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BEFORE THE

Federal Communications Commission

WASHINGTON, D.C. 20554

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JUN 1 8 2002

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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 AOL TIME WARNER INC.

Steven N. Teplitz
Vice President and
Associate General Counsel
AOL Time Warner Inc.
800 Connecticut Avenue, N.W.
Washington, D.C. 20006

Aaron I. Fleischman
Arthur H. Harding
Matthew D. Emmer
Lisa Chandler Cordell
Fleischman and Walsh, LLP
1400 16th St., N.W.
Suite 600
Washington, D.C. 20036
(202) 939-7900

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SUMMARY

The Commission's Declaratory Ruling ("*Declaratory Ruling*") in this proceeding concludes that cable modem service is an interstate information service. Its Notice of Proposed Rulemaking ("*NPRM*") seeks comment on the regulatory ramifications that flow from this conclusion. The decisions ultimately reached by the Commission could have profound effects on the development and deployment of cable modem service. Accordingly, AOL Time Warner Inc. believes that, at this time, the Commission should maintain its policy of deregulation and preemption of information services generally and cable modem service in particular.

A deregulatory policy reflects Congress' clear preference, as expressed in the Telecommunications Act of 1996 ("*1996 Act*"). Section 706 of the 1996 Act directs the Commission to encourage the timely deployment of advanced telecommunications capability to all Americans by "regulatory forbearance." Similarly, Section 230 endorses a deregulatory policy to promote continued competition for Internet and other interactive computer services. Thus far, the Commission has followed these Congressional directives by forbearing from regulating cable modem services, under its policy of "vigilant restraint." This includes permitting cable operators to develop their own business plans to carry multiple Internet service providers ("ISPs"), rather than having the government dictate these requirements.

Given the Commission's finding that cable modem service is an interstate information service, the *NPRM* also seeks comment on the appropriateness of state and local regulation of this service. In particular, the NPRM asks whether local franchising authorities ("LFAs") may require cable operators to obtain additional "information service franchises;" whether LFAs may levy franchise fees on revenue derived from cable modem service; and whether LFAs may impose multiple ISP requirements on cable operators that provide cable modem service. While

cable modem services are delivered over cable systems that typically cross public rights-of-way, they are interstate information services over which the Commission has asserted federal jurisdiction. AOL Time Warner agrees with the Commission that a "patchwork of State and local regulation beyond matters of purely local concern" could impede the development of cable modem service.

Moreover, while state and local officials historically regulated certain cable services, cable modem service is different in terms of its history, its technology and its use. For example, cable television developed as a means to improve the reception of local television broadcast signals in individual communities, and the construction of cable systems entailed disruption to public streets. Thus, it may have been natural for these communities to initiate regulation of cable service through the local franchise process. However, when cable television developed national programming services, the courts and the Commission recognized the growing federal nature of the service, and adopted a dual federal-local regulatory framework. A crucial part of this approach, as expressed in the Cable Communications Policy Act of 1984 ("*1984 Cable Act*") is the preemption of state and local laws that are inconsistent with the federal policy of encouraging growth of this industry free of unnecessary and burdensome restrictions. Given the interstate nature of cable modem service and the global nature of the content carried and the facilities to which such content is delivered, as well as the *1996 Act*'s express directives to encourage the deployment of such services through regulatory forbearance, it is clear that Congress intended for the Commission first to look toward private business arrangements for the development of cable modem service, rather than state and local regulation.

With these Congressional directives in mind, AOL Time Warner agrees with the Commission that LFAs may not "impose an additional franchise on a cable operator that

provides cable modem service." Such a requirement would lead to the crazy-quilt approach that Congress recognized would stifle the roll-out of broadband services. Moreover, while cable franchises are based on cable systems' use of public rights-of-way, existing franchises already address this impact. Cable modem service is provided over the same plant as cable television services, thus it does not entail additional burdens to public rights-of-way. For this reason, there is also no justification to impose additional franchise fees on revenues from cable modem service. As the Commission recognized thirty years ago when capping franchise fees on cable service, such fees, if not directly related to additional impact from the use of public rights-of-way, would merely be a revenue enhancement tool for cities and a regressive tax on consumers, who would end up paying higher rates to cover such fees.

Likewise, it would be premature to impose a multiple ISP obligation on cable operators. As the first cable operator to develop and implement a multiple ISP policy, AOL Time Warner knows first-hand the consumer benefits that flow from this model. Time Warner Cable provides a choice of at least three national ISPs to consumers in 35 of its 39 divisions, with the remainder to have this choice in the coming weeks. Time Warner Cable has also entered into numerous additional agreements with national and regional ISPs. As a result of AOL Time Warner's groundbreaking efforts, other cable operators and ISPs have just begun to follow suit, which we are hopeful will result in an expanding, dynamic industry sector.

In addition to these clear policy reasons not to adopt the local forms of regulation addressed in the *NPRM* at this time, each of these forms of regulation would be preempted by federal law. Already, in the wake of the Commission's *Declaratory Ruling*, some LFAs have taken the position that cable operators must obtain an additional franchise before they may provide cable modem service. However, Section 621(a)(2) of the Communications Act (the

"*Act*") provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." Thus, federal law does not give LFAs the authority to regulate the content that is delivered over cable systems. Since cable modem service is delivered over the cable system, whose construction has already been authorized by the cable franchise, no additional franchise is necessary to provide these non-local services. Furthermore, Section 624 preempts such attempts to regulate the services provided by the cable operator, especially where, as here, cable modem service has been found to be an interstate service. In any event, the Commission has expressly preempted state regulation of information services. Additionally, a state law ban on providing cable modem service without a separate franchise would violate Dormant Commerce Clause principles, as well as the First Amendment.

AOL Time Warner also agrees with the Commission that, in the wake of its finding that cable modem service is an information service, "revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined." In the *1996 Act*, Congress added language to Section 622(b) of the *Act* (which governs franchise fees) to clarify that any revenue from telecommunications or other non-cable services would be free from franchise fees. Therefore, LFAs may not impose franchise fees with respect to revenue derived from cable modem service. In addition to Title VI, the Internet Tax Freedom Act, which places a moratorium on Internet access taxes, also prohibits such fees.

The Commission should also make clear that cable operators cannot be required to repay subscribers franchise fees collected prior to the *Declaratory Ruling*. The Commission recognizes that, prior to this ruling, such fees were sometimes collected because both cable operators and LFAs believed in good faith that cable modem service was a "cable service." At minimum, the Commission should determine that its *Declaratory Ruling* has no retroactive

effect. This would be consistent with past Commission practice and judicial interpretations of past Commission decisions.

Additionally, a multiple ISP requirement would run afoul of numerous sections in Title VI, including Sections 624(a), 624(b), and 621(b)(3)(D). These Sections are designed to prohibit LFAs from regulating the services provided by a cable operator; from establishing requirements for information services, and from requiring that cable operators establish common carrier platforms to provide telecommunications services. Such a requirement would also run afoul of the First and Fifth Amendments to the U.S. Constitution.

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COMMENTS OF AOL TIME WARNER INC.

AOL Time Warner Inc., by its attorneys, submits these comments in response to the Commission's Notice of Proposed Rulemaking[1] in this proceeding regarding the appropriate regulatory treatment for broadband access to the Internet over cable facilities, commonly referred to as "cable modem service." AOL Time Warner's businesses include interactive services, cable systems, publishing, music, networks and filmed entertainment. In particular, Time Warner Cable is an industry leader in the provision of cable modem service, and the first cable multiple system operator ("MSO") voluntarily to adopt a policy designed to offer consumers a choice among multiple Internet service providers ("ISPs") in the provision of cable modem service.[2]

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[1] Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Declaratory Ruling*" or "*NPRM*").

[2] *See* Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000).

I. REGULATION OF CABLE MODEM SERVICE SHOULD BE KEPT TO A MINIMUM.

A. Federal Regulation.

This proceeding provides a timely opportunity for the Commission to reinforce its longstanding federal deregulatory stance towards information services generally and cable modem service in particular. In the *NPRM*, the Commission indicates its desire to create a "rational framework" for the regulation of cable modem services that is pro-deployment and pro-innovation.[3] 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"[4] 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.'"[5] In this atmosphere and in response to competition, cable operators have and are continuing to offer their customers a wide variety of digital, broadband services, and in Time Warner Cable service areas, a choice among multiple ISPs for the provision of cable modem service. This success demonstrates that competitive forces, not government regulation, should be the engine that shapes the deployment of cable modem services.

A policy of regulatory restraint with respect to cable modem service is entirely consistent with Congressional pronouncements on deployment of broadband services. Congress has indicated in the clearest of terms that encouraging the penetration of broadband is a national priority, and thus the Commission must consider ways to reduce, not expand the regulatory

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[3] *See NPRM* ¶ 6.

[4] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 ¶ 3 (2002) ("*Wireline Broadband NPRM*").

[5] *NPRM* ¶ 5 (citing *Wireline Broadband NPRM* at ¶ 5).

burdens that may hamper its growth. 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] The *1996 Act* also added Section 230(a) to the Communications Act of 1934,[7] which expressly endorses the "rapidly growing array of Internet and other interactive computer services."[8] Similarly, Section 230(b)(2) of the Act establishes federal policy "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."[9] 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."[10]

To date, the Commission has correctly taken a position that, to the extent it has regulatory authority with respect to cable modem service, it would be premature for it to exercise that authority. In 1999, the Cable Services Bureau conducted the first Commission review of the development of cable modem service and other broadband Internet services and concluded that a policy of "vigilant restraint" was the preferred approach to foster the rapid competitive

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[6] Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706 (1996), 110 Stat. 56, 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706").

[7] 47 U.S.C. § 151 *et. seq.* (the "Act").

[8] 47 U.S.C. § 230(a).

[9] 47 U.S.C. § 230(b)(2).

[10] *NPRM* ¶ 5.

deployment of cable modem services.[11] The Bureau rejected calls to impose a multiple ISP requirement:

> The notion of applying prophylactic "open access" measures – whether they be in the form of Title II, Title VI, or more simple unbundling regulations – before fuller development of the broadband industry would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry. The market is the only force, at this stage, that is sufficiently dynamic and informed to create a competitive broadband marketplace.[12]

The Bureau noted that a multiple ISP requirement dictated by the government rather than the marketplace would almost certainly have significant adverse effects on deployment of cable modem services:

> While we are not persuaded necessarily that cable operators would halt their nationwide broadband deployment in the face of a mandated access requirement, there is a significant and credible risk that rapid deployment of these services to all Americans would be greatly compromised.[13]

In light of such concerns, the Commission has not veered from its policy of "vigilant restraint,"[14] a policy that continues to this day. In the absence of regulation, while investment in and deployment of broadband facilities and services have flourished, only Time Warner Cable has taken meaningful steps to offer consumers a choice of multiple ISPs company-wide.

Now that the Commission has determined cable modem service to be an "information service," this policy of "vigilant restraint" coalesces with the Commission's thirty-year-old

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[11] *See* "Broadband Today," A Staff Report to Chairman William E. Kennard, by the Cable Services Bureau, Federal Communications Commission, Oct. 1999, at 15.

[12] *Id.* at 44.

[13] *Id.* at 45.

[14] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816 (2000) (Statement of Chairman William E. Kennard)(asserting his continued support for "vigilant restraint" relating to the imposition of an "open access" requirement with respect to cable modem service).

policy of non-regulation of information services.[15] This policy of restraint has undoubtedly led to the explosive growth of a myriad of information processing and delivery services, most significantly the phenomenal growth of the Internet.

In the *1996 Act*, Congress indicated its strong support for the Commission's long-standing policies regarding the unregulated nature of information services. *First*, it codified the basic concepts underlying the definition of "enhanced services" in the new defined term "information services."[16] Significantly, despite this new definition, nothing in the *1996 Act* indicated any Congressional intent whatsoever to overrule the Commission's deregulatory approach to enhanced/information services or to impose a new regulatory regime on such services. *Second*, as mentioned above, it set forth in Section 230 an express federal policy that Internet services should be left unregulated in order that deployment and innovation not be hampered.

The Commission has correctly interpreted the *1996 Act* to reinforce the unregulated treatment of such services. For example, it properly 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

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[15] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 ¶¶ 113-114 (1980); *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 207 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 104 FCC 2d 958, ¶ 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.").

[16] 47 U.S.C. § 153(20). ("Information service" is defined as "the offering of a capability for 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.").

definition of "information services."[17] 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.[18] Finally, it reiterated that service provided by ISPs is "interstate" in nature, reinforcing that federal and not state policies should guide the development of such services, including cable modem service.[19] Indeed, it is well settled that the Commission has primary and exclusive jurisdiction over all interstate communications.[20] All of these actions reinforce the long-standing wisdom of keeping the Internet substantially unregulated.

In any event, additional regulation of cable modem service is not presently warranted. The Commission's own data and analysis fail to demonstrate that a marketplace failure has occurred that would warrant the imposition of new regulations imposing a multiple ISP requirement on cable operators at this time. In the most recent Section 706 report, the Commission analyzed the current state of competition in the broadband Internet service arena.[21]

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[17] *See 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).

[18] *See, e.g., Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers*, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, ¶ 282 (1996).

[19] *See NPRM* ¶ 59 (citing *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, ¶ 52 (2001)).

[20] *Federal-State Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 836 (1997) (Section 2(a) of the Act "grants the Commission sole jurisdiction over interstate and foreign communications"); *Petitions of MCI Telecommunications & GTE Sprint Communications Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 270, ¶ 23 (1986) (noting that the Commission has "exclusive jurisdiction over interstate communications").

[21] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such*

According to the Commission's 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.[22] The current state of high-speed Internet access service is obviously one of robust competition, diverse technologies and innovation. These findings, consistent with the findings in the previous two Section 706 reports, are a testament to the strength and resiliency of facilities-based competition in the provision of high-speed Internet access service, and indicate that a continuation of the policy of "vigilant restraint" is the appropriate approach for now.

B. State and Local Regulation.

The *NPRM* notes that while the Commission has classified cable modem service as an interstate information service subject to federal jurisdiction, it is provided over cable system facilities that occupy local rights-of-way.[23] Expressing concern that a "patchwork of State and local regulations beyond matters of purely local concern" could impede the development of cable modem service,[24] the *NPRM* requests comment on what aspects of the service, if any, should be subject to regulation by state and/or local regulatory authorities.[25]

The Commission is to be commended both for acknowledging its concern about the threat that state and local cable modem service regulation poses to the national policy goal of

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(footnote continued)
Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, Third Report, 17 FCC Rcd 2844 (2002) ("*Third Section 706 Report*").

[22] *Id.* at ¶¶ 1, 61, 89-90, 99.

[23] *NPRM* ¶ 96.

[24] *Id.* ¶ 97.

[25] *Id.* ¶¶ 98 - 108.

rapid deployment of high-speed broadband facilities and for laying, through its classification of cable modem service as an interstate information service, a solid foundation for keeping such regulation within proper bounds. In particular, AOL Time Warner urges the Commission to expressly declare, as a general policy matter, that simply because state and local officials historically have exercised regulatory jurisdiction with regard to certain aspects of the cable television business, this does not lead to the conclusion that it would be appropriate or desirable for state and local governments to exercise a similar level of regulatory authority over cable modem service. Rather, as a review of the development of nonfederal jurisdiction over cable systems indicates, a bright line distinction can and should be drawn between traditional cable services and cable modem service when it comes to defining the scope of state and local regulatory authority.

The role traditionally played by local governments in regulating cable television systems is a by-product of cable television's origins as a fundamentally local service that was designed principally to improve the reception of over-the-air broadcast signals. Thus, local cable regulation developed in a highly insular fashion through the award of franchises on a community-by-community basis. Indeed, what we now call "cable television" initially was known as "community antenna television service" or "CATV."

Local officials justified their regulation of early CATV systems on the grounds that the stringing of wires from the system's reception equipment to individual homes required the construction of facilities that use public rights-of-way. However, as the number of systems grew, the FCC recognized that the operation of these facilities was not exclusively a matter of

local concern. In particular, the FCC invoked (and the United States Supreme Court upheld) its jurisdiction to adopt federal cable regulations.[26]

By the early 1970's, local regulation of CATV facilities had expanded well beyond matters directly impacting on the use of public rights-of-way. Concerned about the adverse effects of this regulatory evolution, the FCC formally delineated the federal and nonfederal areas of regulatory authority in 1972, announcing a policy of "deliberately structured dualism."[27] This policy recognized that the development of cable television was an issue of national concern requiring federal oversight and, with respect to certain matters, federal preemption.

Generally speaking, the dividing line that the Commission established between the nonfederal and federal areas of regulatory authority "rest[ed] on the distinction between reasonable regulations regarding use of the streets and rights-of-way and the regulation of the operational aspects of cable communications."[28] Thus, for example, regulation of technical standards, signal carriage, and non-basic cable rates all fell within the FCC's exclusive jurisdiction. Moreover, even matters that were closely related to the use of public rights-of-way, such as the establishment of construction build-out schedules, franchise fee payments, and franchise term duration, were made subject to federal guidelines and standards that restricted the discretion of nonfederal officials, thereby promoting regulatory uniformity and predictability.

The *1984 Cable Act*[29] essentially codified the Commission's determination that the regulatory stability and certainty needed to encourage the growth and development of cable

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[26] *See U.S. v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[27] *See Cable Television Report and Order*, 36 FCC 2d 143, ¶¶ 177-188 (1972).

[28] *Duplicative and Excessive Over-Regulation of Cable Television*, 54 FCC 2d 855, ¶ 21 (1975).

[29] Cable Communications Policy Act of 1984 ("*1984 Cable Act*" or "*1984 Act*"), Pub. L. 98-549, 98 Stat. 2780 (amending the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*).

television was dependent on the articulation of a national policy framework that delineated the proper scope of federal and nonfederal regulatory jurisdiction. To this end, the legislative history accompanying the *1984 Cable Act* expresses, as one of the primary goals of the legislation, the objective of encouraging the "growth and development of cable systems,"[30] free of unnecessary and burdensome restrictions imposed by state and local authorities, while the legislation itself provides that "any provision of law of any State, political subdivision, agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded."[31]

The success of the clear articulation of a preemptive policy with respect to most state and local regulation of traditional cable service was immediate and obvious. Over the decade following the enactment of the *1984 Cable Act*, cable television systems became ubiquitous and achieved the financial stability necessary to drive development of an unparalleled diversity of video programming choices for consumers. While the *1984 Act* has been amended from time to time, the fundamental policy objective of minimizing and rationalizing the role of state and local governments has not been substantially altered.

The historical evolution of the roles played by federal and nonfederal authorities in regulating traditional cable systems is significant not only because it points up the paramount importance of avoiding a patchwork of local regulation that would impede the development of cable modem service, but also because it highlights the fact that to whatever extent some degree of local regulation may remain appropriate with respect to certain aspects of traditional cable

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[30] H.R. REP. NO. 98-934, at 40 (1984).

[31] 47 U.S.C. § 556(c). In including this provision in the *1984 Cable Act*, it was Congress' intent to make it clear that the exercise of nonfederal regulatory authority with respect to cable television must not conflict with the federal policy of minimally regulating cable service. *See* Cable Telecommunications Act of 1983, S. REP. NO. 98-67, at 30 (1983).

service, a distinction must be drawn as to the exercise of state and local authority over any operational aspect of cable modem service.

The principal reason that drawing such a distinction is appropriate is that the regulation of cable television by state and/or local officials today is largely a legacy of cable's origins as a locally-oriented service. For example, state and local officials continue to have the authority to select one or more franchisees based on *local* needs and interests, to renew cable franchises in accordance with federal standards, to enforce *local* customer service (albeit subject to federal guidelines) and to regulate basic (*i.e., local* broadcast retransmission service) service rates.[32]

In contrast, unlike traditional, locally-oriented cable service, cable modem service is an integral component in a global network of networks. Neither the facilities over which it is delivered nor the content to which it provides access are limited to a particular community. While traditional cable television regulation originated during an era in which most cable systems were "mom and pop" operations offering simple services to limited geographic areas with no need for interconnection or technically compatible facilities, the cable industry of the 21st century is characterized by technologically sophisticated MSOs that utilize multi-state marketing strategies in providing cable modem service (as well as, in many cases, telephony) to large, interconnected clusters of communities that cross numerous political subdivisions.[33]

It thus is a certainty that a patchwork of varying and inconsistent regulations adopted at the state or local level with respect to operational aspects of cable modem service will impede

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[32] *See, e.g.,* 47 U.S.C. §§ 531, 546, 552, 543.

[33] As the Commission has repeatedly noted in its annual video competition reports, "[b]y clustering their systems, cable operators may be able to achieve efficiencies that facilitate the provision of cable and other services, such as telephony." *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 FCC Rcd 1244, ¶ 14 (2002).

the development and deployment of that service, just as, say, inconsistent regulation of trucks can severely impede interstate trucking.[34] And it is clear that, particularly in light of the Congressional 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,"[35] the Commission should follow the example of the *1984 Cable Act* by insulating cable modem service from unnecessary state and local regulation. A uniform, national approach to cable modem service will best ensure that the Commission will accomplish its policy objectives with regard to the development and deployment of high-speed Internet services. As observed by then-Commissioner Powell, if "a contagion of different approaches proliferate throughout the country we will end up with an incoherent, disjointed policy mélange that seems sure to impede the development of advance services, in any form, for our citizens. Such concerns underlie the Constitutional commitment to interstate commerce and the federal supremacy clause."[36]

II. THERE IS NO VALID POLICY BASIS FOR PERMITTING LFAs TO ENGAGE IN ANY OF THE SPECIFIC FORMS OF REGULATION ADDRESSED IN THE *NPRM*.

The *NPRM* invites comment on three major forms of local regulation: it asks whether LFAs may demand that cable operators obtain additional "information service franchises"; whether LFAs may levy franchise fees on revenue derived from cable modem service; and

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[34] *Cf. Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 529 (1959) (holding that state statute violated dormant Commerce Clause where it would have required a kind of mud flap that was "out of line with the requirements of almost all the other States").

[35] 47 U.S.C. § 230(b)(2).

[36] Remarks by Commissioner Michael K. Powell, Before the Federal Communications Bar Association, Chicago Chapter (June 15, 1999).

whether LFAs may impose multiple ISP requirements. In each of these specific areas, additional LFA regulation could stifle the further penetration of broadband service. The Commission should not permit it.

A. There Is No Valid Policy Basis for Permitting LFAs To Require Cable Operators To Obtain Additional Information Service Franchises.

The *NPRM* invites comment on the Commission's tentative conclusion that LFAs may not "impose an additional franchise on a cable operator that provides cable modem service."[37] That conclusion reflects sound policy. Allowing LFAs to require cable operators to obtain new franchises as a condition for being allowed to provide cable modem service would open the floodgates to all kinds of onerous and disparate regulation. As the current experience with video shows, the franchising process is often used by LFAs to engage in broad-ranging regulation, limited only by the *1984 Cable Act*. Thus, allowing LFAs to demand franchises for information services would likely result in broad-ranging regulation that might differ in each locality — precisely the kind of crazy-quilt approach that might stifle the continuing roll-out of broadband service.[38]

Besides, there is no policy rationale for allowing LFAs to demand that cable operators enter into information service franchises. Franchising of cable television systems has traditionally had its policy rationale in cable systems' use of public rights-of-way.[39] Plainly,

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[37] *NPRM* ¶ 102.

[38] *See NPRM* ¶ 97 ("We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries.").

[39] *See, e.g.*, *Entertainment Connections, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 14277, ¶ 52 (1998) ("[T]he cable franchise requirement of Section 621(b) is inextricably linked to the use of public rights-of-way.").

LFAs have legitimate interests in guaranteeing public safety and limiting annoyance to the citizenry when cable operators, telephone companies, and electric utilities dig up the streets or string wires on poles. But existing cable television franchise agreements already safeguard those interests. Cable television franchise agreements typically require that cable operators as much as possible place cable plant underground, that they notify residents and obtain permits before breaking the streets, and that they generally conduct their business in such a way as to minimize disruption.[40] Thus, there is no sensible reason for an additional franchise.

That is particularly true because the addition of cable modem service to a cable operator's offerings does not in any way implicate LFAs' interests in management of public rights-of-way. Because cable modem service is provided over precisely the same plant as cable television service, there is no additional burden on public rights-of-way. It is true that, to provide cable modem service, cable operators must install additional equipment — including Cable Modem Termination Systems ("CMTSs"), servers, and routers.[41] But all that equipment is housed on privately owned real estate at the cable operator's headend and the ISP's data center.[42] Thus, the

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[40]For example, Time Warner Cable's franchise agreement with New York City provides that, "[i]n connection with the construction, operation, maintenance, repair, upgrade, or removal of the System, [Time Warner Cable] shall not obstruct the Streets, subways, railways, passenger travel, river navigation, or other traffic to, from, or within the District without the prior consent of appropriate authorities." Cable Television Franchise Agreement for the Borough of Manhattan, § 6.7. The agreement also requires that, where existing public utility plant is underground, Time Warner Cable too "shall install its cable underground." *Id.*, App. B. Similarly, Time Warner Cable's franchise agreement with Austin, Texas, provides that Time Warner Cable "shall place certain facilities underground according to applicable City Requirements," that all "excavations and other construction in the Public Rights-of-Way shall be performed in accordance with all applicable City Requirements," and that all construction "shall be undertaken so as to minimize interference with the use of public and private property." Ordinance No. 960613-A, §§ 8.1-8.3.

[41]*See Declaratory Ruling* ¶ 13.

[42]*See id.*

only added "burden" on public rights-of-way consists of the additional electromagnetic waves that are transmitted over already existing cable wires. That "burden" does not implicate any legitimate interests in management of public rights-of-way.[43]

B. There Is No Valid Policy Basis for Permitting LFAs To Levy Franchise Fees with Respect to Revenue Derived from Cable Modem Service.

Franchise fees have an effect similar to the sin taxes that governments impose on alcohol and cigarettes. Sin taxes are intended to decrease consumption of products that have negative externalities — say, drunk-driving accidents and costs related to treatment of cancer patients. But the consumption of broadband service has positive externalities. Quite apart from positive *network* externalities,[44] it is widely believed that the penetration of broadband will spur

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[43]*Cf. Bell Atlantic-Maryland, Inc. v. Price George's County*, 49 F. Supp. 2d 805, 820 (D. Md. 1999) ("consistent with [47 U.S.C. § 253(c)], the County may not require telecommunications companies which provide telecommunications services through lines and facilities owned by others to obtain a franchise") *vacated and remanded on other grounds*, 212 F.3d 863 (4th Cir. 2002), *on remand*, 155 F. Supp. 2d 465, 477 (D. Md. 2001) ("[T]he County already has a series of regulations in place by which it maintains the safety of its rights of way. That system is further evidence that the new ordinance is properly construed as an attempt to regulate the telecommunications companies."); *AT&T Communications of Southwest, Inc. v. City of Austin*, 40 F. Supp. 2d 852, 855-56 (W.D. Tex. 1998) (holding that 47 U.S.C. § 253 pre-empted ordinance requiring CLEC providing service over unbundled network elements to obtain franchise separate from ILEC's because, although CLEC "transmit[ted] signals consisting of electrons and lightwaves" over ILEC's wires, it did not "erect telephone poles or dig holes in the City's streets"), *vacated as moot*, 235 F.3d 241 (5th Cir. 2000); *AT&T Communications of Southwest, Inc. v. City of Austin*, 975 F. Supp. 928, 941 (W.D. Tex. 1997) ("The City's only legitimate interest under federal and Texas law is to regulate its public rights-of-way, an interest that is in no way implicated by AT&T's activities in Austin.").

[44]*See Federal-State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, ¶ 8 (1997) ("*Universal Service Order*") ("At the simplest level, increasing the number of people connected . . . makes the network more valuable to all of its users by increasing its usefulness to them.").

beneficial economic activity in a more general sense.[45] Thus, there is no justification for any special exactions on broadband service. If anything, consumption of broadband service should be encouraged by lightening its burden.[46]

That cable modem service is provided over cable television systems does not point to a different result. LFAs were permitted to impose special fees on cable television service for historically sensible reasons. First the Commission and later Congress permitted (but capped) franchise fees as a nod to pre-existing reality: LFAs had for some time been imposing such fees before federal regulators arrived on the scene.[47] Even so, the Commission acknowledged that, insofar as franchise fees exceeded the cost of the use of public rights-of-way, "[t]he ultimate effect" was "to levy an indirect and regressive tax on cable subscribers" and possibly to "burden cable television to the extent that it will be unable to carry out its part in our national

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[45]*See, e.g., Bush Points to FCC for Broadband Policy*, COMMUNICATIONS DAILY, June 14, 2002, at 1-2 ("President Bush . . . said 'this country must be aggressive about the expansion of broadband'" and the Commission must "'understand the true economic vitality that will occur when broadband is more fully accessible'"); John Gallant, *AT&T Broadband Joins Debate*, NETWORK WORLD, May 27, 2002 ("Broadband access is one of the most important issues facing the U.S. today. Affordable, widely available broadband would go far in re-energizing the growth of the economy and spur the development of many new applications — from conferencing to entertainment."); *Over 29 Million In United States Access Internet With High-Speed Connection As Kanakaris Wireless Expands Online Movie Delivery*, BUSINESS WIRE, Mar. 20, 2002 ("[T]he widespread rollout of broadband Internet is considered vital to the U.S. economic recovery.").

[46]*Cf. Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium on Non-Federal Standards*, Clarification of the Cable Television Rules and Notice of Proposed Rulemaking and Inquiry, 46 F.C.C.2d 175, ¶ 96 (1974) (exempting premium and pay-per-view services from pre-1*984 Cable Act* franchise fees in order to promote such services' growth).

[47]*See Amendment of Part 74, Subpart K, of the Commission's Rules and Regulations Relative to Community Antenna Television Systems; and Inquiry Into the Development of Communications Technology and Services to Formulate Regulatory Policy and Rulemaking and/or Legislative Proposals,* Cable Television Report and Order, 36 F.C.C.2d 143, ¶ 185 (1972).

communications policy."[48] It makes no sense to allow impositions with such effect to spread into an entirely new area, particularly when this might stunt the growth of an economically vital resource.

C. There Is Currently No Valid Policy Basis For Imposition Of A Multiple ISP Obligation By Any Level Of Government.

1. Abandoning the Commission's marketplace approach to achieve multiple ISP choice on cable systems would be premature.

As explained above, thus far, the Commission's policy of "vigilant restraint" with respect to the development of cable modem service has yielded positive benefits. For example, in its *Third Section 706 Report*, the Commission again concluded generally that "advanced telecommunications is being deployed to all Americans in a reasonable and timely manner."[49] More specifically, the Commission estimated that, as of December 31, 2001, cable modem service was available to 77.5 million households, and that 94% of the nation's population will soon have access to a broadband wireline service (cable modem or DSL).[50]

In particular, there are signs that an unfettered marketplace approach will lead to the accomplishment of the Commission's salutary goal of providing consumers with a choice among multiple ISPs for the receipt of high-speed Internet service via cable systems. Following Time Warner Cable's groundbreaking lead, we are hopeful that other cable MSOs will respond to evidence that multiple ISP choice makes cable modem service more attractive to consumers. For example, with multiple ISPs offering cable modem service to consumers in connection with the same cable system, each ISP has an incentive to differentiate itself, *e.g.*, by offering different

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[48] *Id.*

[49] *Third Section 706 Report* at ¶ 1.

[50] *Id.* at ¶¶ 61, 65.