features and price points. Moreover, with multiple ISPs, each will devote efforts and resources to the marketing and branding of their respective offerings, thereby raising consumer awareness of the advantages of cable modem service generally.[51]

In short, as cable operators fully appreciate from their video programming business, consumers like choice. The developing array of options for the receipt of high-speed Internet service, both in terms of intermodal providers (cable modem, DSL, satellite, wireless, etc.), as well as the growing availability multiple ISPs competing on an intramodal basis, gives consumers higher overall satisfaction levels.

Similarly, multiple ISP choice has been embraced by ISPs. Time Warner Cable is gratified by the number of both national and regional ISPs that have been willing to engage in marketplace negotiations designed to arrive at mutually beneficial arrangements for the provision of high-speed Internet service in partnership with a wide variety of cable systems operated by Time Warner Cable. Indeed, it has become apparent that ISPs are anxious to diversify their offerings to include both broadband and narrowband options over a variety of intermodal platforms. Moreover, ISPs have little history of or familiarity with local regulation. Their practices and business plans are typically uniform on a national or regional basis. It would be difficult, if not impossible, for ISPs to build business plans against the backdrop of rules that differ in every locality. If competitive conditions ever warrant imposition of a multiple ISP requirement, it is a matter that demands national uniformity through FCC action.

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[51] Many have suggested that any perceived "delay" in broadband deployment is more an issue of consumer demand than of supply. For example, Chairman Powell has cited statistics estimating broadband availability of almost 85%, compared to household subscription of 12%, as evidence of a "demand gap." Remarks of Chairman Michael K. Powell, National Summit on Broadband Deployment (Oct. 25, 2001).

The Commission's marketplace approach to cable modem service also has the advantage of allowing for arms-length negotiations to achieve particularized commercial arrangements that are tailored to the unique needs and goals of each individual ISP and cable operator. In particular, following the announcement of the merger of America Online, Inc. ("AOL") and Time Warner Inc., and before any regulatory conditions were agreed to in connection with it, AOL and Time Warner Cable developed a new business model for the offering of multiple ISPs on cable systems. That model, described below, is designed to meet the business needs of ISPs as well as cable operators, while also serving the needs of consumers. Significantly, the business model developed by Time Warner Cable does not involve separate transport and content components provided by the cable operator and ISP, respectively, just as Time Warner Cable's affiliation agreements with video programmers do not involve separate transport and content components.[52] Rather, a multiple ISP approach to cable modem service involves a seamless product developed and offered jointly by the cable operator and ISP.[53]

The proper analogy here is not that of the ISP and the ILEC in the DSL context. Rather, the more apt analogy is that of the pay cable service and the cable operator. In the earlier days of cable's development, when the average system channel capacity was between 12-36 channels,

[52]The Commission correctly concludes that "neither AOL Time Warner nor any ISP is offering subscribers a separate telecommunications service," *NPRM* ¶ 53, but finds that the record does not contain sufficient facts to determine whether Time Warner Cable might be providing "telecommunications" to ISPs, albeit on a private carrier basis. *NPRM* ¶54. Time Warner Cable does not offer "transport," even on a private carrier basis, to any ISP in connection with the provision of cable modem service from the cable headend to the consumer, just as it does not provide "transport" to the video programming services carried on its systems.

[53] The Commission has recognized this fact. *See NPRM* ¶¶38-39 ("As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering. Cable modem service is not itself and does not include an offering of telecommunications service to subscribers.").

cable operators typically offered only one pay cable service, often a service that shared common ownership with the cable operator. Conventional wisdom was that additional pay cable service would simply "cannibalize" subscribers away from the operator's existing premium offering. However, as channel capacity expanded, operators began to offer multiple pay services. These services sought to differentiate themselves, *e.g.*, through exclusive windows for feature films and creation of original programming. Pay services and cable operators both stepped up their marketing campaigns, raising consumer awareness of particular brands and pay cable service generally. The result was a classic case of "expanding the pie" -- rather than simply taking customers from the existing pay service, the introduction of multiple premium service offerings caused the entire category to grow. Indeed, Time Warner Cable's overall pay cable subscribership has continued to climb with the availability of multiple premium service offerings. And because the pay service/cable operator financial relationship is based on a revenue sharing model, each party has strong incentives to strive for continued growth and customer satisfaction.

Under Time Warner Cable's multiple ISP business model, which is now being implemented on its cable systems, the ISP and the cable operator together offer an integrated Internet service to consumers and both retain a direct interest in providing the service to the customer. Just as the cable industry recognized over time that pay programmers could differentiate themselves from one another so that consumers would want a choice of pay services on their cable systems, so too has Time Warner Cable recognized that ISPs have differentiated their offerings such that there is consumer demand for multiple ISPs on their cable systems. In fact, Time Warner Cable's experience with multiple ISP offerings thus far bears this out. As noted by Time Warner Cable Ventures President and CEO Christopher Bogart, offering multiple

"ISPs has boosted Time Warner Cable's broadband Internet subscriber additions 20 to 25 percent in initial launch markets without cannibalizing subscriptions to its own Road Runner Internet service."[54]

The most important characteristic of the Time Warner Cable multiple ISP business model is that both Time Warner Cable and the ISP retain a direct interest in each customer's account and share in the economics of each customer pursuant to individually negotiated affiliation agreements between Time Warner Cable and the ISP, just as Time Warner Cable does with its pay programmers. This direct financial interest ensures that both parties are strongly motivated to ensure that customers receive quality service when obtaining their ISP service over Time Warner Cable's systems. And unlike arrangements such as DSL, where telephone companies sell wholesale transport to ISPs, Time Warner Cable's multiple ISP business model is structured so that both Time Warner Cable and the ISP take full responsibility for the service customers receive.[55]

Another important aspect of this model is that both Time Warner Cable and the ISP can sell directly to customers. When Time Warner Cable is the selling party, it sets the price. When the ISP is the selling party, it does so. This system benefits consumers because it provides more information about ISP choices and pricing options than would be the case if only one party were the retailer. When customers call Time Warner Cable, they learn about the variety of ISPs available over Time Warner Cable's systems, thereby fostering intramodal competition. When

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[54] *See Time Warner Cable Touts Multi-ISP Upside: MSO Executive Says Early Deployments Boost Cable Modem Subscriber Additions Up to 25 Percent,* CABLE DATACOM NEWS, May 1, 2002, located at http://www.cabledatacomnews.com/cgi-bin/printer.cgi (last visited June 12, 2002).

[55] As the Commission correctly recognizes, this business model "represents a cooperative arrangement between AOL Time Warner and the ISP." *NPRM* ¶ 53.

they call the ISP, they learn about the variety of platforms that the ISP uses to make its services available, including both broadband and narrowband alternatives, thereby fostering intermodal competition.

Time Warner Cable is putting its reputation on the line with every ISP its sells, both in the case of affiliated ISPs like AOL, and unaffiliated ones like EarthLink. Time Warner Cable knows that if customers are dissatisfied with EarthLink as delivered on Time Warner Cable's systems, they will most likely conclude that cable modem service has not met their expectations, and switch to another platform, like DSL, rather than another ISP offered on Time Warner Cable's systems. Accordingly, Time Warner Cable has every incentive to ensure its cable modem subscribers have a positive experience, whether the ISP is affiliated or unaffiliated. As a result, Time Warner Cable believes that consumers are the primary beneficiaries of its partnering model.

2. A marketplace solution is preferable to a multiple ISP regulatory mandate.

So long as the Commission's "vigilant restraint" policy results in meaningful progress towards the goal of multiple ISP choice for consumers, regulatory intervention would be unnecessary. In particular, Time Warner Cable remains fully committed to providing its cable consumers with a choice of affiliated and unaffiliated ISPs. Today, Time Warner Cable provides consumers in 35 of its 39 divisions with a choice of at least three national ISP services: America Online, Road Runner, and EarthLink. Time Warner Cable plans to launch its national multiple ISP offering in three additional divisions this week, and in the final division next week. Thus, Time Warner Cable anticipates that this roll-out will be completed company-wide wherever high-speed Internet services are available by the end of this month.

Time Warner Cable has also entered into additional agreements with national and regional ISPs, which will allow its cable systems to offer consumers additional ISP choice in each division. These include:

- An agreement with Inter.net US Ltd. for the provision of ISP service on Time Warner Cable systems nationwide;
- An agreement with Big Net Holdings, Inc. for the provision of ISP service on Time Warner Cable systems nationwide;
- An agreement with New York Connect.Net Ltd. for the provision of ISP service on Time Warner Cable systems in New York, NY;
- An agreement with Internet Junction Corp. for the provision of ISP service on Time Warner Cable systems in its Tampa Bay and Central Florida Divisions;
- An agreement with LocalNet Corp. for the provision of ISP service on Time Warner Cable systems in its Albany, Binghamton, Liberty, Rochester and Syracuse, NY Divisions;
- An agreement with West Central Ohio Internet Link, LLC for the provision of ISP service on Time Warner Cable systems in its Cincinnati, Columbus, Northeast Ohio and Western Ohio Divisions;
- An agreement with its Global Systems, Inc. for the provision of ISP service on Time Warner Cable systems in its Charlotte, Greensboro and Raleigh, NC, and South Carolina Divisions;
- An agreement with Digital Communications Networks Inc. for the provision of ISP service on Time Warner Cable systems in its Los Angeles, CA Division;
- An agreement with Athena Services, Inc. for the provision of ISP service on Time Warner Cable systems in Milwaukee, Appleton and Green Bay, WI;
- An agreement with Web One, Inc. for the provision of ISP service on Time Warner Cable systems in its Kansas City Division;
- An agreement with Internet Nebraska Corp. for the provision of ISP service on Time Warner Cable systems in its Lincoln, NE Division;
- An agreement with DURO Communications Corp. d/b/a Volaris Online for the provision of ISP service on Time Warner Cable systems in its Memphis, TN and Jackson, MS Divisions;

- An agreement with Applied Technology Group, Inc. for the provision of ISP service on Time Warner Cable systems in its Bakersfield, CA Division; and
- An agreement with ShreveNet, Inc. for the provision of ISP service on Time Warner Cable systems in its Shreveport, LA Division.

As the Commission notes in the *NPRM*, several other large MSOs have taken preliminary steps towards offering multiple ISP choice, although their progress lags significantly behind that of Time Warner Cable.[56] As more cable operators realize that multiple ISP availability is not only beneficial to consumers but also to their own economic interests, there is every reason to believe that marketplace forces will continue to advance the Commission's objectives. Indeed, at least so long as ILECs have an obligation to provide DSL transport to unaffiliated ISPs, cable operators will have an incentive also to offer choice to consumers to remain competitive with DSL.

AOL Time Warner appreciates the concerns expressed by Commissioner Abernathy that some cable operators may lag behind in recognizing the benefits of offering multiple ISP choice to consumers.[57] However, such concerns militate in favor of retaining the Commission's policy of "vigilant restraint." As long as marketplace forces continue to progress towards accomplishment of the Commission's goals with respect to multiple ISP choice on a reasonable and timely basis, embarking upon the huge regulatory undertaking that would be required to implement new mandatory multiple ISP access regulations would be premature and unnecessary.

[56] *NPRM* ¶¶ 26, 83. *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp. Transferee, Memorandum Opinion and Order*, 15 FCC Rcd 9816, ¶¶120-28 (2000) (declining to impose multiple ISP access requirements on AT&T based on the company's commitment to provide cable modem service through unaffiliated ISPs on its cable systems by June, 2002).

[57] *NPRM*, Separate Statement of Commissioner Kathleen Q. Abernathy ("I remain concerned that some cable operators may continue to offer consumers only a single brand of ISP service or that cable operators generally may offer only two or three options.").

III. EACH OF THE FORMS OF LOCAL REGULATION ADDRESSED IN THE *NPRM* WOULD BE PRE-EMPTED BY FEDERAL LAW.

As discussed above, imposition of new regulatory burdens on cable modem service cannot be justified as a matter of policy. We will show below that any imposition of such burdens would also run counter to federal law.

A. Federal Law Does Not Permit LFAs To Demand That Cable Operators Obtain Additional Information Service Franchises.

In the wake of the Commission's *Declaratory Ruling*, some LFAs have taken the position that cable operators can be required to obtain an additional franchise to provide cable modem service — or, put differently, that they must stop providing cable modem service until they have secured an additional franchise agreement with the LFA. The apparent reasoning underlying this position is that existing cable television franchise agreements authorize cable operators to use rights-of-way to provide only cable services; that, in light of the *Declaratory Ruling*'s conclusion that cable modem service is not a cable service, a franchise agreement authorizing a cable operator to provide cable service does not authorize the cable operator to provide cable modem service; and that cable operators therefore may provide cable modem service only if granted permission to that effect.[58]

In the *NPRM*, the Commission tentatively concludes that, "[o]nce a cable operator has obtained a franchise for [a cable] system, our information service classification should not affect

[58] *See* Attachment A, Letter from Larry Dovalina, Office of the City Manager of the City of Laredo, Texas, to Susan Patten, Vice President of Government and Public Affairs, Time Warner Cable, Southwest Division, at 2 (Apr. 8, 2002) ("To the extent you are using and occupying the City of Laredo's public rights-of-way for [purposes other than transmitting cable services], it would appear that your use and occupation is unlawful, and you may be liable under applicable law."); Letter from Rick J. Hermus, Administrator, Village of Kimberly, Wisconsin, to Gary R. Matz, Time Warner Cable (May 7, 2002) ("it is our belief at this time that your providing service within our municipal property without permission or consent constitutes a trespass and taking of Village property without compensation").

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."[59] That tentative conclusion is unquestionably correct: even where existing cable television franchises do not authorize the provision of cable modem service,[60] federal law would not permit LFAs to require an additional information service franchise.

Although LFAs' demands that cable operators obtain information service franchises are commonly framed as a condition to use of public rights-of-way, that is a transparent mischaracterization. In substance, these demands constitute regulation of the content that cable operators may transmit over their existing cable plant. Cable operators' cable television franchises already give them permission to dig up the streets to lay and maintain wires and associated equipment.[61] And the provision of cable modem service does not make the burden on public rights-of-way any heavier: it does not require any addition of plant or equipment housed on public rights-of-way. A requirement to obtain an information service franchise before providing cable modem service would therefore have nothing to do with reasonable restrictions

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[59] *NPRM* ¶ 102; *see id.* ("[W]e tentatively conclude that Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service.").

[60] In fact, most existing franchises, when interpreted properly, do not limit authorization to the provision of "cable services" as that term is now defined by the Commission.

[61] Section 621(a)(2) of the Act provides that "[a]ny franchise shall be construed to authorize the construction of a cable system over public rights-of-way." 47 U.S.C. § 541(a)(2). Cable operators' transmission of a non-cable service through cable wires does not make their cable systems any less a "cable system." *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.'"); *see also* H.R. REP. NO. 98-934, at 44 (1984) ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they cho[o]se . . . . A facility would be a cable system if it were designed to include the provision of cable services (including video programming) along with communications services other than cable service.").

on the use of public rights-of-way. In substantive effect, it would be a prohibition on using a franchised cable system to provide one particular service: cable modem service.

Any such prohibition would clearly be pre-empted by federal law. *First*, any such prohibition would run afoul of Section 624 of the Communications Act.[62] Subsection (a) of Section 624 provides that a "franchising authority may not regulate the services . . . provided by a cable operator except to the extent consistent with this subchapter."[63] The plain language of this provision extends to *all* services provided by a cable operator — not just cable services. Thus, a prohibition on the provision of cable modem service would "regulate the services . . . provided by a cable operator." And such regulation clearly would not be "consistent with" Title VI: nothing in Title VI allows LFAs to require that cable operators obtain information service franchises. In addition, Subsection (b) of Section 624 provides that a "franchising authority . . . may not . . . establish requirements for . . . information services."[64] A prohibition on providing cable modem service would plainly constitute a "requirement" with respect to "information services": it would require cable operators not to provide the service.

Second, at a more fundamental level, any prohibition on the provision of cable modem service would be pre-empted by the basic design of the Act. As the Commission has determined, cable modem service is an *interstate* communications service.[65] Only the FCC may regulate interstate communications services. As noted above, it is well established that the Act grants the

[62] 47 U.S.C. § 544.

[63] *Id.* § 544(a).

[64] *Id.* § 544(b).

[65] *See NPRM* ¶ 59.

FCC jurisdiction to regulate interstate communications, and that this jurisdiction is exclusive.[66] Thus, LFAs would be no more within their rights if they required cable operators to obtain information service franchises before offering cable modem service than if they required long distance carriers to obtain certificates of public necessity and convenience prior to offering interstate long distance service.

Third, the FCC has expressly pre-empted state regulation of all *information* services. As the Commission put it in the *Computer II* rulemaking: "we have determined that the provision of enhanced services is not a common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation."[67] Because that conclusion survived judicial

[66]*See, e.g., Universal Service Order* ¶ 836 (47 U.S.C. § 152(a) "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) (Commission has "exclusive jurisdiction over interstate communications").

[67]*Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),* Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512, ¶ 83 n.34 (1981); *see Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 F.C.C.2d 958, ¶ 343 (1986) ("*Computer III*") ("[W]e determined that since the provision of enhanced services is not common carriage, the efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if such services are free from regulation. Therefore, we preemptively deregulated enhanced services, foreclosing the possibility of state regulation of such offerings.") (footnote omitted); *id.* ¶ 347 ("By retaining the existing general regulatory framework for unregulated enhanced services, we do not alter our conclusion in *Computer II* that such services must remain free of state and federal regulations. Our original reasons for deregulating enhanced services are, if anything, more compelling now, as the telecommunications industry in general and the enhanced services market in particular have become increasingly competitive."); *see also* Peter W. Huber, Michael K. Kellogg & John Thorne, *Federal Telecommunications Law* § 12.4.2, at 1093 (2d ed. 1999) ("To make sure that regulation of enhanced services did not materialize at the local level, the Commission invoked 'ancillary jurisdiction' under Title I of the Communications Act to pre-empt any inconsistent state regulation.").

review,[68] state regulation of information services has never come about.[69] It should not be permitted to begin now. The Commission has decided that cable modem service constitutes an information service.[70] It follows that state regulation is pre-empted — even without any further Commission action at this time.

Fourth, a state law ban on providing cable modem service would violate Dormant Commerce Clause principles. A flat ban would constitute a serious burden on interstate commerce, and could therefore be justified only if necessary to achieve substantial local benefits.[71] That test is not met: the local benefit in whose name the prohibition is imposed — regulation of burdens on public rights-of-way despite already existing cable television franchises and an absence of added plant or equipment — is insubstantial. Besides, "courts have long held that state regulation of those aspects of commerce that by their unique nature demand cohesive national treatment is offensive to the Commerce Clause."[72] The Internet and access to it undoubtedly fall within that category.[73]

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[68] *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 210-12 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *see also Computer III* at ¶ 348 ("We find that our authority to preempt such state regulation is supported by the court decision upholding our decision in *Computer II* to deregulate the provision of enhanced services by common carriers and others.").

[69] *Federal Telecommunications Law* § 12.4.2, at 1094 ("[U]nder the Commission's watchful eye, state regulation of information services has not developed.").

[70] *See Declaratory Ruling* ¶ 38.

[71] *See generally Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (state regulation burdening interstate commerce will be struck down when "the burden imposed on such commerce is clearly excessive in relation to the putative local benefits").

[72] *American Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 169 (S.D.N.Y. 1997); *see also MTS and WATS Market Structure*, Third Report and Order, 93 F.C.C.2d 241, ¶ 57 (1983) (citing *Wabash, St. L. & Pac. Ry. v. Illinois*, 118 U.S. 557 (1886)).

[73] *Pataki*, 969 F. Supp. at 169 ("[T]he Internet is one of those areas of commerce that must be marked off as a national preserve to protect users from inconsistent legislation that, taken to its

Finally, a ban on the provision of cable modem service would raise serous First Amendment concerns. Providers of Internet access (including providers of cable modem service) engage in constitutionally protected speech and are entitled to the same level of First Amendment protection as newspaper publishers.[74] A flat ban on Internet access providers' speech therefore could not survive First Amendment scrutiny.[75]

The *NPRM* also asks whether LFAs would have authorization to require information service franchises even as a matter of state law.[76] In many states, the answer appears to be no. Many state statutes expressly authorize LFAs to award cable franchises, but they either say nothing about information service franchises or affirmatively forbid LFAs from demanding anything other than a cable television franchise.[77] In any event, none of this matters much. Even

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(footnote continued)
most extreme, could paralyze development of the Internet altogether."); *id.* at 181 ("The courts have long recognized that certain types of commerce demand consistent treatment and are therefore susceptible to regulation only on a national level. The Internet represents one of those areas; effective regulation will require national, and more likely global, cooperation. Regulation by any single state can only result in chaos, because at least some states will likely enact laws subjecting Internet users to conflicting obligations.").

[74]*See Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685, 694 (S.D. Fla. 2000).

[75]*See id.* at 696-97 (applying strict scrutiny to strike down an ordinance requiring cable operators to permit access to third party ISPs).

[76]*See NPRM* ¶ 103.

[77]*See, e.g.*, Ariz. Rev. Stat. § 40-283(D) ("Nothing contained in this subsection shall be construed to grant county boards of supervisors additional authority to require . . . cable television systems to obtain licenses or franchises."); Mich. Comp. Laws § 484.3108(11) ("A cable franchise . . . shall satisfy any requirement for the holder . . . to obtain a permit to provide information services or telecommunications services in the municipality."); New York Pub. Serv. Law § 219.2 (expressly authorizing LFAs to require franchises for cable service, but saying nothing about franchises for information service).

if LFAs had state law authority to prohibit the provision of cable modem service by cable operators without an information service franchise, that authority would be pre-empted by federal law — for all the reasons explained above.

B. Federal Law Does Not Permit Any Requirement That Cable Operators Continue To Pay Franchise Fees After, or Repay Franchise Fees Collected Before, the Commission Issued the *Declaratory Ruling*.

The Commission raises two legal questions with respect to franchise fees: (1) whether, after the *Declaratory Ruling*, LFAs can require cable operators to pay franchise fees with respect to revenue derived from cable modem service, and (2) whether cable operators can be made to repay franchise fees they collected prior to the *Declaratory Ruling*.[78] As explained below, the clear answer to both questions is no.

1. In the wake of the *Declaratory Ruling*, LFAs may no longer levy franchise fees on revenue derived from cable modem service.

The *NPRM* unambiguously concludes: "Given that we have found cable modem service to be 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."[79] This conclusion is plainly correct.

Section 622(b) provides: "[T]he franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues from the operation of the cable system *to provide cable services*."[80] Congress added the italicized language in 1996. Its purpose was to make clear that any revenue from telecommunications or

[78] *NPRM* ¶¶ 105-106.

[79] *Id.* ¶ 105.

[80] 47 U.S.C. § 542(b) (emphasis added).

other non-cable services earned by cable operators would be free from franchise fees.[81] Because the *Declaratory Ruling* establishes that cable modem service is not a "cable service,"[82] it is now clear that LFAs may not impose franchise fees with respect to revenue derived from cable modem service. Indeed, when LFAs previously filed comments in this docket, they advocated a "cable services" classification for precisely this reason: they themselves recognized that any other classification would mean that they would no longer be allowed to impose franchise fees.[83]

The *NPRM* goes on to state: "we tentatively conclude that Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service."[84] AOL Time Warner is not aware of any such basis of authority, either — whether in Title VI or elsewhere. Title VI generally provides that local regulation is pre-empted except to the extent

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[81] *See, e.g.*, H.R. REP. NO. 104-204, Pt. 1, at 93 (1995) (amendment "establishes that franchising authorities may collect franchise fees under section 622 of the Communications Act solely on the basis of the revenues derived by an operator from the provision of cable service"); S. REP. NO. 104-23, at 36 (1995) ("This 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.").

[82] *See Declaratory Ruling* ¶ 60.

[83] *See, e.g.*, Comments of the National League of Cities, et al., at 13, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("[T]he financial loss to local governments [in franchise fees] if cable modem service is not classified as a 'cable service' would cumulatively reach into the billions of dollars by the end of the decade."); Comments of the Town of East Hampton and the Town of Southampton, New York at 7, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("[F]or the Commission to classify Internet access over cable as anything other than a 'cable service' would usurp the franchising and regulatory authority Congress permits to be exercised by local government units."); Comments by the Marin Telecommunication Agency at 7, GN Docket No. 00-185 (FCC filed Nov. 13, 2000) ("The failure to classify cable modem services as a cable service will have very adverse financial and regulatory consequences for public agencies on national basis. The substantial franchise fees that local public agencies were expecting to receive from cable modem services will be lost."); *see generally NPRM* ¶ 105 & n.348.

[84] *NPRM* ¶ 105.

specifically permitted.[85] The only provision permitting franchise fees is Section 622(a), which provides that cable operators "may be required under the terms of any franchise to pay a franchise fee."[86] That authorization, however, is expressly made "[s]ubject to the limitation of subsection (b)."[87] Because there is no other provision addressing franchise fees in Title VI, any imposition on cable operators that qualifies as a "franchise fee" — no matter how denominated — must comply with "the limitation of subjection (b)."

However characterized, any fee on revenue derived from cable modem service would unquestionably constitute a "franchise fee" for purposes of Section 622. That is so because "franchise fee" is defined 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."[88] Any fee imposed with respect to cable modem service plainly would be a fee imposed on a cable operator "solely because of its status as" a cable operator. As the term makes clear, only cable operators provide cable modem service.

Because a franchise fee on cable modem service revenue would constitute a "franchise fee" for purposes of Section 622, it inevitably follows that such revenue may not be subjected to fees. Subsection (b) of Section 622 provides that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross

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[85]*See, e.g.*, 47 U.S.C. § 556(c) ("[A]ny provision of any franchise granted by [a franchising] authority, which is inconsistent with this chapter shall be deemed to be preempted and superseded.").

[86]Section 622(a) provides in its entirety: "Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee." 47 U.S.C. § 542(a).

[87]*See id.*

[88]*Id.* § 542(g)(1).

revenues . . . from . . . cable services."[89] Thus, any fee charged with respect to cable modem service revenue would count towards the 5 percent fee cap, while the cable modem service revenue would not go into the fee base — so that the sum total of fees would still be limited to 5 percent of cable services revenue. Franchise agreements commonly already require cable operators to pay a franchise fee of 5 percent of cable services revenue. Section 622(b) therefore does not permit additional exactions.

Even if a franchise fee imposed on cable modem service revenue somehow was not captured by the definition of "franchise fee" contained in Section 622, it would still be pre-empted for a separate reason: it would run afoul of the Internet Tax Freedom Act. That statute prohibits any new "taxes on Internet access."[90] Cable modem service qualifies as "Internet access."[91] It is true that the statute exempts from the "tax" definition "any franchise fee . . . imposed . . . pursuant to section 622."[92] Plainly, however, LFAs could not claim simultaneously that a fee is "imposed . . . pursuant to section 622" for purposes of the Internet Tax Freedom Act, but is not a "franchise fee" for purposes of Section 622.

LFAs cannot avoid the limits of Section 622 and the Internet Tax Freedom Act by imposing fees on third party ISPs that provide service pursuant to multiple ISP arrangements. It is true that Section 622(h)(1) states that "[n]othing in this chapter shall be construed to limit any authority of [an LFA] to impose a [franchise fee] on any person (other than a cable operator) with respect to cable service or other communications service provided by such person over a

[89] *Id.* § 542(b).

[90] *Id.* § 151 note (§ 1101(a)(1)).

[91] *See id.* (§ 1104(5)); see also *Declaratory Ruling* ¶ 38 ("We find that cable modem service is an offering of Internet access service....").

[92] *Id.* (§ 1104(8)(B)).

cable system for which charges are assessed to subscribers but not received by the cable operator."[93] But that provision was designed to serve the limited purpose of preventing cable operators from avoiding franchise fees by having programming services (say, HBO) bill subscribers directly.[94] It was plainly not intended to permit broader assessment of third parties than of cable operators. It is difficult to see what policy basis could justify such a discrepancy, and there is no historical evidence that Congress intended it.[95] It would be pointless in any event: the heavier assessment could readily be avoided simply by having the cable operator do the billing.

It is true that Section 622(h) uses the phrase "cable service or other communications service" — a phrase that is broader than the phrase "cable services" in Section 622(b). But Section 622(h) was enacted as part of the *1984 Cable Act* — long before the advent of cable modem service and the classification controversy surrounding it. The part of Section 622(b) that makes clear that LFAs may tax only "cable services" was inserted as part of the *1996 Act* to prevent exactions imposed on revenue derived from services other than cable services. Congress's failure to remove "or other communications service" from Section 622(h) was thus

[93] 47 U.S.C. § 542(h)(1).

[94] *See* H.R. REP. NO. 98-934, at 65 ("This provision is included to assure that cable operators and cable programmers do not rearrange the manner of payment by subscribers for services in order to avoid those fees which are based on the cable operator's revenues.").

[95] *See, e.g., National Pub. Radio, Inc. v. FCC*, 254 F.3d 226, 230 (D.C. Cir. 2001) (FCC need not slavishly follow statutory language where it appears "either that, as a matter of historical fact, Congress did not mean what it appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it") (citation and internal quotation marks omitted).

an inconsequential oversight, and should not be viewed as a strangely underhanded way of allowing broader exactions on third parties.[96]

Besides, Section 622(h)(1) says only that "[n]othing in *this chapter* [*i.e.*, the Communications Act of 1934] shall be construed" to prohibit a fee. By its terms, Section 622(h)(1) does not foreclose regulation by the Commission, thus leaving open the possibility of a Commission rule prohibiting LFAs from taxing ISPs. In addition, Section 622(h)(1) has nothing to say about statutes other than the Act. Accordingly, even if Section 622(b) would not prohibit LFAs from assessing ISPs, the Internet Tax Freedom Act would. A franchise fee imposed on an ISP plainly would not be "imposed . . . pursuant to section 622" for purposes of the Internet Tax Freedom Act — it would be imposed *despite* Section 622.

2. The Commission should make clear that cable operators cannot be required to repay subscribers franchise fees collected prior to the *Declaratory Ruling*.

The Commission notes that its "policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that call upon our expertise."[97] The Commission asks "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

[96] *See, e.g., Chickasaw Nation v. United States*, 122 S. Ct. 528, 533 (2001) ("[C]ommon sense suggests that the cross-reference is simply a drafting mistake, a failure to delete an inappropriate cross-reference in the bill that Congress later enacted into law."); *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1043 (D.C. Cir. 2001) (per curiam) ("We find it quite plausible that the Congress substituted '(ii)' for '(i)' in § 126 inadvertently in the course of a routine renumbering of statutory cross-references.").

[97] *NPRM* ¶ 107.

cable modem service revenues or whether these issues are more appropriately resolved by the courts."[98]

The Commission unquestionably has jurisdiction to resolve this issue. The Commission has exercised its authority to interpret Section 622 on a number of occasions in the past.[99] The cable modem service issue now before the Commission is at least as important and national in scope as the issues resolved in the past. Unless the Commission now resolves the issue, expensive and vexing class action litigation might proliferate around the country: strike-suit lawyers purporting to represent cable subscribers may claim that cable operators must return franchise fees collected with respect to a service that, in hindsight, turns out not to be a fee-able cable service.[100] Any such actions would be meritless as a matter of state law,[101] pre-empted as a matter of federal law, and of more concern to LFAs than to cable operators. Nevertheless, there

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[98] *Id.*

[99]*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 F.C.C.2d 386, ¶¶ 18, 19 (1986) (noting its jurisdiction to decide "whether costs incurred in connection with [PEG] facilities should count toward the statutory five percent fee limit") (citation omitted); *United Artists Cable of Baltimore*, Memorandum Opinion and Order, 11 FCC Rcd 18158, ¶¶ 27-28 (1996) (deciding whether LFAs may charge a fee on bill items collected under the heading of "franchise fee"); *Time Warner Entertainment/Advance-Newhouse Partnership, et al., Petitions for Declaratory Ruling on Franchise Fee Issues*, Memorandum Opinion and Order, 14 FCC Rcd 7678, ¶ 12 (1999) (deciding whether uncollected debts may be included in the franchise fee base); *City of Pasadena, et al., Petitions for Declaratory Ruling on Franchise Fee Pass Through Issues*, Memorandum Opinion and Order, 16 FCC Rcd 18192, ¶ 15 (2001) (deciding whether franchise fees collected on nonsubscriber revenues may be passed through to subscribers).

[100]*See Bova v. Cox Communications, Inc.*, No. 7:01CV00090, 2002 WL 389264 (W.D. Va. Mar. 12, 2002); *Bova v. Cox Communications, Inc.*, No. 7:01CV00090, 2001 WL 1654708 (W.D. Va. Dec. 12, 2001).

[101]Because no federal cause of action is available, any action would have to rest on state law. It is entirely unclear how state law could afford subscribers a cause of action in connection with fees that they voluntarily paid to cable operators, and that cable operators collected and remitted in good faith in response to demands by LFAs.

is no good reason why the Commission should permit even the possibility that such meritless class action litigation might grow out of its *Declaratory Ruling*.

Exercising its jurisdiction, the Commission should make clear that cable operators that remitted franchise fees collected before the issuance of the *Declaratory Ruling* cannot be held liable to subscribers. There is plainly a strong policy basis for doing so. As the *NPRM* notes, "until the release of the Commission's declaratory ruling to the contrary, cable operators and local franchising authorities believed in good faith that cable modem service was a 'cable service' for which franchise fees could be collected pursuant to section 622."[102] And, "[a]s illustrated by the Fourth Circuit's statement in *Henrico County* . . . that 'the issue of the proper regulatory classification of cable modem service . . . is complex and subject to considerable debate,' cable operators and franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service."[103]

The Commission should therefore nip meritless class action litigation in the bud by making clear that any state law cause of action for a refund of bill items labeled "franchise fee" would be in conflict with Section 622. That provision expressly permits "[e]ach cable operator [to] identify . . . as a separate line item on each regular bill of each subscriber . . . [t]he amount of the total bill assessed as a franchise fee."[104] Thus, it affords cable operators a federal right to

[102] *NPRM* ¶ 107.

[103] *Id.* (footnote omitted, alteration in original).

[104] 47 U.S.C. § 542(c)(1); *see also id.* § 542(f) ("A cable operator may designate that portion of a subscriber's bill *attributable* to the franchise fee as a separate item on the bill.") (emphasis added); 47 C.F.R. § 76.985(a)(1) ("[c]able operators may identify as a separate line item of each regular subscriber bill . . . [t]he amount of the total bill *assessed* as a franchise fee") (emphasis added).

identify on their bills the amounts that LFAs have "assessed."[105] The franchise fees here at issue — rightly or wrongly — plainly were "assessed." Any state law cause of action penalizing cable operators for invoking their federal right to identify amounts assessed would therefore be in direct conflict with federal law, and, as such, pre-empted.[106] Whether or not the statute is unambiguous on this point, this Commission plainly can and, given the strong policy basis, should interpret it in this manner.

At a minimum, the Commission should determine that, insofar as franchise fees are concerned, the *Declaratory Ruling* has no retroactive effect. The Commission unquestionably has authority to do so. Indeed, in a quasi-legislative context like that here, the Commission's authority to make its decisions apply retroactively in the primary sense (*i.e.*, in the sense of altering the past legal consequences of past conduct) is severely constrained.[107] Thus, even

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[105]Congress's design in creating this right is plain: to prevent LFAs from requiring cable operators to obscure the franchise fee levied, thereby exposing LFAs to political pressure from cable subscribers and inhibiting overreaching in the franchising process.

[106]*See, e.g., Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 325-26 (1981) ("It would vitiate the overarching congressional intent . . . to permit the State of Iowa to use the threat of damages to require a carrier to do exactly what the Commission is empowered to excuse."); *Hill v. State of Florida*, 325 U.S. 538, 542-43 (1945) (holding that state law that penalized employees for invoking right protected under the National Labor Relations Act was pre-empted).

[107]*See, e.g., Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) ("[A] statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate [primary] retroactive rules unless that power is conveyed by Congress in express terms."); *Sierra Club v. Whitman*, 285 F.3d 63, 68 (D.C. Cir. 2002) ("We have held that the [Administrative Procedure Act] prohibits retroactive rulemaking."); *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 192-93 (D.C. Cir. 1997) (suggesting as authoritative Justice Scalia's concurring opinion in *Bowen* that rules "altering the *past* legal consequences of past actions" are impermissible unless the agency has explicit statutory authorization to adopt them) (citation and internal quotation marks omitted, emphasis in original). Besides, even if the *Declaratory Ruling* had been issued in a quasi-adjudicative context, the Commission would still have ample authority to give it prospective effect only. *See, e.g., Epilepsy Found. of Northeast Ohio v. NLRB*, 268 F.3d 1095, 1102 (D.C. Cir. 2001) (retroactive adjudication not permitted if "notions of equity and fairness . . . militate strongly

without further Commission action, courts would likely interpret the *Declaratory Ruling* as having prospective effect only. Nevertheless, to eliminate any doubt, the Commission should now expressly determine that, at least insofar as franchise fees are concerned, the *Declaratory Ruling* applies only prospectively.

C. Federal Law Does Not Permit LFAs To Impose A Multiple ISP Requirement.

In the *NPRM*, the Commission seeks comment as to whether, in light of its ruling that cable modem service is an interstate information service, states and LFAs may still impose multiple ISP requirements on the provision of cable modem service.[108] The answer is that they may not. Specifically, several provisions of the Act prohibit such requirements in the face of the Commission's *Declaratory Ruling*. Thus, any conflicting state or local law is preempted by the express terms of the Act.[109]

1. Section 624(a).

Section 624(a) of the Act restricts an LFA from regulating "the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[110] Nothing in Title VI permits LFAs to require cable operators to offer raw "transport" to ISPs, or

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(footnote continued)
against retroactive application") (internal quotation marks omitted), *cert. denied*, 2002 U.S. LEXIS 4231 (June 10, 2002); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750, 756 (D.C. Cir. 1987) (retroactive adjudication not permitted if "the inequities produced by retroactive application are not counterbalanced by sufficiently significant statutory interests"), *aff'd*, 488 U.S. 204 (1988).

[108] *NPRM* ¶ 100.

[109] 47 U.S.C. § 556(c) ("[e]xcept as provided in Section 557 [regarding pre-existing PEG channel requirements], any provision of law of any State, political subdivision, or 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 superceded.")

[110] 47 U.S.C. § 544(a).

even to provide cable modem service in connection with an affiliated ISP, for that matter. Significantly, the Section 624(a) restriction is not limited merely to *cable* services, but precludes LFA regulation of any "services" offered by a cable operator, which obviously includes information services. Accordingly, a multiple ISP requirement would not be "consistent with this title."

2. Section 624(b).

Section 624(b) of the Act provides that "[i]n the case of any franchise granted after the effective date of this title, the franchising authority . . . may not . . . establish requirements for video programming or other *information services*."[111] Since the Commission has ruled that cable modem service is an information service, LFAs obviously may not establish any "requirements" with respect to information services, including a multiple ISP requirement.[112]

This would also be the case in franchise renewal situations. While Section 626 of the Act permits an LFA to establish minimum requirements that a cable operator must include in its franchise renewal proposal,[113] this authority is expressly limited by the Section 624(b)(1) prohibition against requirements as to information services, and the statute specifically applies to a "request for proposals for a franchise (including requests for renewal proposals . . .)."[114] Moreover, given that cable modem service has been determined not to be a "cable service," provision of cable modem service by a cable operator is not relevant to "cable-related

[111] 47 U.S.C. § 544(b)(1) (emphasis added).

[112] Similarly, a requirement that cable operators provide "transmission" to unaffiliated ISPs would run a foul of Section 624(e) which states that "[n]o State or franchising authority may prohibit, condition, or restrict a cable system's use of any type of subscriber equipment or any transmission technology." 47 U.S.C. § 544(e).

[113] 47 U.S.C. § 546(b)(2).

[114] 47 U.S.C. § 544(b)(1).

community needs and interests," the threshold standard for renewal under Section 626.[115]

3. Section 621(b)(3)(D).

Section 621(b)(3)(D) 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."[116] 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."[117]

Alternatively, a multiple ISP requirement would similarly be invalid under Section 621(b)(3)(D) because it would constitute a requirement that the cable operator provide "telecommunications facilities." In *MediaOne Group, Inc. v. County of Henrico,* the U.S. Court of Appeals for the Fourth Circuit found that a multiple ISP obligation violated 621(b)(3)(D) as an invalid requirement that a cable operator provide "telecommunications facilities."[118] According to the court, "although MediaOne maintains a 'cable *system*,' its facilities can be properly classified as telecommunications facilities when they provide a transmission path to the

[115] 47 U.S.C. § 546(c)(1)(D).

[116] 47 U.S.C. § 541(b)(3)(D).

[117] A requirement that a cable operator provide "telecommunications service" also would be void under Section 621(c) of the Act, which provides that "[a]ny cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service," as well as pursuant to Section 621(b)(3)(B), in that such a requirement would have "the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof." 47 U.S.C. §§ 541(c), (b)(3)(B).

[118] 257 F.3d 356, 363-365 (4^{th} Cir. 2001).