

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities)	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
)	
)	

REPLY COMMENTS OF THE CITY OF NEW YORK

The City of New York ("City"), hereby submits the following reply comments in response to the Notice of Proposed Rulemaking ("NPRM") released by the Federal Communications Commission ("Commission") in the above captioned proceeding.¹ The City previously submitted comments in this proceeding dated June 17, 2002 (the "City Comments").²

¹ See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities and Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Notice of Proposed Rulemaking (rel. Mar. 14, 2002) (*Internet Over Cable Facilities NPRM*).

² The City Comments can be found in the Commission's Electronic Comment Filing System under GN Docket No. 00-185.

**1. PRESERVING THE GROWTH OF CABLE MODEM SERVICE BY
PRESERVING THE CABLE ACT MODEL.**

In its comments of June 17, 2002 in this proceeding AOL Time Warner Inc. (AOLTW) (said comments referred to hereinafter as the "AOLTW Comments") emphasizes (as did the City in its original comments in this proceeding) the great success cable providers have achieved so far in swiftly making available and achieving subscription to cable modem services. These observations echo the Commission's own findings and are also reflected in similar observations in other June 17, 2002 comments from the cable industry (see, for example, comments of Cablevision Systems Corporation ("CSC") and the National Cable and Telecommunications Association ("NCTA")). These various cable industry comments argue that such success should not be tampered with, in that the regulatory scheme applicable to cable modem services should not be supplemented by adoption of ISP access requirements. But AOLTW and other cable industry commenters go further to inconsistently to argue that the prevailing local regulatory approach to cable modem service -- the approach that has supported what all agree is the explosive growth of cable modem service -- should now be radically upset.

The existing approach in the City, reflected in the City's 1998 cable franchise agreements with AOLTW and CSC, has been that cable modem services are treated under the same carefully limited scope of local authority long established for traditional cable television services. That carefully circumscribed local authority, described in Title VI of the Communications Act and developed by Congress in 1984 with adjustments in 1992 and 1996, has successfully nurtured traditional cable television services to a

remarkably successful maturity and seen cable modem service into a healthy and enthusiastically growing youth. The City proposes no greater authority over cable modem services than it has long held with respect to cable television services.

Even AOLTW's comments recognize the value of this existing model: "...the Commission should follow the example of the *1984 Cable Act* by insulating cable modem service from unnecessary state and local regulation." (AOLTW Comments at p. 12). The City agrees that the 1984 Cable Act model can, and already does, perform the same role for cable modem service as it has done for traditional cable television service. Unfortunately, the cable industry's comments in this proceeding fail to follow their own logic, but rather go on to seek a radical undermining of the approach of the 1984 Cable Act by proposing an approach that would vitiate the Cable Act's form of compensation for use of municipal rights-of-way, nullify the Cable Act's effort to ensure nondiscriminatory access to service, and negate the Cable Act's approach to consumer service protection. The City understands that the cable industry is seeking to avoid the creation, whether by the Commission or by local franchising authorities ("LFAs"), of ISP access requirements. But to prevent the creation of such requirements by LFAs does not require that the entire, successful regime established by the Cable Act be tossed out. To the contrary, as AOLTW acknowledged in the quote cited above, it merely requires that the Cable Act regime be fully embraced with respect to cable modem service.

Generally speaking, LFAs under the Cable Act are largely limited to (1) protecting, and receiving compensation for use of, the local streets, and (2) enforcing reasonable consumer service standards (including the obligation to offer nondiscriminatory service to all households within the franchise area). AOLTW's

comments attempt to present LFAs as bogeyman trying to shut down cable modem service (See AOLTW Comments, p. 25). The City has no such desire. The City, as reflected in the 1998 franchise agreements that treat cable modem services in a manner comparable to traditional cable television services, has been and is satisfied to treat cable modem service as authorized under existing franchises under the circumscribed and highly successful Cable Act regime. It was not LFAs but the Commission's order in this proceeding and the response of AOLTW and other cable companies in response to that order that placed LFAs in the position of having to take the position that separate and additional "information services" franchises are now required. The City and other LFAs would strongly prefer not to have to do that and only do so to protect local rights. The Commission can swiftly resolve the issues its own order has provoked by following the City's recommendations in our original comments.³ Generally speaking, the City recommends that that Commission clarify that local authority over cable modem information service can be treated by franchise contract as if it were a traditional cable television service, subject to the same careful circumscriptions on local authority applied by the Cable Act to "cable service" but also subject to the same limited areas of local authority as is "cable service" under the Cable Act.

2. PREEMPTION ISSUES.

AOLTW's comments lengthily discuss various ostensible bases for the notion that local *regulation* of interstate information services is preempted (for example, AOLTW

³ See pages 39 to 41 of the City's Comments. Note that the reference to "a cable service provider" in numbered paragraph (5) on page 41 of the City's Comments should refer to "a cable modem service provider".

cites language from the Computer II proceedings and also refers to the Commerce Clause of the U.S. Constitution), but none of these citations go to the central issue of whether *franchising* by LFAs is preempted. The City's initial comments document in detail how and why local franchising is not preempted and cannot be preempted by the Commission. As City of Dallas v. FCC 165 F.3d 341 (5th Cir. 1999) has stated, the intention to preempt local franchising authority "must be unmistakably clear in the language of the statute" (City of Dallas 165 F.3d at 460). No such unmistakable statutory preemption of local franchising authority is evidenced in federal law, as discussed in detail in the City's original comments. Beyond that general reference back to the City's earlier discussion, however, two specific references in the AOLTW Comments call for a more detailed response.

(1) Footnote 61 of the AOLTW Comments engages in a particularly egregious misreading of the recent U.S. Supreme Court decision in NCTA vs. Gulf Power Company 122 S.Ct. 782 (2002). AOLTW claims that Gulf Power stands for the proposition that, quoting the AOLTW Comments, "Cable operators' transmission of a non-cable service through cable wires does not make their cable systems any less a 'cable system'" (AOLTW Comments, p. 26, fn. 61), and that therefore the term 'cable system' in Section 621(a)(2) includes the concept of cable modem service. But the Supreme Court in Gulf Power was utterly unambiguous about *not* reaching that very question. The Court in Gulf Power made it clear that their decision turned on the use of the word "by" in 47 USC Section 224(a)(4), a word that does not appear in the relevant portion of Section 621(a)(2). The Court in Gulf Power specifically preserves the possibility that a "cable system" as defined in Section 602(7) of the Cable Act may only be a "cable system" to

the extent it is providing "cable service". As the Court says in Gulf Power: "So even if a cable television system is only a cable television system 'to the extent' it provides cable television [respondent would still not prevail]." Nothing in the Gulf Power case eliminates the possibility that the Cable Act's limits on LFA authority over "cable systems" may only be applicable to facilities in the context of their use to provide "cable service", and not in the context of their use to provide cable modem information service (unless of course such service is treated, as the City suggests, as if it were a cable service).

(2) Footnote 81 of the AOLTW Comments (See AOLTW Comments, p. 32) quotes two Congressional committee reports ostensibly to make the point that legislative history supports AOLTW's interpretation of Cable Act Section 622(b) (referred to in the City's initial comments as the "Arbitrary Interpretation") and not the more plausible interpretation of that section (referred to in the City's initial comments as the "Rational Interpretation") (see City Comments, pp. 7-8). In fact, both pieces of legislative history language quoted by AOLTW in its footnote 81 support the City's, not AOLTW's, interpretation. AOLTW first quotes H.R. Rep. No. 104-204, Pt. 1 at 93 (1995), which states that 622(b) as amended "establishes that franchising authorities may collect franchise fees *under Section 622* of the Communications Act solely on the basis of revenues derived by an operator from the provision of cable service" [emphasis added]. It is precisely the point of the City and other LFAs that if cable modem service is not a cable service, or is not treated as if it were a cable service, then franchise rentals in connection therewith are not collected *under Section 622*, are thus not subject to the 5% cap found in Section 622, and can therefore be imposed at any level (consistent with state

and local law) that may be negotiated between LFAs and cable modem service providers. Again, the City believes the best way to avoid the uncertainty of that result is for the Commission to clarify that cable modem information service can and should be treated as if it were a cable service for franchising purposes. AOLTW then goes on further in its footnote 81 to quote from S.Rep. No. 104-23 at 36 (1995), which uses virtually the same language as an excerpt from the Conference Report as quoted by the City in our original Comments⁴: "This change makes 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" [emphasis added]. Again, the emphasized language reveals the legislative intention that the provision, which is a cap, is not to be applied to services other than cable services -- thus leaving non-cable services uncapped. This approach was a perfectly reasonable one for Congress to take: with respect to services it was specifically considering it specified a cap on what common law would otherwise treat as the unlimited right of LFAs to charge rental for the use of LFA property; but with respect to services it was not yet imagining Congress left LFA's full common law rights appropriately unmolested.

3. CONCLUSION

The cable industry's comments make clear how deeply concerned the industry is that LFAs not be found to have the authority to impose ISP access requirements. The

⁴ City Comments, p 9.

City expects that the Commission may well agree that the decision to impose, or not impose, ISP access requirements on the cable industry is appropriately reserved to the federal level of jurisdiction. But the cable industry's comments provide no justification for throwing the baby out with the bathwater. Cable Act-style franchising, including Cable Act-style franchise compensation, has proven entirely consistent with the growth of traditional cable television into a dominant industry that has transformed national habits and culture. Comparable franchising treatment and comparable franchise compensation can be entirely consistent with broadband cable modem services having a similar effect on modern life. The City, in concert with its franchisees, has acted with great success since 1998 to treat cable modem service as if it were a cable service for local franchising purposes. We ask that the Commission allow us to continue in that successful mode and not to throw cable modem franchising into years of uncertainty by attempting an unsupported and unprecedented attempt at preemption. The cable service model long and successfully established for the relationship between LFAs and cable providers can and should be the basis for franchising cable modem information service.

Respectfully submitted,

/s/

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