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

In the Matter of	)	
	)	
Appropriate Regulatory Treatment	)	CS Docket No. 02-52
for Broadband Access to the	)	
Internet Over Cable Facilities	)	

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Respectfully submitted,

COX COMMUNICATIONS, INC.

Alexandra M. Wilson
COX ENTERPRISES, INC.
1225 19th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 296-4933

To-Quyen T. Truong
David E. Mills
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Its Attorneys

August 6, 2002

TABLE OF CONTENTS

Page

SUMMARY

The cable industry has been at the forefront in bringing residential broadband Internet services to American consumers. This successful deployment, acknowledged by all commenters, could not have occurred and could not continue in the face of intrusive government regulation. The "hands-off" policy of the Commission and most local governments made it possible for cable operators to make the tremendous risk investments necessary to deploy cable modem service. Not only is this approach extremely sound as a matter of policy, it also is legally mandated by the statutory framework Congress created to advance ubiquitous broadband deployment, facilities-based competition and an Internet free from intrusive federal, state and local regulation.

Congress expressly protected interstate information services, particularly Internet services such as cable modem service, from burdensome government regulation by establishing (i) the Title I information service category that is separate and distinct from the more heavily regulated Title II telecommunications service and Title VI cable service categories, (ii) the Section 706 edict that federal, state and local governments remove impediments to broadband deployment, (iii) the Section 320 directive against regulation of Internet services by any level of government and (iv) the Internet Tax Freedom Act ("ITFA") prohibition against Internet access taxes and discriminatory fees on electronic commerce.

Notwithstanding these express congressional directives, local franchising authorities ("LFAs") argue that Congress intended to leave in LFAs' hands free-floating authority to regulate Internet and other interstate information services, including cable modem services. Nothing could be further from Congress' intent. Congress recognized that requiring cable operators to go through the franchise process, pay a separate franchise fee and assume additional local obligations each time they provide a new, non-cable service over their franchised cable system would place cable operators at a disadvantage vis-à-vis their competitors and discourage the deployment of new

services. Accordingly, Congress drafted Sections 621 and 622 to preempt such local requirements. Under the plain language of Section 621, the cable franchise authorizes the cable system's occupation and use of public rights-of-way – without limiting the system to any particular service. Section 622 allows LFAs to impose a franchise fee for the system's use of such rights-of-way, but specifies that LFAs must base the fee solely on gross revenues generated by the provision of cable services. As the Supreme Court stated in *NCTA v. Gulf Power Co.*, interpreting the Communications Act to allow the imposition of additional costs on cable operators when they use their cable systems to provide cable modem services would directly contradict the congressional mandate to promote these new services. And, the ultimate losers from LFA imposition of unnecessary franchising, franchise fee and customer service regulations on cable modem service would be consumers, who would be forced to bear the costs in increased franchise fees and decreased efficiency.

Consumer welfare also is best protected by allowing cable operators to satisfy cable modem service customers through the operation of normal market forces, rather than government directives. Cable operators have every incentive in the highly competitive marketplace for Internet access services to make customer service a top priority. Indeed, Cox interacts with its cable modem customers and addresses any concerns through a variety of highly effective mechanisms that have been developed especially for broadband customers. Government intervention in these efforts not only is unnecessary; it also would be counterproductive.

In addition to recognizing the Act's statutory preemption of local regulation of cable modem service, the Commission should exercise its jurisdiction to decide the cable modem franchise fee refund issue. The few commenters who prefer case-by-case adjudication in their local courts fail to address the desirability of establishing a consistent national approach to the refund question that is coordinated with the national approach applicable to the franchise fee issue going forward. Their

arguments go to whether refunds should be issued, not whether the Commission should exercise its jurisdiction over this issue. Yet the refund issue directly implicates the Commission's expert knowledge of the affected industries and the applicable regulatory scheme, as well as the peculiar situation of regulatory uncertainty that existed prior to the Commission's ruling that cable modem service is not a cable service and that gave rise to the refund dilemma. Leaving the refund issue to the courts would result in the very same problem that led to the Notice of Inquiry – a hodgepodge of inconsistent obligations and judicial decisions, many of which would involve disparate interpretations of the Communications Act that would directly subvert the Commission's mission to formulate national policy.

The need for a uniform national rule – unrefuted by any commenter – also mandates forbearance from Title II regulation of cable modem service in the Ninth Circuit. The few commenters opposing forbearance fail to rebut the importance of a consistent national regulatory framework, or to show why common carrier regulation of cable modem service is necessary in the nascent, evolving and competitive Internet access marketplace that exists in the Ninth Circuit as well as the rest of the nation. As the D.C. Circuit held in *Computer and Communications Industry Association v. FCC*, the federal policy of promoting enhanced services and taking a market-based approach to these services would support forbearance even if these services could be held to be common carrier services. The Commission is entirely correct, justified and indeed encouraged by the Ninth Circuit to exercise its forbearance authority as necessary to establish consistency and clarity in the national regulatory framework for cable modem service, and to resolve the situation of regulatory uncertainty that otherwise would prevail until the Ninth Circuit rules on the petitions to review the Commission's *Ruling*.

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

In the Matter of	)	
	)	
Appropriate Regulatory Treatment	)	CS Docket No. 02-52
for Broadband Access to the	)	
Internet Over Cable Facilities	)	

REPLY COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding regarding the appropriate regulatory treatment for broadband access to the Internet over cable facilities.[1] As discussed in Cox's initial comments, the Communications Act of 1934, as amended (the "Act" or the "Communications Act") establishes strict statutory limitations on the authority of both the Commission and state and local governments to regulate cable modem service. Commenters generally agree that the Commission's Title I ancillary jurisdiction does not allow the imposition of access and other intrusive regulations on cable modem service. Accordingly, Cox's reply comments focus on the legal, policy and customer service reasons why the Commission must declare that local regulation of cable modem service violates federal law, resolve the cable modem franchise fee refund issue, and forbear from common carrier regulation of cable modem service in the Ninth Circuit. Such Commission action is essential to establish a uniform regulatory framework that

[1] Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment of Broadband Access to the Internet Over Cable Facilities, *Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77 (rel. Mar. 15, 2002) ("*Ruling & Notice*").

satisfies Congress' directives to promote broadband deployment and to keep Internet services unfettered from intrusive government involvement.

I. THERE IS NO LEGAL BASIS FOR LOCAL REGULATION OF CABLE MODEM SERVICE, AND SUCH REGULATION WOULD BE CONTRARY TO FEDERAL COMMUNICATIONS LAW AND POLICY.

A. Section 621 Preempts LFA Imposition Of Separate Franchising Requirements For Cable Modem Service.

In adopting the 1984 Cable Act, Congress contemplated that cable operators would provide non-cable services over their cable systems.[2] It emphasized that "[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*."[3] Congress also drafted the Cable Act to prevent local franchising authorities ("LFAs") from impeding the roll-out of new services by imposing duplicative franchising and franchise fee requirements for each non-cable service the operator offers over its franchised cable system. Section 621(a)(2) specifically provides that "[a]ny cable franchise shall be construed to authorize the construction of a *cable system* over public rights of way, and through easements . . .."[4] Under the statute's plain language, therefore, a cable franchise authorizes the cable system's occupation of public rights-of-way -- without limiting the system to any particular use or service. Section 621 accordingly preempts any LFA requirement that the cable operator obtain another franchise to

---

2 *See, e.g.*, H.R. REP. NO. 98-934, 98th Cong., 2d Sess., at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("H.R. REP. NO. 98-934") ("[C]able operators are permitted under the provisions of Title VI to provide any mixture of cable and non-cable service they choose."); Comments of the Alliance of Local Organizations Against Preemption at 62 ("ALOAP Comments") ("The Cable Act recognizes that cable systems can be used to provide non-cable communications services.").

3 H.R. REP. NO. 98-934 at 44.

4 47 U.S.C. § 541(a)(2) (emphasis added).

use the same franchised cable system, occupying the same rights-of-way, to provide cable modem service.

Indeed, even several LFA commenters observe that "cable modem service is still delivered by these same locally franchised private companies over the same franchised infrastructure which occupies locally managed and controlled public rights-of-way."[5] Other LFAs similarly emphasize that "[t]he same physical infrastructure is required whether an end user is watching television, surfing the net, chatting on-line, video conferencing or downloading files. Parsing of words does not change the physical basis for franchise."[6] These acknowledgements prove the cable industry's point: There is no physical or legal basis for LFAs to require a cable operator to obtain another franchise to provide cable modem service over the same franchised infrastructure.[7] Section 621(a)(2) simply makes explicit the basic principle that the operator need not obtain duplicative franchises for the same cable system's occupation of public rights-of-way.

In *City of Dallas v. FCC*, the court recognized that a service provider could not access public rights-of-way to construct its facilities without ever having obtained from the LFA a

---

5 Initial Comments of Metropolitan Government of the City of Nashville et al. at 11.

6 Letter Comments of The Girard Township Board of Supervisors at 1; *see also* Comments of the City Coalition at 32 ("both cable service and cable modem service utilize the same physical network").

7 *See National Cable Television, Inc. v. FCC*, 33 F.3d 66, 73 (D.C. Cir. 1994) (upholding Commission ruling that telephone company offering video dialtone service does not need a cable franchise, because there is "no reason to believe that Congress intended to subject a telephone company to such duplicative regulation," and "[r]egulation as a cable system would be duplicative because common carrier regulation incorporate[s] the same concerns about public safety and convenience and use of public rights of way that provide a key justification for the cable franchise requirement.") (citations and internal quotation marks omitted); *see also City of Auburn v. Qwest Corp.*, 247 F.3d 966, 981-85 (9th Cir. 2001) (discussing limits on state and local governments' authority derived from their interest in rights-of-way management).

franchise for such occupation.[8] ALOAP relies heavily on this opinion to argue that LFAs accordingly have independent, unbounded authority to require "[a] franchise for use and occupancy of public rights-of-way," without regard to Section 621.[9] But a franchised cable operator already has such a franchise for its cable system's use and occupancy of public rights-of-way. As demonstrated in Cox's opening comments[10] and as confirmed by the above LFA statements, cable operators' existing cable franchises and LFAs' local ordinances already address any and all burdens placed by the cable system on the public streets, thereby fully protecting LFAs' interest in physical management of these rights-of-way. Moreover, pursuant to the terms of their franchise agreements, cable operators' payment of cable service franchise fees and other benefits undoubtedly afford LFAs more compensation than any other rights-of-way users.[11]

Furthermore, as explained in the affidavit of Richard Mueller, Cox's Vice President for Network Planning, Engineering, and Operations (attached hereto as Appendix A), all the alleged rights-of-way burdens listed by LFAs in their comments are associated with the provision not just of cable modem service but of all next generation digital services that are supported by overall cable system upgrades. The only additional equipment that is unique to cable modem service, and that is not used by other services provided over the integrated cable network, is installed at the cable operator's head-end and the customers' premises – thus imposing no burden

---

8 *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999) ("*Dallas*").

9 ALOAP Comments at 26-28; *see also* Comments of the Public Cable Television Authority et al. at 27-28 ("PCTA Comments") (same). Ironically, the *Dallas* court explicitly stated that Title VI, and Section 621 in particular, "defin[ed] and limit[ed]" LFAs' authority in the franchising process. *Dallas*, 165 F.3d at 348 (quoting legislative history).

10 *See* Cox Comments at 42-45.

11 *See id.* at 45-47, 50-52 & Appendix A.

on public rights-of-way. Moreover, cable system upgrades often are demanded by the LFAs themselves during the course of cable franchise negotiations. Since LFAs already have approved all upgrade activities under the terms of existing cable franchises and local ordinances (which set forth permitting, construction and other requirements for such rights-of-way use), no separate franchise is necessary when a cable operator begins to offer high-speed Internet access over its upgraded cable infrastructure.[12]

PCTA cites a number of cases to support its contention that all franchises are limited to a specific use – in this case, cable services.[13] Those opinions are inapposite. The 1928 and 1938 state court opinions on which PCTA most heavily relies dealt with franchise agreements that contained terms explicitly limiting the franchise to a specific use, which the courts distinguished from general franchises permitting multiple uses.[14] The remaining cases cited by PCTA (reaching back as far as 1898) involved a franchisee's attempts to construct and operate new facilities, occupying additional public rights-of-way, to provide services different from those expressly specified in its franchise agreement.[15] In one case, the franchisee even sought to

---

12 *See id.* at 42-45. Cable operators also have a strong interest not to disrupt public rights-of-way unnecessarily, especially given the extensive responsibilities and liabilities existing cable franchises impose on cable operators for such rights-of-way use.

13 PCTA Comments at 21-22.

14 *See Consolidated Water Co. v. City of Talco*, 116 S.W.2d 411, 413, (Tex. Civ. App. 1938); *Citizens Pipeline Co. v. Twin City Pipeline Co.*, 10 S.W.2d 493, 496 (Ark. S.Ct. 1928). One wholly irrelevant 1911 opinion that PCTA cites dealt with the claim of a company that its franchise, expressly limited to the furnishing of manufactured gas to the city and its inhabitants, precluded the city's grant of a franchise to another company for the provision of natural gas. *Cumberland Gaslight Co. v. West Virginia & Maryland Gas Co.*, 188 F. 585 (4th Cir. 1911).

15 *See Chicago General St. Ry. Co. v. Ellicott*, 88 F. 941, 944, (Cir. Ct., N.D. Ill. 1898); *Hooks Tel. Co. v. Town of Leary*, 352 S.W.2d 755, 758, (Tex. Civ. App. 1961).

confer on another company the right to enter the city and use public rights-of-way for its own facilities and separate business activities.[16]

In contrast, here, Section 621(a)(2) establishes that cable franchises are general in character, authorizing cable systems' occupation of public rights-of-way without limiting them to any particular use or service. The provision of cable modem service over a franchised cable system thus does not entail any use of the rights-of-way not contemplated by Congress.[17] Section 636(c) further provides that any state or local law or franchise provision "which is inconsistent with this Act shall be deemed to be preempted and superseded."[18] Section 621(a)(2) accordingly preempts any state or local law or franchise provision that purports to limit cable franchises to cable services and to exclude cable modem services.

ALOAP is wrong in arguing that the Section 621(b)(3) prohibition against LFA imposition of separate Title VI franchising requirements on telecommunications services is an acknowledgement that LFAs can impose such requirements on other services that cable operators provide.[19] Section 621(b) simply prevents conflict and confusion at the intersection of Title VI and Title II by clarifying that Title II regulations apply to cable operators' provision of

---

16 *See City of Aurora v. The Elgin, Aurora & Southern Traction Co.*, 81 N.E. 544, 548 (Ill. S.Ct. 1907).

17 PCTA also cites a number of state opinions for the proposition that "[t]he occupation and/or utilization of [public rights-of-way] for a purpose other than authorized by constitution, statute, or franchise constitutes a public nuisance under California law." PCTA Comments at 23-24. Here, Section 621(a)(2) and cable operators' existing cable franchises already authorize the provision of cable modem service over franchised cable systems.

18 47 U.S.C. § 556(c).

19 ALOAP Comments at 62-63.

telecommunications services.[20] ALOAP essentially argues that Congress intended cable operators' Title I interstate information services, such as cable modem service, to be subject to *heavier* local regulation than Title II telecommunications services. Nothing could be further from Congressional intent. In contrast to Title II and Title VI services, Congress explicitly chose to keep Title I information services, particularly Internet access services such as cable modem service, unfettered from intrusive regulation by any level of government.[21]

B. Section 622 Preempts LFA Imposition Of Franchise Fees On Cable Modem Service Gross Revenue.

Just as it specified that cable operators shall not have to obtain more than one franchise for their cable systems' occupation of public rights-of-way, Congress also provided that cable operators shall pay only one franchise fee for the cable system's use of public street and easements. Section 622(b) 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 revenues derived. . . from the operation of the cable system to provide *cable services*."[22] Under the statute's plain

---

[20] 47 U.S.C. § 541(b). Section 253(c) recognizes the authority of state and local governments to manage the use of public rights-of-way by telecommunications service providers and to receive fair and reasonable compensation for that use. 47 U.S.C. § 253(c). Because these interests are fully protected through the cable franchise, there is no need for local governments to require cable operators to secure an additional franchise, and pay additional franchise fees, when they provide telecommunications services over their upgraded cable networks. *See* Comments of Cox Communications, Inc. in WT Dkt. No. 99-217, CC Dkt. No. 96-98 (filed Oct. 12, 1999).

[21] 47 U.S.C. § 230(b). Some LFAs continue to argue that they have regulatory authority over cable modem service because it is or includes a cable service, directly contradicting the Commission's holding in the *Ruling & Notice*. LFAs could have presented these service classification arguments in a petition for reconsideration but did not do so. Such argument now properly belongs in the Ninth Circuit's review of the *Ruling & Notice*. Moreover, to the extent ALOAP argues that cable modem service may include video transmissions that qualify as cable services, we note that cable modem service merely delivers the same categories of content and functionalities as other Internet service providers' ("ISPs") services classified as information services, as the *Ruling & Notice* recognized. *See, e.g.*, ALOAP Comments at 42-43.

[22] 47 U.S.C. § 542(b) (emphasis added).

language, Section 622(b) applies to all franchise fees that LFAs assess with respect to any cable system, and limits these cable franchise fees to gross revenues derived from the provision of cable services.[23] Section 622(b) thus expressly preempts LFA imposition of franchise fees on cable modem service.

As a federal court recently concluded in analyzing Section 622(b), this provision "was primarily designed to protect cable operators."[24] The court quoted the legislative history demonstrating that Congress drafted Section 622(b) "to prevent local governments from taxing private operators to death as a means of raising local revenues for other concerns" and because Congress was "concerned that, without a check on such fees, local governments may be tempted to solve their fiscal problems by what would amount to a discriminatory tax not levied on cable's competitors."[25] Consequently, as the New Orleans LFA observed in its comments, "the 1996 Act amended prior [Section 622(b), codified at 47 U.S.C.] section 542(b) by inserting 'to provide cable services' . . ., thus *limiting the scope of the services on which cable operators must pay*

---

[23] ALOAP's argument that Congress has no authority to limit the fees demanded by LFAs for rights-of-way use by cable modem service providers is untenable. ALOAP Comments at 51-52. This argument would invalidate Section 622 as a whole. Furthermore, even before the enactment of the 1984 Cable Act, the Commission exercised "authority over the setting of maximum franchise fees a local government could charge a cable system." As the courts have recognized, "[t]his continued federal intervention was deemed necessary because of a potential conflict between the states, tempted to view cable television as 'a convenient revenue-producing enterprise,' and the federal government." *New York State Comm'n on Cable Television v. FCC*, 749 F.2d 804, 809 & n.6 (D.C. Cir. 1984) (citing *Applications for Certificate of Compliance*, 66 F.C.C.2d 380, 391-92 (1977)).

[24] *Bova v. Cox Communications, Inc.*, 2002 WL 1575738, at *3 (W.D. Va. 2002).

[25] *Id*. (quoting S. REP. NO. 98067, at 25 (1983); 129 CONG. REC. S8254 (daily ed. June 13, 1983) (statement of Sen. Goldwater)) (emphasis added, internal quotation marks omitted).

franchise fees with respect to any cable system to cable services only."[26] The House Conference Report, discussing this statutory change, explained that Congress adopted the "cable services" limitation to Section 622(b) to make clear that state and local authorities must limit the franchise fees they impose on cable operators to "only the operators' cable-related revenues."[27] The "cable services" amendment to Section 622(b) thus manifests Congress' intent to bar LFAs from imposing additional fees for cable systems' occupation of public rights-of-way when cable operators provide new, non-cable services over their franchised facilities.

The Supreme Court, in *Gulf Power*, warned against interpreting the Communications Act to permit the imposition of additional costs on cable operators when they use their cable systems to provide cable modem services. The Court considered the consequences of interpreting the statute to mean that, "if a cable company attempts to innovate at all and provide anything other than pure television, it loses the protection" of the fee limiting provisions of the Communications Act – such as the Section 224 pole attachment rate limitation in that case and the Section 622(b) cable franchise fee limitation here.[28] The Court concluded that such a reading of the statute

---

[26] Comments on Behalf of The Utility, Cable & Telecommunications Committee of The City Council of New Orleans at 11 (emphasis added); *see also* Comments of the National League of Cities, *et al.* in GN Dkt. No. 00-185 at 13 (stating that classification of cable modem service as a non-cable service would bar LFAs from collecting franchise fees on the service).

[27] *See* H.R. CONF. REP. NO. 104-458 (1996), *reprinted in* 1996 U.S.C.C.A.N. 124, 193. The 1996 changes to Section 622(b) were not intended to affect local governments' ability (where permitted by state and local law) to manage rights-of-way by telecommunications service providers and to receive fair and reasonable compensation, on a competitively neutral and nondiscriminatory basis, for that use. *Id.* at 192-193. As noted previously, these interests are fully protected by the cable franchise when a cable operator provides telecommunications services over its upgraded cable network. *See supra* note 20. Indeed, as demonstrated in Cox's comments, cable operators offering telecommunications services undoubtedly pay more in cash and in-kind benefits for their rights-of-way use than any other telecommunications service provider. Cox Comments at 45-47 and Attachment A.

[28] *National Cable & Telecommunications Association, Inc. v. Gulf Power*, 122 S. Ct. 782, 789 (2002) (*"Gulf Power"*).

"would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'"[29] Allowing LFAs to impose franchise fees on cable modem service would defeat, not only the express terms of Section 622(b), but also Congress' directive to promote the deployment of facilities-based broadband Internet services and to protect these services from burdensome regulation at all levels of government.

C. The Internet Tax Freedom Act Prohibits LFA Imposition Of Franchise Fees On Cable Modem Service Gross Revenue.

A franchise fee on cable modem service also would violate the Internet Tax Freedom Act ("ITFA").[30] The same LFAs who contend that a fee on cable modem service is not a franchise fee (and thus not subject to Section 622(b)) assert, remarkably, that the ITFA does not prohibit such a fee because it would be a "franchise-fee-like imposition[]."[31] These LFAs state that a cable modem service fee would fall into the ITFA's exclusion of "any franchise fee or similar fee imposed by a State or local franchising authority, pursuant to section 622 or 653 of the

---

[29] *Id*. The Commission applied the same principle in the *Ruling & Notice*, when it rejected Earthlink's argument that a separate "open access" regime should apply to the cable modem services of cable operators who also offer telephone service. The Commission observed that many cable operators would stop offering telephony service if such offerings would trigger access obligations for cable modem service. Consequently, the Commission concluded, such a rule would undermine the goal of the 1996 Act to encourage facilities-based competition and to encourage deployment of advanced telecommunications capability by removing barriers to infrastructure investment. *Ruling & Notice* at ¶¶ 46-47.

[30] Pub. L. No. 105-277, § 1100 *et seq.*, 112 Stat. 2681 (1998) (reproduced at 47 U.S.C. § 151 note).

[31] PCTA Comments at 39; *see also* ALOAP Comments at 56.

Communications Act of 1934, or any other fee related to obligations of telecommunications carriers under the Communications Act of 1934."[32]

A cable modem service fee, however, would not be a telecommunications carrier fee or obligation, because cable modem service is not a telecommunications service. Nor would the fee be imposed pursuant to Section 653, which deals with open video systems.[33] LFAs also could not require payment of the fee pursuant to Section 622, because (as explained above) that provision prohibits LFAs from levying such fees on non-cable service revenues. In short, a fee imposed on cable modem service would not fall into the ITFA's "franchise fee" exclusion.

A local government fee on cable modem service accordingly would be a "tax" subject to the ITFA moratorium on state and local governments' imposition of any "taxes on Internet access" or "multiple or discriminatory taxes on electronic commerce."[34] The ITFA defines a "tax" to include "any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes and is not a fee imposed for a specific privilege, services, or benefits conferred."[35] As discussed in Cox's opening comments,[36] franchise fees on cable modem services are taxes under the ITFA, because LFAs impose these fees for the purpose of raising revenues for governmental purposes. Moreover, LFAs are not conferring any new privilege, service or benefit in exchange for such fee payments, given that cable operators already have (and pay for) an existing franchise for their cable systems' occupation and use of

---

32 PCTA Comments at 39 (quoting ITFA § 1140(8)(b)); ALOAP Comments at 56 (citing same).

33 47 U.S.C. § 573 – Establishment of Open Video Systems.

34 ITFA § 1101(a). This moratorium has been extended through November 1, 2003. Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, 115 Stat. 703 (2001).

35 ITFA § 1104(8)(A)(i).

36 Cox Comments at 52.

public rights-of-way. Therefore, to the extent LFAs contend that they are imposing a fee on cable modem service in exchange for giving cable operators the "privilege" of providing this Internet access service in their franchise areas, the fee is a prohibited tax on Internet access.[37] It is also a discriminatory tax on electronic commerce, [38] because LFAs do not impose the same fee on other Internet service providers.[39]

---

[37] Even if the ITFA were repealed to allow taxes of general applicability on Internet access services, Section 622(g)(2) of the Cable Act would prohibit LFAs from structuring such taxes in a way that unduly discriminated against cable operators. Although that section recognizes that local governments may apply (where authorized by state law) taxes of general applicability to cable operators, it expressly precludes the imposition of taxes that are "unduly discriminatory." 47 U.S.C. § 542(g)(2); *see also* H.R. REP. NO. 98-934, at 64 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4701 (taxes or fees of general applicability would include "such payments as a general sales tax, an entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes . . ."). A local government that attempted to single out cable operators by, for example, imposing a tax or fee only on cable operators' Internet access services and not on other ISP services, would be deemed by Section 622(g) to be imposing a "franchise fee" on cable operators. And, as previously discussed, such a fee would be impermissible because franchise fees may not be levied against anything other than cable operators' cable services revenues, pursuant to Section 622(b).

[38] The fee on cable modem service fits under several provisions of the ITFA discriminatory tax definition, because it

> (i) is not generally imposed and legally collectible . . . on transactions involving similar property, goods, services or information accomplished through other means;
>
> (ii) is not generally imposed and legally collectible at the same rate . . . on transactions involving similar property, goods, services or information accomplished through other means . . .;
>
> [or]
>
> (iv) establishes a classification of Internet access service providers or online service providers for purposes of establishing a higher tax rate to be imposed on such providers than the tax rate generally applied to providers of similar information services delivered through other means.

ITFA § 1104(2)(A)(i), (ii) & (iv).

[39] The discriminatory imposition of the fee only on cable modem service providers, and not other information service providers, precludes LFAs from arguing that the fee is somehow a

continued…

Congress recognized that requiring cable operators to go through the franchise process, pay a separate franchise fee and assume additional local obligations each time they provide a new, non-cable service over their franchised cable system would place cable operators at a disadvantage vis-à-vis their competitors and discourage the deployment of new services. Consequently, Congress drafted the ITFA and Sections 621 and 622 of the Cable Act to preempt such local regulation. This statutory preemption is an essential element of Congress' express policy to promote broadband deployment and facilities-based competition and to protect the Internet from all levels of intrusive governmental regulation.

D. LFA Regulation Of Cable Modem Customer Service Standards Is Unnecessary And Contrary To Federal Communications Policy.

Congress' directives to promote broadband deployment, facilities-based competition and an Internet free from intrusive government regulation also preclude the imposition of cable modem customer service standards. Despite their rhetoric to the contrary, LFAs have failed to demonstrate that the provision of cable modem service presents any unique customer service problems (or, indeed, any problems at all) that could justify singling out cable operators for government regulation. Imposition of government-mandated customer service standards would only retard cable modem service deployment, because it would place cable operators at a competitive disadvantage vis-à-vis other Internet access service providers by unnecessarily increasing the regulatory burden on cable modem services. Such government intervention is

---

…*continued*

"generally applicable" fee imposed for using public rights-of-way to provide Internet access services. Even if a generally applicable information service rights-of-way fee were imposed, moreover, levying such a fee on cable modem service providers would still be discriminatory because cable operators would have to pay twice for use of the same rights-of-way: once through their existing cable service franchise fee and again through the "generally applicable" information service fee.

completely unwarranted in today's nascent and dynamic market. As discussed in Cox's opening comments, Internet access services remain highly competitive.[40] This robust competition compels cable operators to provide the best customer service possible in order to retain and attract buyers for their cable modem services, particularly at this critical juncture in the industry's effort to promote customer migration from narrowband to broadband services.

Market forces already have led cable operators to ensure excellent customer service for cable modem subscribers. For example, Cox provides a variety of means for its customers to obtain service support. At the service initiation stage, Cox gives customers a 2-hour appointment window for service installation by Cox representatives. As an alternative option for those customers who choose to connect their service themselves, Cox provides a self-installation kit and an 800 telephone number for technical support. This option has been highly successful. In some Cox markets, over 60% of installations are performed successfully by the customer.

In Cox's call centers, a tiered support group of trained representatives utilize diagnostic tools to trouble shoot problems throughout the subscriber relationship. Tier 1 can handle about 92% of customer issues related to their cable modem service. Higher skilled Tier 2 representatives trouble shoot more complex customer issues. Although Cox resolves 99% of all customer issues within Tiers 1 and 2, a Tier 2.5 group also looks for trends in customer issues and provides root cause analysis. Issues that extend beyond individual customers go to the network engineers who comprise Tier 3. In addition, Cox maintains a Web portal that provides self-service support to customers in the form of Frequently Asked Questions and a dynamic knowledge base that allows customers to type in questions in natural language and receive immediate answers.

---

40 *See* Cox Comments at 16-18.

Cox and other cable operators are developing these innovative customer service solutions to address the unique issues that cable modem service presents. For instance, subscribers' unprecedented control over their customer premises equipment (their computers and modems) results in the installation and use of new software and applications that are unique to individual subscribers and beyond the cable operator's control. Instead of being concerned only with its own network, a cable operator responding to a cable modem subscriber's service problem may have to evaluate everything from the customer's input in the computer, to his or her unique software and hardware, to the Web-page that he or she seeks to access, in order to identify and resolve the problem. Cox developed its tiered customer service system specifically to address the unique trouble-shooting demands of cable modem service. In Cox's experience, because the subscriber's service issues are so complex, customer satisfaction depends on resolution of the full problem presented rather than the speed of the service calls. Indeed, the average Cox customer service phone call for cable modem service takes approximately twice as long as that for cable television service. The demands of cable modem service thus require the cable operator and its customer care representatives to develop a much deeper and more complicated relationship with the subscriber than traditionally has been forged through the provision of video programming services.

A multiple-ISP environment inevitably will multiply the layers of complexity that cable modem service adds to the customer care process. The division of customer care responsibility between each ISP and cable operator will likely vary depending on their individual contractual arrangements. Government regulation of customer service standards would be extremely difficult to develop and implement in this environment. Indeed, such regulation would further complicate contract negotiations aimed at introducing additional ISPs on the cable modem

platform by forcing one-size-fits-all regulation on all service providers, to the detriment of consumers. Moreover, regulation of the cable modem platform would subject any ISP that operates on this platform to a laundry list of customer service regulations and potential penalties for non-compliance, even though the ISP would be free from such regulation when it provides the same Internet access service on any another platform. Consequently, singling out cable operators for customer service regulation would impede both the deployment of cable modem service and the introduction of multiple ISPs.

By interfering with the efficient operation of the market, imposition of cable modem customer service standards also would harm consumers' interests in other ways. For example, because empirical measurement standards are difficult to develop and implement where an operator offers a variety of customer care options, regulation may force an operator such as Cox to cease offering such consumer choice in customer service. Local regulation would be especially problematic and inefficient because cable operators' successful deployment of cable modem service depends on the use of regional and national networks and support systems that take advantage of economies of scale and scope (achieved in part through the clustering of cable systems). Because these networks and support systems are not defined along state or local political boundaries, forcing cable operators to comply with disparate and potentially conflicting local regulations would require them to dismantle and rebuild their infrastructure. Cable operators and consumers can ill afford the resultant increases in costs and losses in efficiency.

Similarly, the ISPs with whom cable operators will be partnering are highly unlikely to have a local, franchise-specific presence, making compliance with a patchwork of local requirements a practical impossibility. Far from enhancing the customer's experience, therefore, imposition of local customer service standards may well prohibit the introduction of additional

choices on the cable modem platform. For all of these reasons, local regulation of cable modem customer service would conflict with Congress' directives and the Commission's mission to promote the ubiquitous deployment of broadband services and to protect the Internet from intrusive government regulation.

Congress' intent to protect information services, particularly Internet access services such as cable modem service, from the burdens of local regulation and fees is manifest in (i) its establishment of the Title I information service category, (ii) the Section 706 directive that federal, state and local governments remove impediments to ubiquitous broadband deployment, (iii) the Section 320(b) admonishment against regulation of Internet services by any level of government and (iv) the ITFA prohibition against Internet access taxes and discriminatory taxes on electronic commerce. Moreover, Sections 621 and 622 explicitly preempt LFA imposition of additional franchising and franchise fee requirements for cable modem service provided over franchised cable systems. This federal framework precludes LFA imposition of local regulations and fees on cable modem service.

II. THE COMMISSION CAN AND SHOULD ASSERT EXCLUSIVE JURISDICTION TO RESOLVE THE FRANCHISE FEE REFUND ISSUE.

Few commenters oppose the Commission's exercise of jurisdiction to resolve the refund issue, and none of their arguments is persuasive. Comments were filed by a number of LFAs, who naturally prefer that their own local courts adjudicate any dispute over refunds on a case-by-case basis, allowing for individual interpretations of both the Communications Act and the Commission's rulings in the *Ruling & Notice*. Although these LFAs do not dispute that the Commission has jurisdiction to resolve the refund issue, they continue to dispute the Commission's determination that the Section 622(b) prohibition applies against cable modem service franchise fees. These LFAs would rather remove this issue from the Commission's

docket and send it to local courts within each LFA's jurisdiction, where they hope to obtain more favorable interpretations of federal law. These LFAs fail to address, however, the desirability of establishing a consistent national approach to the refund question that is coordinated with the national approach applicable to the issue of franchise fees on cable modem service going forward.[41]

Also opposing Commission jurisdiction over refunds are two individuals who represented a small class of cable modem subscribers in Cox's Roanoke, Virginia cable system in a class action formerly pending in the Western District of Virginia.[42] Although not explained in their filing, their class was limited to subscribers in that one federal district (effectively just the Roanoke system). The subscribers sought refunds of franchise fees as well as their attorney's fees and expenses. Cox argued in that case (among other things) that the refund issue should be resolved nationally by the Commission, not piecemeal by numerous courts. Like the LFAs, these subscribers express no concern for a uniform national policy on the refund question.[43]

Three clear points emerge from these comments. First, there is no serious question that the Commission has jurisdiction to decide the refund matter. While some commenters question whether the Commission *should* exercise its jurisdiction, none denies the fundamental principle that the Commission *has jurisdiction* over franchise fee questions that implicate national

---

41 *See* ALOAP Comments at 64-67; City Coalition Comments at 32-33; PCTA Comments at 40.

42 On July 10, 2002, the case was dismissed for lack of subject matter jurisdiction, with the court finding no Title II claims and no implied private right of action for subscribers to sue for refunds of franchise fees under the Cable Act. *Bova*, 2002 WL 1575738, at *4.

43 Comments of Kimberly D. Bova and William L. Bova at 4-6 ("Bova Comments").

communications policy and Commission expertise.[44] There also should be no dispute that the refund question presents a national issue, because it affects parties located in every state throughout the country. The Commission has acknowledged the national scope of this issue, stating "that the fees in question were collected pursuant to section 622 and that our classification decision will alter, *on a national scale*, the regulatory treatment of cable modem service."[45] The refund question plainly arises directly under the Communications Act, raises a national issue, and falls well within the "national policy rubric."[46]

Contrary to the suggestion of some commenters, the refund issue *does* implicate the Commission's expertise. Agency expertise is not narrowly limited to a mechanical understanding of a particular technology. The Commission's expertise in this area includes not only a thorough understanding of the technologies involved, but also decades of institutional knowledge of the affected industries; a comprehensive understanding of the statutory scheme and various regulatory frameworks instituted and revised over the years; the particular interests, concerns and expectations of LFAs, subscribers and cable operators; the competing interests of

---

44 *See Ruling & Notice* at ¶ 107. Although the Bovas confusingly suggest at one point that the Commission lacks jurisdiction to decide the issue, in fact they argue that the courts have *concurrent* jurisdiction. The Bova Comments also mistakenly rely on Commission statements from 1986 that cable franchise fee disputes are often best resolved by courts. Bova Comments at 4-6. In reality, while the Commission in 1986 recognized that it may be appropriate for courts to resolve purely local matters, it also explained that it would still "entertain fee disputes concerning matters that arise directly under specific provisions of the Cable Act" that may implicate the Commission's expertise. Amendments of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984, *Memorandum Opinion and Order*, 104 FCC 2d 386, 393 (1986).

45 *Ruling & Notice* ¶ 107 (emphasis added).

46 Time Warner Entertainment/Advance-Newhouse Partnership Petitions for Declaratory Ruling on Franchise Fee Issues, *Memorandum Opinion and Order*, 14 FCC Rcd 7678 (1999). *See* Cox Comments at 58-64. Even the Bovas admit that "the issue of liability is national in scope." Bova Comments at 6.

ISPs, telecommunications service providers and others; the records of related rulemaking proceedings; and the expectations of Congress. More specifically, the Commission is particularly familiar with the regulatory scheme for the calculation, collection, pass through and refund of franchise fees; the causes of regulatory uncertainty prior to the classification ruling; and the difficult position of LFAs and cable operators as they have attempted to determine their respective obligations. Ultimately, Congress mandated that the Commission have primary responsibility for establishing a cohesive and uniform national communications policy in this area. None of these things can be said of the many local courts that would address these issues if the Commission declines to exercise jurisdiction.

Second, most of the arguments opposing Commission jurisdiction are, in fact, arguments on the merits, not reasons why the Commission should decline jurisdiction. The arguments go to whether refunds should be issued, not whether the Commission should exercise its jurisdiction to address the issue. The LFAs argue that refunds *should not* be granted because the fees could have been levied "without running afoul of the Cable Act's franchise fee limit," and that Section 622(b) does not invalidate contractual provisions pre-dating its amendment under the Telecommunications Act of 1996.[47] They also say refunds should not be ordered, because it would be a "logistical nightmare," because they already spent the money ("to further important public purposes"),[48] and because no purpose would be served by applying the Commission's classification decision retroactively.[49] By contrast, the Bovas argue that the Act *requires* the refund of franchise fees and that cable operators should be held responsible because they

---

47 ALOAP Comments at 66.

48 City Coalition Comments at 33.

49 *See* PCTA Comments at 40.

allegedly "could easily have negotiated a contractual provision passing on any refund obligation to the LFAs."[50] They also contend that LFAs and cable operators simply could have asked the FCC to decide the classification question at the outset.[51]

None of these arguments supports the notion that the Commission should decline to exercise jurisdiction on the refund question. To the contrary, the arguments go to the merits of the substantive issue, requiring interpretation of the Communications Act and implicating the Commission's policy on franchise fees going forward – poignantly demonstrating why the Commission *should* exercise jurisdiction rather than leave such interpretations to myriad local courts. The refund issue is inextricably intertwined with the Commission's interpretation of Section 622 and requires a uniform national resolution. It cannot be resolved fairly by numerous local courts as an afterthought to the Commission's *Ruling*. This is precisely what Congress had in mind in entrusting the interpretation of the Act and the establishment of national communications policy to the Commission. Indeed, the commenters' arguments implicate issues of national policy that lie at the heart of this very proceeding. As the *Ruling & Notice* makes clear, this proceeding is the proper forum for parties to raise any arguments concerning LFAs' authority to impose franchise fees on cable modem service.[52]

The third clear point to emerge from the comments is that the alternative to Commission resolution of the refund issue – i.e., individual court cases – would create a hopeless hodge-

---

50 Bova Comments at 10.

51 *Id*.

52 One commenter says there are "specific, individual factors" that preclude Commission resolution of these issues. *See* ALOAP Comments at 66-67. Not so. No commenter has presented a fact pattern so unique that it would require separate proceedings for each LFA, rather than Commission determination of a framework applicable to all similarly-situated parties nationwide.

podge of inconsistent obligations and judicial decisions, many of which would involve disparate interpretations of the Communications Act and application of other legal doctrines. While it may be in the self interest of class action subscribers (or LFAs) to proceed with their own private suits, such suits demonstrate why judicial resolution is unsuitable here. For example, the subscriber suit that Cox was forced to litigate failed to join the affected LFAs – instead seeking recovery solely from the cable operator and leaving out critical participants interested in the franchise fee issue. The subscribers in that case also made arguments on the refund question that would have required interpretation of federal law and would have broad implications for LFAs, the cable industry and others, well beyond the refund dispute. Similarly, the LFAs argue for state court resolution of the refund issue so that they can argue for disparate interpretations of the Act. As a result, cable operators would be subject to disparate obligations, and some subscribers might receive refunds whereas others would not.

In short, if the Commission declines to resolve the refund issue, numerous courts will do so in cases involving different parties, different interests and different theories, resulting in conflicting rulings. This would only undermine the Commission's national policy mission. The Commission is in the best position to resolve the refund issue justly and efficiently.[53] Proceeding before the Commission with all interested parties is far superior to struggling through numerous court actions across the country. Leaving the refund issue to local courts will result in the very same problem that led to the Notice of Inquiry in the first place – conflicting court decisions creating regulatory uncertainty and a tremendous waste of resources. The classification decision

---

[53] *See* Cox Comments at 58-64.

partially filled a regulatory vacuum, and the Commission should finish the job by exercising jurisdiction over the refund issue.

III. THE COMMISSION CAN AND SHOULD FORBEAR FROM APPLYING COMMON CARRIER REGULATION TO THE EXENT THAT CABLE MODEM SERVICE MAY BE SUBJECT TO TELECOMMUNICATIONS SERVICE CLASSIFICATION IN THE NINTH CIRCUIT.

The Commission's analysis and tentative conclusion to forbear from applying Title II regulation to cable modem service in the Ninth Circuit are entirely correct.[54] The few comments filed against forbearance misconstrue the law and fail to refute the Commission's analysis. No commenter disputes the need to adopt a uniform national regulatory framework and to resolve the temporary regulatory anomaly posed by the Ninth Circuit's 1999 opinion in *Portland*. Indeed, the comments opposing forbearance demonstrate the danger of leaving the conflict unresolved. As the Supreme Court made clear, these issues are highly complex and the Commission is the appropriate body to decide the regulatory questions posed by cable modem service.[55] It is likely that the Ninth Circuit itself will remove some uncertainty upon review of the *Ruling*, but until then the Commission can and should ensure uniformity in the regulation of cable modem service. As the Ninth Circuit recognized, the Commission has "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is necessary to prevent discrimination and protect consumers, and is consistent with the public interest."[56]

---

54 *See id.* at 64-75.

55 *See id.* at 66-67.

56 *AT&T v. City of Portland*, 216 F.3d 871, 879 (9th Cir. 2000); *see also GTE.Net LLC v. Cox Communications, Inc.*, 185 F. Supp. 1141, 1147 (S.D. Cal. 2002) (same).

Some commenters suggest that the tentative conclusion lacks reasoned analysis and factual support,[57] but this is simply unfounded. The Commission tentatively concluded that Title II regulation in the Ninth Circuit is unnecessary to ensure fair and just rates and practices because, like other interstate information services, "cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing" in the Ninth Circuit as in the rest of the country.[58] This is fully supported by the extensive record in the proceeding and, frankly, is undisputed.[59] The opposing commenters fail to rebut these reasons or to show why they are insufficient to justify taking a market-based approach to cable modem service regulation.[60]

In fact, the D.C. Circuit has held that the competitive market conditions that characterize information services and the Commission's policy interest in promoting data services provide sufficient grounds for forbearance from Title II regulation of such services. In upholding the Commission's *Computer II* decision, the D.C. Circuit stated, "[t]o the extent that certain enhanced services could lawfully be regulated under Title II once they were identified as

---

57 *See* Earthlink Comments at 16; PCTA Comments at 37.

58 *Ruling & Notice* at ¶ 95.

59 *See* Cox Comments at 16-18.

60 Earthlink also fundamentally misconstrues the forbearance inquiry, accusing the Commission of deciding that it will disregard the Ninth Circuit's ruling on appeal by forbearing from Title II regulation even if the Ninth Circuit overturns the Title I classification decision. But the *Notice* asks only whether the Commission should forbear from imposing Title II requirements on cable modem service in the Ninth Circuit on the assumption that the rest of the country is subject to the Commission's Title I classification. Obviously, the Commission did not know the *Ruling* would be reviewed in the Ninth Circuit until well after the *Ruling & Notice* had been issued. The forbearance question the Commission posed is whether to ensure the uniform application of the announced Title I classification across the country (notwithstanding an arguably conflicting 1999 court decision), subject, of course, to appellate review.

common carrier services, we sanction the Commission's forbearance from Title II regulation."[61] The Court found the Commission's forbearance decision well-supported by its policy "to promote the 'efficient utilization and full exploitation of the interstate telecommunications network' . . . [and] not to regulate data processing services under Title II."[62] Thus, the Commission is further supported in its tentative decision to forbear from Title II regulation of cable modem service in the Ninth Circuit because of its findings of competitive market conditions,[63] which make common carrier regulation unnecessary to protect consumers and the public interest.[64]

Earthlink also says the Commission cannot forbear on the ground that it has never regulated the transmission "component" of information services, because (according to Earthlink) the precedents the Commission cites were based on the "bedrock principle that every information service is provided over a common carrier telecommunications service."[65] This argument misstates both the Commission's reasoning and the law. The Commission merely noted its long history of classifying information services under Title I and not subjecting them to Title II regulation; it did not suggest that information services should be broken into separate pieces for different regulatory treatment. To the contrary, the Commission stated in *Computer II*

---

61 *Computer & Communications Industry Ass'n v. FCC*, 693 F.2d 198, 210-11 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) (*"CCIA"*).

62 *Id*.

63 *See* Cox Comments at 16-22.

64 Moreover, the Commission is fully justified in preempting any state or local regulation that would interfere with its decision to forbear from imposing common carrier obligations on cable modem service providers. In *CCIA*, the D.C. Circuit upheld the Commission's exercise of ancillary jurisdiction to preempt state and local regulation of enhanced services in furtherance of the federal policy "favoring regulation by marketplace forces." *Id*. at 217.

65 Earthlink Comments at 16-17.

and in the *Report to Congress* that enhanced functions and transmission functions are so intertwined in information services (including Internet access services), that there is no separate telecommunications service component.[66] In addition, the Commission explicitly held in the *Non-Accounting Safeguards* proceeding that information services encompass services provided over *non*-common carrier facilities.[67]

Opposing commenters also make a few weak arguments directly under Section 10. Earthlink says that uniformity is not a legitimate policy goal because Section 10 permits forbearance on a geographic basis.[68] This is incorrect. Section 10 expands the Commission's authority by explicitly allowing consideration of regional differences and does not purport to limit the agency's policy choices. Indeed, this proceeding demonstrates that geographically limited forbearance may be necessary even to achieve national uniformity in regulation (which cannot seriously be disputed as a valid policy goal).

---

[66] Amendment of Section 67.702 of the Commission's Rules and Regulations, *Final Decision*, 77 F.C.C.2d 384, 430 (1980) ("*Computer II*"); Federal-State Joint Board on Universal Service, *Report to Congress*, 13 FCC Rcd 11501, 11536 (1998) ("*Report to Congress*"). Indeed, information services and telecommunications services are mutually exclusive; an information service cannot include a telecommunications service. *Report to Congress*, 13 FCC Rcd at 11508.

[67] Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended, *First Report and Order and Further Notice of Proposed Rulemaking*, 11 FCC Rcd 21905, 21957 (1996) ("*Non-Accounting Safeguards I*") (Congress intended that the term "information services" would extend to the same functions as "enhanced services," except that "'enhanced services' under Commission precedent are limited to services 'offered over common carrier transmission facilities used in interstate communications,' whereas 'information services' may be provided, more broadly, 'via telecommunications.'").

[68] *See* Earthlink Comments at 18.

Earthlink also argues that Section 10 cannot be satisfied here because it is *per se* unreasonable to deny access to ISPs under Sections 201 and 202.[69] This is nonsense. Section 10 authorizes the Commission to forbear from enforcing "any provision of this Act . . . ."[70] Earthlink cannot rewrite the statute to exempt from forbearance "denials of access" under Sections 201 and 202 just because Earthlink says they are "unjust." There is ample basis in the record for the Commission to conclude under Section 10 that imposing such requirements is unnecessary to ensure fair and just rates and practices.

Finally, PCTA argues that the Commission's forbearance authority is merely self-limiting and cannot preempt state and local authorities from enforcing Title II obligations on cable modem service.[71] But the plain language of Section 10(e) defeats this argument: "A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a)."[72] LFAs derive any authority to regulate under Title II from a delegation of state power. They can have no greater authority than a state commission to regulate telecommunications services, and they would be subject to the same forbearance decision of the Commission. Moreover, the Commission plainly has the

---

[69] *Id.*

[70] 47 U.S.C. §160(a).

[71] PCTA Comments at 38. This assertion of LFA authority to impose Title II regulation on cable modem service notwithstanding Commission rulings highlights the real danger of inconsistent regulation – not just as between the Ninth Circuit and the rest of the country, but also between LFAs and the Commission – if the Commission fails to establish a uniform national rule.

[72] 47 U.S.C. § 610(e).

authority to preempt state and local regulation when the Commission elects to rely on market forces to achieve its regulatory policy.[73]

As the Commission recently held in the *CPNI Third Report & Order*, forbearance from application of Title II requirements is appropriate where it serves to ensure that the Commission's "rules and regulations are consistent and clear."[74] Until the Ninth Circuit rules on the petitions to review the *Ruling*, the *Portland* decision will continue to cause regulatory uncertainty and undermine congressional and Commission policy objectives. The Commission is entirely correct and justified in exercising its forbearance authority to resolve this problem and establish a national regulatory framework for cable modem service.

CONCLUSION

For the foregoing reasons and those discussed in Cox's opening comments, Cox urges the Commission to confirm that there is no legal or policy basis for imposing federal, state or local access, franchising and other regulations on cable modem service. To avoid ongoing disputes in this area, the Commission must declare that the Communications Act preempts state and local regulation of cable modem service, including the imposition of separate franchising, franchise fee, customer service and other requirements for cable modem service. To ensure a uniform

---

[73] *See New York State Commission on Cable Television v. Federal Communications Commission*, 669 F.2d 58, 66 (2d Cir. 1982) ("Federal regulation need not be heavy-handed in order to preempt state regulation.").

[74] In the Matter of Implementation of the Telecommunications Act of 1996; Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act, As Amended; 2000 Biennial Regulatory Review – Review of Policies and Rules Concerning Unauthorized Changes of Consumers' Long Distance Carriers, *Third Report and Order and Further Notice of Proposed Rulemaking*, CC Docket Nos. 96-115, 96-149, 00-257, FCC 02-214, at ¶ 128 (rel. July 25, 2002) (forbearing from imposing Title II express consent requirements to the disclosure of customers' preferred carrier freeze information).

national framework, the Commission also should assert jurisdiction to resolve the cable modem franchise fee refund issue for LFAs, cable operators and subscribers nationwide, and exercise the Commission's authority to forbear from Title II regulation to the extent cable modem service may be subject to such regulation in the Ninth Circuit. After years of regulatory uncertainty, it is time for the Commission to take these essential actions to end the threat of inconsistent and improper regulation and allow cable modem services to reach their full potential – thereby fulfilling Congress' directive to promote ubiquitous broadband deployment, facilities-based competition and an Internet free from intrusive federal, state and local government regulation.

Respectfully submitted,

COX COMMUNICATIONS, INC.

/s/ To-Quyen T. Truong

To-Quyen T. Truong
David E. Mills
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Its Attorneys

Alexandra M. Wilson
COX ENTERPRISES, INC.
1225 19th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 296-4933

August 6, 2002

APPENDIX A
DECLARATION OF RICHARD MUELLER

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

In the Matter of	)	
	)	
Appropriate Regulatory Treatment	)	CS Docket No. 02-52
for Broadband Access to the	)	
Internet Over Cable Facilities	)	

DECLARATION OF RICHARD MUELLER IN SUPPORT OF REPLY COMMENTS OF COX COMMUNICATIONS, INC.

I, Richard Mueller, declare as follows:

1. I have worked in the cable television industry for 36 years. My entire career has been involved with designing, building, and operating cable systems. I am currently Vice President, Network Planning, Engineering, and Operations, for Cox Communications, Inc. ("Cox"), based in Atlanta, GA. I have been directly involved in the planning and design of dozens of Cox's cable system upgrades throughout the United States over the last decade. I am a member of the Society of Cable Telecommunications Engineers and the Institute of Electrical and Electronic Engineers.

2. I am submitting this Declaration in support of Cox's Reply Comments in the above-captioned proceeding. This Declaration responds to the submission of Andrew Afflerbach and David Randolph in support of the Comments of the Alliance of Local Organizations Against Preemption in this proceeding (the "ALOAP Submission"). In preparing this Declaration, I have relied on my personal knowledge of the cable network architecture Cox owns and the services it provides.

3. Cox's and other cable operators' upgrades of their cable systems are not driven by the provision of cable modem services. Rather, these upgrades were and are necessary to provide the entire menu of next generation digital services – with primary focus on the addition of video channels to maintain customer satisfaction and remain competitive against the offerings of direct broadcast satellite ("DBS"). The ALOAP Submission is simply wrong in its claim that the cable systems that existed in the early 1990s "would not have been upgraded at all if it were not for the need to offer two-way services." (ALOAP Submission at 1, 20.) On August 13, 1996, Cable TV Technology, published by Paul Kagan Associates, Inc., projected that, by 1997, only approximately 2% of cable subscribers nationwide would be served by 750MHz cable systems -- with the remaining cable systems being incapable of providing the array and quality of cable video channels available today. Most cable systems of the early 1990s offered only approximately 300 MHz and 35 cable video channels. Upgrading systems to 750MHz has enabled cable operators to offer hundreds of video channels in both analog and digital formats, thereby permitting them to compete effectively against the video program packages offered by DBS. Cable video services could not have remained competitive without the cable system upgrades that operators undertook.

4. Cable system bandwidth upgrades come in blocks, those being the bandwidth choices vendors make available to cable operators. Cable operators generally upgrade to the maximum bandwidth available (generally 750 or 860MHz), based on the knowledge that bandwidth needs are constantly expanding. The provision of cable modem service has no impact on cable operators' decisions to upgrade to increase their cable system bandwidth, because the spectrum used for cable modem service is only 12MHz, or 1.6% of the total bandwidth on a 750MHz cable system.

5. Likewise, cable modem service is not the driver for cable operators' upgrades to provide two-way capacity. Cable modem service utilizes only 16.2% of the 37 MHz of bandwidth dedicated to "upstream" transmissions (from the subscriber towards the headend) on an upgraded cable system. (The remaining bandwidth, whether on a 750 or 860 MHz system, is dedicated to "downstream" transmissions, from the headend toward the subscriber.) To remain competitive, even a cable system providing only cable video services would require two-way capability for such services as video-on-demand and impulse pay-per-view, as well as such basic needs as network telemetry to monitor the network's operations. Furthermore, the return modules that provide such upstream transmission capability are installed inside existing downstream amplifier housings and create no incremental impact on the public rights-of-way.

6. Indeed, the provision of cable modem service does not change the cable system's footprint in any way. The only additional equipment that is unique to cable modem service, and that is not used by other services provided over the integrated cable network, is installed at the cable operator's head-end and the customers' premises – thus imposing no burden on public rights-of-way.

7. The network elements that the ALOAP Submission identifies as being uniquely applicable to the provision of cable modem service actually enhance the overall reliability of the cable system and provide no unique benefit to cable modem subscribers. For example, the addition of power supplies (ALOAP Submission at 10) provides enhanced reliability for customers who receive any service over the network, not just cable modem service customers. Power passing taps and plates (*id.* at 19) are not even a requirement for the provision of cable modem service (but are used to ensure continuity of service to telephone customers). Even if power passing taps and plates were required for the provision of cable modem service, their

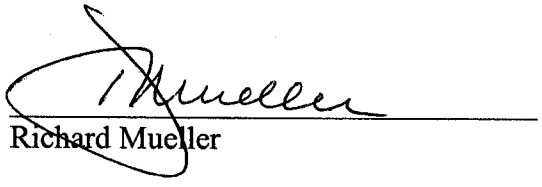
impact on the public rights-of-way would be *de minimis* at most, since they merely replace existing taps and plates. (These devices are approximately 3"x 5"x 1.5", depending on the manufacturer). The ALOAP Submission's discussion of these network elements is instructive only because it further demonstrates ALOAP's distortion of the impact that cable system upgrades have on public rights-of-way.

8. Contrary to the ALOAP Submission's suggestion that cable operators' fiber upgrades have imposed additional burdens on public rights-of-way, the use of fiber has helped to minimize such burdens while increasing the reliability and quality of cable video services, as well as other services on the system. By employing fiber optic cable, cable operators can leverage the maximum bandwidth capacity from their existing coaxial cable networks, rather than having to rebuild the entire network or build a dual cable network. Instead of installing a string of amplifiers on a coaxial cable run, stretching all the way back to the head-end, the use of "fiber to the node" technology means that cable operators can instead simply replace existing amplifiers with higher bandwidth/higher gain devices– thereby eliminating the need for complete network rebuilds and minimizing the impact of an upgrade on public rights-of-way.

9. The ALOAP Submission also appears to overlook the existence of cable system hubs that existed even before upgrades. Indeed, for larger geographic systems such as Cox's cable systems in San Diego, Phoenix and Omaha, where video signals must be transported over long distances in a format not recognizable by consumers' electronics, hubs are essential to convert video signals to a format that subscribers' television sets would recognize. Fiber upgrades in fact allowed the elimination of some hubs. Moreover, (to my knowledge) with the exception of one hub in a cable system that Cox acquired, Cox purchases private property on which to build its hubs, rather than placing them in public rights-of-way.

10. As to the ALOAP Submission's claims that cable operators must upgrade their systems to provide redundant capacity in support of cable modem service, Cox does not install redundant networks solely to support its cable modem service, but instead employs a ring-in-ring architecture to increase network reliability for the entire network. Cox does so by ensuring that if one route of fiber gets cut, another would remain to provide continuous service to subscribers, regardless of the services received by the subscriber. While the ALOAP Submission observes that additional fiber receivers and lasers may be required to increase a network's reliability (ALOAP Submission at 19), it fails to mention that the additional receivers and lasers are installed inside existing node housings and create no incremental burden on the public rights-of-way. And, again, this additional equipment is not dedicated to the transmission of any specific service offering.

I hereby declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.



Richard Mueller

Executed on August 5, 2002