cable franchise fees on cable modem service revenue, they have received expressions of concern from dozens of LFAs.

⁸⁶ 47 U.S.C. § 543.

implementing rules clearly identify franchise fee payments as a component of the rate that an operator charges for monthly service.⁸⁷ Thus, as the Commission has recognized, issues arising out of or otherwise relating to a cable operator's collection of a franchise fee charge from subscribers are rate regulation issues.⁸⁸ Section 623(a)(1) states that "No Federal agency or State may regulate the rates for the provision of cable service except to the extent provided under this section and Section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section." Given that nothing in Sections 612 or 623 allows for any regulation of the rate charged for cable modem service (including any franchise fee included with or associated with that rate), a cable operator is immune from liability arising out of its collection of franchise fees on cable modem service revenues regardless of whether its classification as an information service is applied prospectively or retroactively. And even if a case could be made for a review of amounts collected as franchise fees on cable modem service under Section 623, it is clear that there is no private right of action under that section.⁸⁹

⁸⁷ See, e.g., 47 U.S.C § 543(b)(2)(C)(v) (directing FCC rules for establishing reasonableness of cable rates to take into account amounts assessed as a franchise fee); 47 C.F.R. § 76.922(f) (identifying franchise fees as a category of "external costs" whose recovery is governed by FCC rate rules).

⁸⁸ See Letter Dated September 17, 1997 from Meredith J. Jones, Chief, Cable Services Bureau, to Thomas R. Nathan, Vice President/General Counsel, Comcast Cable Communications, Inc., DA 97-1995, 13 FCC Rcd 9254 (rel. Sept. 18, 1997) (declaring that the Commission regards questions relating to the propriety of franchise fee pass-throughs as rate regulation matters).

⁸⁹ See, e.g., *Mallenbaum v. Adelpia Communications Corp.*, 74 F. 3d 465 (3d Cir. 1996) (no express or implied private right of action under section 623).

C. Consumer Protection and Customer Service

The Commission notes that franchising authorities have expressed concern that their authority to impose consumer protection requirements pursuant to Section 632 of the Communications Act would be affected if cable modem service is not classified as "cable service."⁹⁰ The Commission should allay such concerns by confirming that generally applicable consumer protection laws may apply to cable modem service, but that federal customer service standards apply only to "cable service."

Section 632(d)(1) of the Act provides that nothing in Title VI "shall be construed to prohibit any State or any franchising authority from enacting any consumer protection law, to the extent not specifically preempted by this title."⁹¹ Similarly, Section 253(b) is designed to preserve the ability of States to enact laws to "safeguard the rights of consumers," so long as any obligations are imposed "on a competitively neutral basis."⁹² Consistent with these principles, the Commission should confirm that classification of cable modem service as an information service does not affect the enforceability of State consumer protection laws of general applicability, provided they are truly applied on a "competitively neutral" basis, *i.e.*, they must be enforced equally against all high speed Internet access service providers, whether DSL, cable modem, wireless, satellite or some other technology.

Similarly, the Commission should confirm that LFAs have no authority, whether under Section 632(d)(2) or otherwise, to adopt customer service regulations specifically applicable to cable modem service and not to other intermodal providers of high speed Internet service. There can be no dispute that competition among providers of broadband high speed Internet service is

⁹⁰ *NPRM* at ¶ 108.

⁹¹ 47 U.S.C. § 552(d)(1).

⁹² 47 U.S.C. § 253(b).

fierce. The cable industry is highly motivated to provide excellent customer service in order to avoid the loss of customers to other broadband providers such as DSL, satellite, mobile or fixed wireless, powerline (electric grid) or fiber networks. Imposing customer service obligations only on cable modem service would place cable operators at a competitive disadvantage requiring them to manage inconsistent and costly regulatory schemes throughout their service areas while other broadband providers would operate free of such regulation.

Government mandated customer service standards are unnecessary since cable operators have already demonstrated excellence in customer service without burdensome regulatory intervention. Cable service, although now subject to robust and ever increasing competition, was not incubated in the same competitive environment in which cable modem service is developing. Cable operators experienced rapid growth in the late 1980s and early 1990's, placing pressure on their ability to maintain a high level of customer service performance. Without a government mandate, the cable industry adopted voluntary standards prior to the 1992 Act to establish uniformity in addressing customer service issues. Although the Commission subsequently went on to adopt more stringent standards pursuant to the 1992 Act, the FCC in its Report and Order adopting those standards recognized that, given the substantial voluntary efforts already undertaken, "the average cable system should be able to come into compliance with our standards within three months without significant industry disruption."⁹³

Cable modem service providers have recently demonstrated that existing marketplace forces result in good customer service without regulatory intervention. Even in the most difficult of circumstances such as the bankruptcy and resulting shut down of the Excite@Home high-

⁹³ See *In the Matter of Implementation of Section 8 of the Cable Television Consumer Protection And Competition Act of 1992; Consumer Protection and Customer Service*, Report and Order, 8 FCC Rcd 2892, ¶ 26 (1993).

speed Internet network on March 1, 2002, the cable industry responded with strong customer service efforts. Cable modem customers around the country experienced a smooth transition from Excite@Home to their local cable operator's own networks. For example, as reported in the January, 2001 Albuquerque Journal, most of Comcast's cable modem customers woke Saturday "without a hitch in the switch." Nonetheless, Comcast had extra staff available at the local office number answering calls within an average of 11 seconds.⁹⁴ Cox Communications meanwhile transitioned over half a million customers nationwide to its new self-managed network in less than four weeks. Although there were service issues associated with the transition, the company worked around the clock to insure a smooth transition.⁹⁵ Mediacom also launched its new high speed internet service in its transition from Excite@Home. With over 200 personnel in the Waterloo, Iowa area, Mediacom provided support for customers who needed extra assistance to implement the change-over. "For those that followed the instructions," the process was "simple and seamless."⁹⁶ Such dedication to customer service at this time in particular was essential as formidable competitors like Verizon and SBC launched stepped-up marketing drives to court customers unhappy with the Excite@Home switchover.⁹⁷

In clarifying the distinction between consumer protection and customer service, the Commission can reassure local authorities of their ability to enforce consumer protection laws

⁹⁴ Rosalie Rayburn, "Comcast Switches Users with Just a Twitch" ALBUQUERQUE JOURNAL (January 8, 2002) Page C6.

⁹⁵ "Cox Communications Transitions High Speed Internet Service Customer to New Cox – Managed Network" BUSINESS WIRE (February 11, 2002).

⁹⁶ "Waterloo, Iowa – Area Cable – Modem Service Migrates Customers from @Home" WATERLOO COURIER (February 20, 2002).

⁹⁷ "Cox Web Woes have DSL rivals courting disgruntled surfers" ORANGE COUNTY BUSINESS JOURNAL (February 4, 2002).

applicable to all Internet service providers on a non-discriminatory basis. Further, in confirming that no local customer service regulations that single out cable modem service may be adopted, the Commission's position will be supported by the cable industry's strong customer service history and recent excellent performance on behalf of cable modem service customers.

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CONCLUSION

For all of the foregoing reasons Commenters support the Commission's policymaking goal of encouraging the deployment of broadband by creating a "rational framework" for the regulation of cable modem service. This framework should rely on the market, not government regulation, to drive competition.

Respectfully submitted,

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