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 AOL TIME WARNER INC.

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SUMMARY

In its initial comments in this proceeding, AOL Time Warner argued that the Commission should maintain the longstanding federal deregulatory approach towards information services. Specifically, AOL Time Warner argued that as a consequence of the Commission's determination that cable modem service is an interstate information service, the Commission should rule that (1) franchised cable operators do not need to obtain additional information service franchises; (2) local franchising authorities ("LFA") may not impose franchise fees or other assessments on cable modem service, and (3) cable operators need not refund to subscribers any such fees previously collected.

A number of other commenters in this proceeding launched, to varying degrees, facial attacks on the Commission's previous *Declaratory Ruling*, claiming, for example, that the *Declaratory Ruling* was incorrect because cable modem service, in their view, should be categorized as something other than an information service, or that the classification announced by the Commission was not yet "final." The Commission must not revise its correct and final decision that cable modem service is an interstate information service. Aside from the fact that no commenter has suggested any valid reasons to alter the Commission's classification of cable modem service, this proceeding is the wrong forum for any such attacks. The *Declaratory Ruling* is a distinct determination, separate from the *NPRM*. Furthermore, the *Declaratory Ruling* is unambiguous in its holding and does not request comment on the conclusion that cable modem service is an interstate information service.

As a matter of law, commenters now pushing to change the *Declaratory Ruling* are precluded from doing so in this proceeding. As several courts have ruled, the Commission's declaratory rulings are final orders for the purposes of the Administrate Order Review Act.

Under this act, final orders like the *Declaratory Ruling* may be challenged only through a timely appeal before a U.S. Court of Appeals or by filing a petition for reconsideration with the Commission. Some commenters did seek review from the Court of Appeals. However, within the window allotted by Commission rules, no commenter filed a petition for reconsideration before the Commission. Parties who failed to pursue the appropriate avenue for Commission reconsideration should not be allowed to surreptitiously receive reconsideration via their comments in the *NPRM*.

Several incumbent local exchange carriers ("ILECs") argue that notions of "regulatory parity" demand that, absent an "open access" obligation for cable modem service, they should be relieved of their traditional common carrier obligations. Clearly, the regulatory implications of classifying cable modem service as an interstate information service do not include imposing ISP access requirements on cable operators or relieving ILECs of their common carrier obligations. But contrary to the contentions of the ILEC commenters, the inherent differences between wireline carriers and cable operators mitigate against blind adherence to the vague principle of "regulatory parity" to justify the sweeping changes advocated by the ILECs. Allowing ILECs to escape their common carrier obligations would violate the legitimate expectations of the ISP community, would harm consumers and competition and would be contrary to the public interest. Thus, regardless of what is decided in this proceeding, the Commission should not sway from its consistent policy that the public interest is best served by continuing to require ILECs to offer their wireline transmission services, regardless of speed or capacity or whether defined as broadband or narrowband, on existing and future infrastructure, to unaffiliated ISPs on non-discriminatory rates, terms and conditions.

LFAs should not be permitted to require that cable operators obtain additional "information service" franchises. Federal law prohibits second franchises once an initial franchise has been granted to use the public right of way. LFAs' franchising authority stems from cable systems' use of the local rights-of-way. Despite the claims of certain LFA commenters, cable systems that offer cable modem service do not place a greater burden on the right-of-way. Therefore, there is no policy reason for allowing LFAs to require a separate franchise.

Imposing a second franchise requirement for cable modem service is particularly problematic because the Commission has sole authority to regulate cable services and interstate communications services. To that end, the Commission may pre-empt local regulation. Many LFA commenters mistakenly contend that the Commission lacks the authority to pre-empt their local cable modem franchise requirements and that in the absence of an express provision requiring pre-emption, local authority is preserved. As to the later claim, Section 636 of the Communications Act does not require express pre-emption of local authority – it requires express authorization for the exercise of local authority. Overall, the pre-emption of any second franchise requirement is unequivocally within the Commission's statutory authority under Title VI of the Communications Act. Title VI gives the Commission authority over any communications network qualifying as a cable system. Since Title VI specifically contemplates that such networks will at times be used to provide non-cable services, it is proper that the Commission use this authority to prevent LFA disruption of cable modem service.

Commission preemption of LFA regulation is both statutorily sound and completely constitutional. Citing the Fifth Amendment of the federal Constitution, several LFAs argue that local rights-of-way are equivalent to private property and that if the Commission allows cable operators to provide modem service without additional compensation, then the Commission has committed an unconstitutional taking. The LFAs' argument fails because the LFAs cannot show that the current franchise fee system undercompensates the LFAs for the burden imposed by cable service and cable modem service combined. Certain LFA commenters also raise a Tenth Amendment claim that federal pre-emption unlawfully commandeers state and local property in the services of a federal regulatory program. This argument is unconvincing because Tenth Amendment jurisprudence only prohibits federal laws which put a positive burden on local officials or property. Here, Commission pre-emption merely forbids local regulation and thus is a negative burden.

Not only should LFAs be prohibited from demanding a second franchise, the Commission should also bar LFAs from levying additional franchise fees for cable modem service revenues. Various LFAs argue that it would be good policy to allow LFAs to charge franchise fees on cable-modem service. First, it makes little sense to permit the imposition of a special tax on a product whose increased consumption has become a national priority. Second, these LFAs would have the Commission ignore that cable operators already pay for their use of public rights-of-way by paying the franchise fee of five percent of cable-service revenue permitted by Section 622, an amount well in excess of LFAs' cost of making available the public rights-of-way used. To force cable operators to pay again for the same use of the same public rights-of-way would create inefficient incentives to forgo use of public rights-of-way by cable operators willing to pay the true costs. Thus, permitting LFAs to impose additional franchise fees would diminish, not enhance, efficiency and harm the public interest. And it surely is no basis for allowing patchwork of LFA assessments on cable operators only, and not on providers of comparable services – particularly when cable operators are already richly compensating LFAs for their use of public rights-of-way by paying a franchise fee.

As a matter of law, LFAs are barred by Section 622(b) of the Communications Act from any form of franchise-fee taxation on cable modem service. LFA commenters presented a variety of cleverly worded taxation schemes, but any franchise fee on cable modem service is still prohibited. Particularly, commenters who argue that cable modem service is included within cable service for the purpose of calculating franchise fees directly ignore the *Declaratory Ruling's* fundamental holding that cable modem service is an interstate information service and not a cable service. Also, there is no "retroactive law" problem with Section 622(b). Where the 1996 amendment of Section 622(b) invalidates existing franchise requirements, it only limits the collection of future revenue and does not affect previously collected amounts. Irrespective of Section 622(b), the Internet Tax Freedom Act also bars LFAs from levying a tax on cable modem service.

To further clarify the issue of franchise fees and to prevent vexatious litigation, the Commission should expressly state that past payments need not be returned for franchise fees collected on cable modem service. Any such fees were collected in good faith and itemized as franchise fees. Yet, as the comments of certain parties indicate, costly litigation is already developing over previously collected franchise fees on cable modem service revenues. Thus, as a matter of public policy, the Commission should confirm that the *Declaratory Ruling* does not apply retroactively to fees paid prior to the ruling.

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REPLY COMMENTS OF AOL TIME WARNER INC.

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

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

I. THIS PROCEEDING IS NOT AN APPROPRIATE FORUM TO REVISIT THE COMMISSION'S FINAL DETERMINATION THAT CABLE MODEM SERVICE IS AN INTERSTATE INFORMATION SERVICE

A number of commenters in this proceeding launched, to varying degrees, facial attacks on the Commission's *Declaratory Ruling*.[2] Some of these commenters claimed outright that the *Declaratory Ruling* was incorrect because cable modem service, in their view, should be categorized as something other than an information service.[3] Other commenters were less specific in their attacks.[4] Aside from the fact that their arguments are incorrect on the merits, this NPRM proceeding is the wrong forum in which to raise them.

A. The NPRM Does Not Solicit Comment on, or Otherwise Reopen, the Commission's Final Declaratory Ruling that Cable Modem Service is Properly Classified as an Interstate Information Service.

The Commission's *Declaratory Ruling* and its *NPRM* in the above-captioned proceedings are clearly distinct. They are self-contained in two different dockets, GN Docket No. 00-185 for

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[2] *See, e.g.*, of Public Cable TV Authority Comments at 9; City Coalition Comments at 1, 7-16; City of North Charleston, South Carolina Comments at 6-9, 12; City of Nashville, Tennessee Comments at 11 (although Nashville correctly recognizes at page 3 that the *Declaratory Ruling* is not at issue in this NPRM proceeding); Attorney General of the State of Texas Comments at 2-3; Consumer Federation of America Comments ("CFA") at 3-6; the American Civil Liberties Union Comments ("ACLU") at 1; Earthlink Comments at 3; Newton Communications Access Center Comments at 2; Center for Digital Democracy, Media Access Project *et al.* Comments ("CDD/MAP") at 23.

[3] *See, e.g.,* District of Columbia Comments at 4 ("[t]he District believes that the FCC's conclusion is incorrect and that cable modem service should be classified as a cable service"); ACLU Comments at 1-2 ("[t]he ACLU believes that the Commission was mistaken when it classified cable modem service as an information service as defined in 47 U.S.C. 153(20). . . . We believe that cable modem services is properly classified as a telecommunications service . . . .") (footnote omitted).

[4] *See, e.g.*, City Coalition Comments at 1 ("[t]he City Coalition does not agree with the determination by the Federal Communications Commission that cable modem service is an information service rather than a cable service and as such is not subject to local regulation"); Public Cable TV Authority Comments at 9 ("a commission decision will be overturned if the commission has failed to consider an important aspect of the problem.")

the *Declaratory Ruling* and CS Docket No. 02-52 for the *NPRM*. Furthermore, the *Declaratory Ruling* occupies Section III of FCC 02-77, and the *NPRM* occupies a completely separate Section IV. In the *Declaratory Ruling* portion, the Commission clearly states: "[w]e conclude that cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs."[5] The statement is unambiguous. It does not label the conclusion "tentative."[6] It does not request comments on this conclusion. Indeed, several local franchising authority ("LFA") commenters expressly recognize this fact.[7]

Similarly, the *NPRM* portion clearly states that, "[h]aving determined that cable modem service is an interstate information service, we now address the regulatory implications of our determination."[8] Again, this language reflects that the Commission has unambiguously reached a final, not a tentative conclusion, and has not sought comment on that conclusion, but rather on the regulatory implications thereof. Accordingly, it is clearly inappropriate for commenters to seek reconsideration, either explicitly or implicitly, of the Commission's classification of cable modem service as an information service in the context of comments filed in CS Docket No. 02-

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[5] *Declaratory Ruling* at ¶ 33.

[6] Accordingly, the State of Texas Attorney General's Office and the Township of Upper Darby, PA are simply in error when they state, at pages 2-3 and 1 of their respective comments, that the *Declaratory Ruling* is a "tentative conclusion" by the Commission.

[7] *See, e.g.*, Kansas City, KS Regional Telecommunications Consortium Comments at 1 ("[a]lthough the Commission has not requested comments on its declaratory ruling . . . the Consortium must state that it disagrees with this ruling"); City of Nashville, TN Comments at 3 ("[a]lthough the Commission's Declaratory Ruling has been appealed and will be heard in the Ninth Circuit, we will assume that cable modem service is an interstate information service for the purpose of our Comments.") (footnote omitted).

[8] *NPRM* at ¶ 72.

52. Rather, as explained *infra*, any party desiring the Commission to reconsider its ruling should have filed a Petition for Reconsideration pursuant to Section 1.106 of the Commission's rules.

B. The Commission's Declaratory Ruling that Cable Modem Service is an Interstate Information Service is a Final Order.

According to the Commission's rules, the *Declaratory Ruling* became a final order upon its public release on March 14, 2002.[9] Indeed, federal appellate courts that have considered the issue have overwhelmingly confirmed that declaratory rulings of the Commission are final orders.[10] No less than six separate judicial appeals were filed regarding the *Declaratory Ruling* -- two in the U.S. Court of Appeals for the Ninth Circuit,[11] and four in the U.S. Court of Appeals for the D.C. Circuit.[12] These cases have been consolidated in the Ninth Circuit.[13]

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[9] 47 C.F.R. § 1.103(b); 47 C.F.R. § 1.4(b)(2).

[10] *Wilson v. A.H. Belo Corp.* 87 F.3d 393, 398-99 (9th Cir. 1996); *New York State Broadcasters Ass'n v. United States,* 414 F.2d 990, 994 (2d Cir. 1969); *North Carolina Util. Comm'n v. FCC,* 537 F.2d 787 (4th Cir. 1976); *State Corp. Comm'n v. FCC,* 787 F.2d 1421, 1428 (10th Cir. 1986); *Telecommunications Research & Action Ctr. V. FCC,* 26 F.3d 185, 190-92 (D.C. Cir 1994); *New York State Comm'n on Cable Television v. FCC,* 749 F.2d 804, 805, 815 (D.C. Cir. 1984). The Eleventh Circuit has held that a declaratory ruling is final and subject to judicial review only when it promulgates a regulation or settles a dispute between parties. *Miller v. FCC,* 66 F.3d 1140, 1144 (11th Cir. 1995). As the Ninth Circuit points out in *Wilson,* however, the Eleventh Circuit's holding is seriously flawed. 87 F.3d at 398-99. Moreover, even under the Eleventh Circuit Court's standard, the court may arguably review the Commission's *Declaratory Ruling* because it creates new regulations, as evidenced by the *NPRM*. Furthermore, even under the Eleventh Circuit Court's view, parties who disagreed with the *Declaratory Ruling* retained the option of filling a Petition for Reconsideration with the Commission but failed to pursue that valid avenue of review.

[11] *Brand X Internet Services v. FCC,* No. 02-70518 (9th Cir. filed Mar. 25, 2002); *People of the State of California et al. v. FCC,* No. 02-70879 (9th Cir. filed April 24, 2002).

[12] *Consumer Federation of America v. FCC,* No. 02-1099 (D.C. Cir. filed March 25, 2002); *Earthlink, Inc. v. FCC,* No. 02-1097 (D.C. Cir. filed March 22, 2002); *Verizon Telephone Companies v. FCC,* No. 02-1100 (D.C. Cir. filed March 25, 2002); *National League of Cities v. FCC,* No. 02-1147 (D.C. Cir. filed May 13, 2002).

[13] *Brand X Internet Services et al. v. FCC,* Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-71425.

1. If the Commission's Declaratory Ruling was Not a "Final Order," the Court of Appeals Would Not Have Jurisdiction to Hear the Appeal.

Pursuant to Section 402(a) of the Communications Act, "[a]ny proceeding to enjoin, set aside, annul or suspend any order of the Commission under this Act (except those appealable under subsection (b) of this section) shall be brought as provided by and in the manner prescribed in chapter 158 of title 28, United States Code [28 USCS §§ 2341 et seq.]."[14] Section 2342 of Title 28 provides:

> The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of --
>
> (1) all *final orders* of the Federal Communications Commission made reviewable by Section 402(a) of title 47 . . . .[15]

Accordingly, the courts have routinely dismissed petitions for review of decisions by the Commission and other federal agencies where the agency decision was not a final order and thus not ripe for jurisdiction by the court.[16] Therefore, the Court of Appeals for the Ninth Circuit, and the D.C. Circuit before it, could not have accepted jurisdiction over and docketed the various appeals of the Commission's *Declaratory Ruling* if the *Declaratory Ruling* was not a final order of the Commission.

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[14] 47 U.S.C. § 402(a).

[15] 28 U.S.C. § 2342(1) (emphasis added).

[16] *See, e.g., Coalition for a Healthy Cal. v. FCC*, 87 F.3d 383, 385 (9th Cir. 1996) ("This court is authorized to determine the validity of only 'final orders' of the FCC."); *Dienethal v. NRC*, No. 99-1001, 1999 U.S. App. LEXIS 7325 (D.C. Cir. March 31, 1999) (dismissing petition for review of a Nuclear Regulatory Commission action because the action was not a final order and therefore not ripe for review); *Melcher v. FCC*, 134 F.3d 1143, 1163 (D.C. Cir. 1998) ("*Melcher*"); *Wade v. FCC*, 986 F.2d 1433, 1434 (D.C. Cir. 1993).

2. Parties Who Disagreed with the Declaratory Ruling Should have Filed Either a Petition for Reconsideration with the Commission or a Petition for Review with the Court of Appeals.

As a final order, parties seeking to challenge the *Declaratory Ruling* had only two options: a Petition for Reconsideration filed with the Commission or Petition for Review with the Court of Appeals.[17] Accordingly, since the *Declaratory Ruling* was released on March 14, 2002, parties who disagreed with the *Declaratory Ruling* had thirty days, *i.e.*, until April 15, 2002, to file a Petition for Reconsideration.[18] However, the commenters who now disagree with the *Declaratory Ruling* did not file petitions for reconsideration during the allotted window. Indeed, as of August 5, 2002, no petitions for reconsideration of the *Declaratory Ruling* have been filed with the Commission, according to the Commission's docket sheet for this proceeding. Consequently, commenters are now precluded from challenging the validity of the *Declaratory Ruling* before the Commission.

Moreover, if petitions for reconsideration had been filed, or indeed, if the Commission considers commenters' back-door attempts at seeking reconsideration of the *Declaratory Ruling*, the Ninth Circuit would likely hold in abeyance the applications for judicial review that have been filed. Where a federal agency's reconsideration of an issue overlaps judicial review of the same topic (as would be the case here if the Commission now reconsiders its *Declaratory Ruling*), the Ninth Circuit has suspended its deliberations pending the completion of the agency's reconsideration process.[19] Likewise, in the D.C. Circuit, where four of the six appeals of the

[17] 47 U.S.C. § 402; 28 U.S.C. § 2342; 47 C.F.R. § 1.106; *Wilson*, 87 F.3d at 396-397.

[18] 47 C.F.R. §1.106(f). The thirty day period expired on Saturday, April 13. Thus, parties had until the next business day, Monday, April 15, to file. *See* 47 C.F.R. § 1.4(j).

[19] *See, e.g.*, *Friends of Sierra Railroad, Inc. v. ICC*, 881 F.2d 663, 666 (9th Cir. 1989) ("The petition in our court was held in abeyance pending resolution of Friend's petition to the ICC for reconsideration.")

Declaratory Ruling were originally filed, the court typically suspends its deliberations while the Commission completes its reconsideration.[20] The reason for holding the case in abeyance was well articulated by the D.C. Circuit Court in *Melcher*: "[i]f a party determines to seek reconsideration of an agency ruling, it is a pointless waste of judicial energy for the court to process any petition for review before the agency has acted on the request for reconsideration."[21]

If the Commission does consider commenters' back-door attempts at reconsideration, the Ninth Circuit Court must bar certain of these commenters from participating in the review entirely. Several circuits, including the D.C. Circuit, have ruled that "a pending petition for administrative reconsideration renders the underlying agency action nonfinal, and hence unreviewable, with respect to the petitioning party."[22] Procedurally, this holding means that a party cannot simultaneously seek Commission and judicial review of the same administrative action. In particular, CFA is a party to the Ninth Circuit challenge to the *Declaratory Ruling*, having originally filed an appeal with the Court of Appeals for the D.C. Circuit. In its comments, CFA also demands outright reconsideration of the *Declaratory Ruling*. If the Commission reconsiders the *Declaratory Ruling* because of the LFAs' and other comments, the

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[20] *See, e.g., ALLTEL Corp. v. FCC*, 838 F.2d 551, 556 (D.C. Cir. 1988) (noting that a temporary abeyance was granted to allow the Commission to deal with petitions for reconsideration before it); *Melcher*, 134 F.3d at 1147; *Teledesic, LLC. v. FCC*, 275 F.3d 75, 83 (D.C. Cir. 2001) ("[i]n such cases, we often hold a petition for review in abeyance pending the FCC's further proceedings."); *Wrather-Alvarez Broad., Inc. v. FCC*, 248 F.2d 646, 649 (D.C.Cir.1957) ("[w]e think the proper course in such a case is . . ., upon motion of any party, to hold the appeal in abeyance pending the Commission's further proceedings, keeping the record open for supplementation to reflect those proceedings.")

[21] 134 F.3d at 1163.

[22] *United Transp. Union v. ICC*, 871 F.2d 1114, 1116 (D.C. Cir. 1989). *See West Penn Power Co. v. EPA*, 860 F.2d 581 (3d Cir. 1988); *Winter v. ICC*, 851 F.2d 1056 (8th Cir.); *TeleStar, Inc. v. FCC*, 888 F.2d 132, 134 (D.C. Cir 1989) (per curiam).

Ruling is not final Commission action as to CFA, and thus CFA forfeits its standing in the Ninth Circuit case under the above-cited statutory provisions.

In short, the attacks by some commenters on the Commission's *Declaratory Ruling*, contained in comments to the Commission's separate *NPRM*, are clearly misdirected. These commenters had two avenues for seeking review of the Declaratory Ruling -- they could have either filed a Petition for Reconsideration with the Commission or a Petition for Review with the Court of Appeals. Some parties, such as CFA, did file judicial appeals. An appeal by any party that has also sought "back door" reconsideration from the Commission in this proceeding is not ripe and is subject to dismissal. As to the remaining commenters, since they did not file timely Petitions for Reconsideration with the Commission, the Declaratory Ruling is a final Commission action, and thus is not subject to review by the Commission, especially in this *NPRM* proceeding where the Commission has not sought comment on its *Declaratory Ruling*, but rather on the regulatory implications thereof.

II. "REGULATORY PARITY" DOES NOT JUSTIFY IMPOSING ISP ACCESS REQUIREMENTS ON CABLE OPERATORS OR RELIEVING ILECs OF THEIR COMPUTER INQUIRY OBLIGATIONS

The primary argument put forth by the Incumbent Local Exchange Carriers ("ILECs") – that notions of "regulatory parity" dictate that, absent an "open access" obligation for cable modem service, ILECs should be relieved of their traditional common carrier obligations to provide DSL transport to unaffiliated ISPs – must be rejected.[23] As described below – and as we have argued in other proceedings – this argument fails to recognize the inherent differences between wireline carriers and cable operators, would violate the legitimate expectations of the

[23] BellSouth Comments at 2-9; SBC Comments at 7-24; Verizon Comments at 6-23; USTA Comments at 7-10.

ISP community, and would be contrary to the public interest.[24] Thus, regardless of what is decided in this proceeding, the Commission should maintain its consistent policy that the public interest is best served by continuing to require ILECs to offer their wireline transmission services, regardless of speed or capacity or whether defined as broadband or narrowband, on existing and future infrastructure, to unaffiliated ISPs on non-discriminatory rates, terms and conditions.

A. Regulatory Parity Must Not Take Precedence Over The Public Interest.

Regulatory parity must not be treated as the sole, or even predominant public policy goal in this or the companion wireline broadband proceeding.[25] As the Commission has often recognized, "regulatory parity" means application of a consistent regulatory framework to different contexts, not identical regulatory treatment of services simply because they compete.[26] Regulatory parity has value in contexts where it can be used as a tool to enhance consumer welfare and thus advance the public interest. But where, as in these contexts, "regulatory parity" would result in identifiable harms to consumers, customers, competition or the continuing deployment of advanced facilities and services, the public interest is obviously not served.

Accordingly, the Commission has consistently recognized in various contexts that regulatory parity for its own sake is not generally required by any provision of the Communications Act or when it is contrary to the public interest. For example, despite

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[24] *See, e.g,* AOL Time Warner's Comments and Reply Comments in CC Docket 02-33.

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

[26] *See Public Service Company of Oklahoma Request for Declaratory Ruling*, Declaratory Ruling, 3 FCC Rcd 2327 at ¶ 21 (1988) (services provided over private utility network did not have to be subject to the same regulatory regime as ILEC local services just because the services were substitutable and competitive).

repeatedly recognizing the emergence of DBS service as a viable competitor to cable, the Commission has twice in recent years declined to establish regulatory parity by rejecting proposals to impose equivalent cable-type broadcast carriage and public interest regulations on DBS providers.[27] Similarly, the Commission earlier refused to heed calls for "regulatory parity" in connection with the disparate requirements applicable to television translator stations and cable systems engaged in the retransmission of television stations.[28]

Regulatory parity is not now and has never been a central federal policy concern in the wireline, cable or Internet contexts. Congress has long applied different regulatory schemes to distinct technologies. For example, in the 1996 Act, Congress set forth four means by which common carriers may enter the video programming marketplace: (1) radio-based systems; (2) common carriage of video traffic; (3) franchised cable systems; and (4) open video systems.[29] Each option carries a unique mix of regulatory obligations in exchange for differing levels of autonomy. Clearly, Congress does not intend every video system to be subject to identical regulation in the name of parity. Indeed, Congress specifically rejected a "parity" approach when adopting the 1996 Act.[30]

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[27] *Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Retransmission of Broadcast Signals*, 15 FCC Rcd 21688 at ¶ 20 and n.78 (2000) (declining to impose identical non-duplication, syndicated exclusivity, and sports blackout protection regulations on DBS providers and cable operators); *Direct Broadcast Satellite Public Interest Obligations,* 13 FCC Rcd 23254 at ¶ 60 (1998)(declining to establish "regulatory parity" by imposing identical public interest obligations on DBS providers and cable operators.)

[28] *Public Interest Requirements to be Imposed on Television Broadcast Translator Stations*, 68 FCC 2d 1450 at ¶ 12 (1978) ("[W]e do not believe that revision of the cable television rules nor the concept of 'regulatory parity' between translators and cable television should be made specific elements of the proceeding.").

[29] Telecommunications Act of 1996, Pub. L. No. 104-104, § 651, 110 Stat. 118-19 (1996).

[30] The Senate bill that formed the basis for the 1996 Act at one time contained a "regulatory parity" section that would have directed the Commission "to move to a time when the same set

Instead of slavish adherence to "regulatory parity," Congress has directed the Commission to focus on other, more important principles in implementing the Communications Act, including promotion of competition, the unfettered growth of the Internet and information services, the provision of new technologies and services, and the deployment of advanced telecommunications capability to all Americans.[31] Nor can it be said that Congress has implicitly signaled to the Commission that regulatory parity should be an overriding concern.[32] In other contexts (*e.g.,* commercial wireless radio services) where Congress has determined that regulatory parity would serve the public interest, it well understood how to achieve equivalent

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of regulations will apply to services provided by integrated telecommunications providers." Telecommunications Competition and Deregulation Act of 1995, S. Rep. 652, 104th Cong. 1st Sess., S. Rep. No. 104-230 at 51 (1995). This proposed new section was not included in the final legislation. *See also Cable Holdings of Georgia, Inc. v. McNeil Real Estate Fund VI LTD.*, 953 F. 2d 600, 606-607 (11th Cir. 1992) (The fact that Congress considered but ultimately rejected a Section 633 to the 1984 Cable Act which would have granted cable operators a federal right of access to multiple-dwelling unit resident units was a clear indication that Congress did not intend Section 621, which was adopted, to be read to include such a right); *Cable Investments, Inc. v. Mark Woodley*, 867 F. 2d 151, 156 (3rd Cir. 1989); *Russello v. United States*, 464 U.S. 16, 23-24 (1983) ("Where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

[31] *See e.g.* 47 U.S.C. § 157 (encourage new technologies and services); 47 U.S.C. § 230 (promote and preserve vibrant and competitive market for Internet); 47 U.S.C. § 157 note (Publ. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706")) (encourage reasonable and timely deployment of advanced telecommunications capability).

[32] Congress has implicitly rejected the notion that the existence of cable as a potential competitor for some services means that ILECs should be relieved of their common carrier and unbundling obligations as to their wireline infrastructure. In adopting the 1996 Act, Congress recognized that cable operators offered a significant potential to provide facilities-based voice services in competition with incumbent wireline carriers. Yet, Congress did not provide in the Act or suggest that this competition should allow the ILECs to evade common carrier requirements.

regulatory treatment through statutory language and/or legislative history.[33] It has never done so in these contexts.

In sum, while the Commission is correct in seeking "to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures. . . that is, to the extent possible, consistent across multiple platforms,"[34] it is equally true that a "rational" regulatory framework does not necessarily mandate identical regulatory treatment of all communications platforms that may be used to deliver certain competing services.[35] Given its final determination in GN Docket No. 00-185 and its tentative conclusion in CC Docket No. 02-33 that retail high-speed Internet access is an unregulated information service, regardless of delivery platform, the Commission has fulfilled its policy goal of establishing a rational framework for the regulation of competing services offered over different platforms. However, the mere fact that certain unregulated information services may be delivered over the ILEC common carrier platform provides no rational basis for relieving the ILECs of their common carrier obligations, nor does it provide a rational basis for transforming cable systems into common carrier facilities.

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[33] *See Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, § 6002(b)(2), 107 Stat. 312 (1993) and 47 U.S.C. § 332(c)(2). *See also* H.R.Rep. 103-213, 103rd Cong., 1st Sess. 494 (1993) (Conference Report); H.R.Rep. No. 103-111, 103rd Cong., 1st Sess. 259-60 (1993) (House Report).

[34] *NPRM* at ¶ 6 (emphasis added).

[35] *NPRM* at ¶ 6. Overuse of regulatory parity would also quickly disintegrate into absurdity. For example, a slavish adherence to regulatory parity would require not only imposing ILEC regulations on cable, but cable regulations on ILECs. Thus, true regulatory parity would require ILECs to comply with a host of cable specific requirements such as must-carry, PEG, leased access and other Title VI requirements. See 47 C.F.R. § 76.1 *et seq.*

B. Cable Modem Service Provides No Justification For the Commission to Abandon the ILECs' Long-Standing Common Carrier Obligations.

This proceeding should not be used as a predicate to renounce the common carrier treatment of ILEC broadband platforms. The ILECs' broadband offerings and cable operators' cable modem services are fundamentally and dramatically different in terms of their history and economics, and thus pure regulatory equality for the two is not mandated and would not serve the public interest.

The Commission must continue to acknowledge the long and important history of treating the ILEC networks as a national resource designed to provide an affordable, stable, and accessible public communications infrastructure.[36] The ILECs and their predecessors have properly been considered stewards of this resource with an affirmative obligation to serve the public on an open, nondiscriminatory basis. From the beginning of the Bell system, complex tradeoffs between the costs and benefits of this stewardship were built into the regulatory structure governing the incumbent carriers. For example, in exchange for agreeing to act as common carriers, the "public switched telephone network" operated by the ILECs has been financed, constructed and maintained through decades of monopoly profits derived from captive ratepayers, affording the ILECs a guaranteed rate of return. Cable operators, by stark contrast, invested their own risk capital with no assured returns, and in exchange have retained greater control of their own proprietary networks, subject to certain limited exceptions as expressly established by Congress.

[36] *Verizon Communications, Inc. v. FCC,* 122 S. Ct. 1646, 1654-1656 (May 13, 2002); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, 104 FCC 2d 958 at ¶ 148 (1986) ("We have long recognized that the basic network is a unique national resource…").

The incumbent carriers benefit from their special common carrier status, allowing them to deploy their infrastructure while realizing substantial returns and minimizing the risk that virtually all other businesses must face. Common carrier regulation of ILECs historically has increased the difficulty of new entry by competing telecommunications carriers and provided substantial benefits such as the right of eminent domain and control over rights-of-way, universal service subsidies, guaranteed returns and exclusive franchises. Because of these long-standing benefits, the Commission and Congress have repeatedly recognized the importance to the public interest that ILEC networks continue to be available on a common carrier basis.[37]

Nothing about the ILECs' regulatory tradeoff has suddenly changed due to the presence of DSL or cable modem service. The fact that unregulated information services are offered over the ILECs' common carrier facilities should not alter the regulatory treatment of the underlying platform. The converse is equally true, nothing about cable modem services being offered on cable systems should alter the regulatory treatment of those systems. Unlike cable operators, the ILECs still have bottleneck control over a public resource and the incentive to use that control to their maximum advantage and to the public's determent. After affording ILECs the ability to reap the benefits of their regulated monopoly common carrier status, the public interest would not be served by altering this balance to benefit the ILECs and at the expense of unaffiliated ISPs and the public.

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[37] *See e.g., Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access and Local Exchange Markets,* Report and Order, 16 FCC Rcd 7418 at ¶ 46 (2001) ("The Internet Service Providers require DSL service to offer competitive Internet access service. We take this issue seriously, and note that all carriers have a firm obligation under Section 202 of the Act to not discriminate in their provision of transmission service to competitive Internet or other enhanced service providers."); *Telecommunications Act of 1996,* Conference on S. 652, 104th Cong., 2d Sess., H. Rep. 104-458 at 131-132 (1996).

C. The Existence of Cable Modem Service, Which Has No History of Being Offered on a Wholesale Transport Basis, Provides No Reason to Undermine the Legitimate Expectations of the ISP Community that the ILECs Would Continue to be Required to Offer Their Long-Standing Transport Services on a Non-Discriminatory Basis.

There is an extensive history of ISPs obtaining transmission service from ILECs on a nondiscriminatory basis, and the ISP community has reasonably relied upon the safeguards embodied in Title II of the Act as the foundation for their present and future businesses. Nonetheless, based on cable operators offering cable modem service to individual subscribers, the ILECs ask the Commission to alter the common carrier predicate of our nation's wireline infrastructure by allowing wireline carrier to cease offering broadband transmission service to ISPs under common carrier principles.[38] There is no basis to grant this request. That cable modem service is made available to individual subscribers at retail in competition with DSL-based Internet access offerings provides no justification for altering the current classification of ILEC-provided transmission services as "telecommunications service." Because cable operators do not offer transmission services to ISPs, no ISP or other information service provider has reasonably built its business on the expectation that cable would be subject to Title II common carrier obligations. Thus, the relationship between ISPs and cable operators, as well as other non-common carrier platforms, is readily distinguishable because reclassification of common carrier ILEC facilities would result in massive disruption, displacement of unaffiliated ISPs, and a reduction in competition.

The Commission should not now embark upon changes that undermine legitimate expectations built over the course of many years. It is well-settled that in analyzing the public

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[38] BellSouth Comments at 6-8; SBC Comments 4-5; Verizon Comments at 7-9; USTA Comments at 7.

interest aspects of a proposed change in rules, the Commission must give weight to entities' reliance on the current regulatory framework.[39] The Commission must therefore consider the adverse impact of the proposed ILEC deregulation on existing ISP customers, who in turn could lose the ability to serve consumers. The Commission must also consider how any proposed changes to the existing competitive safeguards would impact investment decisions by those businesses that currently rely upon ILEC transmission services. Not only would such a radical departure from longstanding precedent create massive uncertainty and confusion, it would profoundly undermine the legitimate expectations and interests of businesses and consumers, and must be rejected.

The importance of reasonable reliance is especially weighty where, as here, the Commission has not merely acquiesced in these activities, but rather has "invited and encouraged them."[40] Not only has the Commission enforced a common carrier framework for use of ILEC transport facilities by unaffiliated information service providers since at least the 1960s,[41] the

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[39] *See e.g., Omnipoint Corp. v. FCC*, 78 F. 3d 620, 633 (D.C. Cir. 1996) ("Commission was required to take into account petitioners' justifiable reliance upon old rule when enacting new rule."); *Sierra Club v. EPA*, 719 F.2d 436, 468 (D.C. Cir. 1983), *cert. denied sub nom. Alabama Power Co. v. Sierra Club,* 468 U.S. 1204 (1984). *See also,* In *Revision of Rules and Policies for the Direct Broadcast Satellite Service,* Report and Order, 11 FCC Rcd 9712 at ¶ 74 (1995), *aff'd sub nom. DirecTV, Inc. v. FCC,* 110 F.3d 816 (1997) (the Commission declined to adopt restrictive cross-ownership rules because certain cable operators already had invested substantial resources in the creation of a DBS system, at least in part out of reliance on an earlier Commission decision not to prohibit cable/DBS cross ownership).

[40] *National Ass'n of Independent Television Producers and Distributors v. FCC*, 502 F.2d 249, 255 (2d Cir. 1974).

[41] *See Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* Notice of Inquiry, 7 FCC 2d 11 (1966) ("*Computer I*"); *Amendment of Section 64.702 of the Commissions Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 FCC 2d 384 (1980) ("*Computer II*"); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, Report and Order, 104 FCC 2d 958 (1986) ("*Computer III*").

Commission has explicitly acknowledged and reaffirmed that competitive information services are dependent upon the common carrier offering by ILECs of such basic services.[42] Noting that these basic services are the "building blocks" upon which enhanced services are offered, the Commission recognized that the ILECs' control of these bottleneck "building blocks" mandates the imposition of reasonable transport obligations on ILECs.[43] As such, the reliance by ISPs and other information service providers on the current regulatory framework has been reasonable, and the sweeping detrimental changes advocated by the large ILECs must be rejected as contrary to the public interest.

III. LFAs SHOULD NOT BE PERMITTED TO REQUIRE THAT CABLE OPERATORS OBTAIN ADDITIONAL "INFORMATION SERVICE" FRANCHISES.

In our opening comments, we explained that LFAs should not be permitted to require cable operators to obtain additional "information service" franchises, either as a matter of policy or as a matter of law. As a matter of policy, permitting LFAs to require a second franchise would open the flood gates to disparate and onerous local regulations that would unnecessarily raise the cost of providing cable modem service. Permitting such regulations is particularly unjustified because they would be entirely unsupported by any legitimate interest in managing access to public rights-of-way.[44]

As a matter of law, any requirement to obtain a separate franchise would be pre-empted. Section 621(a)(2) provides that a cable television franchise "shall be construed to authorize the

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[42] *See Review of Customer Premises Equipment And Enhanced Services Unbundling Rules In the Interexchange, Exchange Access And Local Exchange Markets,* Report and Order, 16 FCC Rcd 7418 at ¶ 3 (2001).

[43] *Id.*

[44] *See* AOL Time Warner Comments at 13-15.

construction of a cable system over public rights-of-way."[45] Federal law thus dictates the scope of permission to use public rights-of-way: when an LFA grants a franchise, it grants a cable operator authority to use the public rights-of-way to build a cable system and to provide whatever services can be provided over such a system.[46] The LFA cannot hold back authority to provide cable modem service. Any state or local regulation requiring a second franchise would thus be pre-empted as inconsistent with Section 621(a)(2).

Besides, because cable modem service imposes no appreciable additional burden on public rights-of-way, a requirement for a second franchise would have nothing to do with permission to use public rights-of-way. Instead, it would be tantamount to a prohibition on using a cable system to provide one particular service: cable modem service. Any such prohibition would run afoul of Section 624 of the Communications Act;[47] would encroach upon the Commission's exclusive jurisdiction with respect to interstate communications services; would be specifically preempted by Commission orders prohibiting local regulation of enhanced services; and would run counter to both the Commerce Clause and the First Amendment.[48]

Several LFAs nonetheless argue that they should be permitted to require additional franchises. As explained below, their arguments are off the mark.

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[45] 47 U.S.C. § 541(a)(2).

[46] *See* H.R. Rep. No. 98-934 at 44 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4681 ("[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.").

[47] 47 U.S.C. § 544.

A. LFAs Are Wrong in Arguing That Permitting Them To Require Separate Franchises Would Make Good Policy.

Various LFAs imply that it is only fair to allow them to require a separate franchise — on the theory that cable systems providing cable modem service impose a greater burden on public rights-of-way than cable systems providing only video service.[49] But, as explained more fully in the attached affidavit of Jeffrey M. King, Time Warner Cable's Executive Vice President, Technology & Data Operations, the factual premise underlying this policy argument is baseless. The "burdens" to which LFAs point were caused by cable operators' upgrading their cable systems to a "hybrid fiber coax" ("HFC") architecture.[50] The driving forces behind the upgrade to HFC, to which cable operators committed before cable modem service came on the scene, were all video-related: more channel capacity, better picture quality and greater reliability.[51]

Once HFC systems were built, cable modem service could be offered without imposing any incremental burdens on public rights-of-way.[52] LFAs' argument that cable operators have sometimes split "nodes" to accommodate heavy cable modem service use is vastly overstated. Even where a particular node falls victim to congestion, the most common solutions — allocating more bandwidth, adding electronics — impose no additional burden on public rights-of-way[53] LFAs are also wrong in arguing that cable modem service is driving an effort to wire previously uncabled central business districts. Insofar as cable operators are voluntarily extending their plant to business districts, video service drives the process: large business offices

[48] *See* AOL Time Warner Comments at 25-30.

[49] *See, e.g.,* ALOAP Comments at 41-42; PCTA Comments at 31.

[50] *See* King Aff. ¶ 2.

[51] *See id.*

[52] *See id.* ¶¶ 8-10.

are much more likely to subscribe to video service than to cable modem service.[54] Finally, LFAs are wrong in contending that cable modem service is driving cable operators' efforts to install equipment designed to increase reliability. Again, video - not cable modem service - is driving the effort.[55]

B. LFAs Are Wrong in Arguing That the Commission Is Legally Required To Permit LFAs To Require Cable Operators To Obtain Separate Information Service Franchises.

LFAs make numerous legal arguments as to why the Commission must permit them to require separate franchises. Each of these arguments, however, is plainly mistaken.

1. The Commission Has Ample Statutory Authority To Pre-Empt Second Franchise Requirements.

Various LFAs claim that the Commission has no "jurisdiction" to pre-empt measures requiring information service franchises. The thrust of this argument (which sometimes takes on near-metaphysical dimensions) appears to be as follows: (1) if cable modem service is not a cable service, then the Commission cannot derive pre-emptive power from Title VI; (2) thus, if the Commission has any pre-emptive power at all, it must derive from Title I; (3) the Commission's power under Title I is limited to actions that are "ancillary" to express powers granted elsewhere; and (4) if cable modem service is not a cable service, regulation of cable modem service cannot be viewed as ancillary to regulation under Title VI.[56]

In deep thought about abstract matter, the LFAs have plainly lost their way. The neatly compartmentalized world that the LFAs portray — in which Title VI applies only to cable

[53] *See id.* ¶¶ 12-16.

[54] *See id.* ¶¶ 17-20.

[55] *See id.* ¶¶ 21-23.

[56] *See, e.g.*, ALOAP Comments at 32-37; PCTA Comments at 17.

services, Title II applies only to telecommunications services, and everything else is left to state regulation[57] — does not exist. Title VI contains substantive rules about, among other things, *cable systems*. Those rules apply regardless of whether the operators of those systems provide cable services or other (say, information) services. Indeed, many of Title VI's provisions specifically contemplate that cable systems will sometimes be used to provide non-cable services.[58] Thus, Title VI unquestionably applies to any communications network qualifying as a "cable system." And the definition of that term — contained in Section 602 of the Act[59] — nowhere suggests that a cable system somehow stops being a cable system when it is used to transmit a communications service other than a cable service. Indeed, the Supreme Court has expressly rejected that argument.[60]

And the substantive rules contained in Title VI prohibit LFAs from requiring second franchises. For example, Section 621(a)(2) states that "[a]ny franchise shall be construed to

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[57] *See, e.g.*, PCTA Comments at 25 (stating without further explanation that "it would seem obvious that the cable operator cannot rely upon its cable franchise as a source of authority given the Commissio[n]'s determination that cable modem service does not constitute a cable service").

[58] *See, e.g.*, 47 U.S.C. § 541(b) (providing rules governing LFA-level regulation of "telecommunications services" provided over cable systems); *id.* § 541(d) (providing rules governing state-level regulation of "any communication service other than cable service" provided over cable systems); *id.* § 543(a)(1) ("Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.").

[59] *Id.* § 522(7).

[60] *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.'"). New York — which argues that cable systems' "redesign appears . . . to render at least those elements of such facilities that are used to provide information service to be no longer part of a 'cable system' (because not 'designed to provide cable service')," New York Comments at 7 n.16 — simply ignores the Supreme Court's decision.

authorize the construction of a cable system over public rights-of-way."[61] That means that, when an LFA awards a cable franchise, it authorizes the franchisee to build and operate a cable system — regardless of what kinds of services the system's operator provides over the system and regardless of any language in the franchise agreement purporting to limit the authorization. Thus, Title VI itself provides that, just as a cable operator needs no additional franchise to offer telecommunications services, so too it needs no additional permission to provide information services over its franchised cable system.[62]

2. Constitutional Prohibitions Are Not Remotely Implicated.

Various LFAs claim that any measure prohibiting them from requiring additional franchises would effect a physical occupation of their public rights-of-way in violation of the Fifth Amendment's injunction that "private property [shall not] be taken for public use, without just compensation."[63] Even assuming that requiring LFAs to allow cable operators to use public

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[61] 47 U.S.C. § 541(a)(2).

[62] Section 621(b)(3)(A) makes clear that, "[i]f a cable operator . . . is engaged in the provision of telecommunications services," it "shall not be required to obtain a franchise." 47 U.S.C. § 541(b)(3)(A). LFAs seek to turn this provision on its head by arguing that, in stating that no new franchise *is* necessary for telecommunications services, Congress implied that a new franchise is necessary for other non-cable services. *See* ALOAP Comments at 63. But Section 621(b)(3)(A) is much more plausibly read as a manifestation of a more general judgment that one franchise should be enough. Congress's failure to mention other non-cable services specifically is hardly surprising: in 1996 (before the advent of cable modem service), it likely did not occur to Congress that cable operators might provide services that were neither cable nor telecommunications services. Thus, the *expressio unius* maxim that LFAs apparently invoke is inapplicable. *See, e.g., United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 836 (2001) (*expressio unius* maxim places no weight on the scale unless "there was a good reason to consider the [omitted item] at the time the regulation was drawn"). That maxim cannot render a statute so clear as to deprive the Commission of *Chevron* deference in any event. *See Mobile Communications Corp. v. FCC*, 77 F.3d 1399, 1404-05 (D.C. Cir.) ("*Expressio unius* is simply too thin a reed to support the conclusion that Congress has clearly resolved an issue.") (interal quotation marks and brackets omitted), *cert. denied*, 519 U.S. 823 (1996).

[63] *See* ALOAP Comments at 51-54; Nashville Comments at 7-9; Taylorsville Community Ass'n Comments at 2.

rights-of-way to provide cable modem service involves a physical occupation,[64] and that, for Takings Clause purposes, public rights-of-way are the equivalent of privately owned land,[65] the argument fails. LFAs are receiving compensation for their supposedly taken rights-of-way: Section 622(b) permits them to charge a fee of as much as five percent of revenue derived from cable service.

To make a successful takings claim, then, LFAs would have to demonstrate that this five-percent fee, while sufficient to compensate for use of public rights-of-way to provide video service only,[66] is not enough to compensate for use of public rights-of-way to provide both video and cable modem service. LFAs cannot do so: as already explained, cable modem service imposes no appreciable burden in addition to the burden imposed by video service.[67] Besides, even if there were an incremental burden, LFAs would still have to show that the five-percent fee permitted by Section 622(b) is not enough to compensate for the burden imposed by cable service and cable modem service combined — something that they have not even attempted to do. For good reason: because the five-percent fee permitted by Section 622(b) vastly *over*compensates LFAs, any such claim would be meritless.

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[64] That claim certainly will not be available with respect to new franchise agreements. *See FCC v. Florida Power Corp.*, 480 U.S. 245, 251-52 (1987) (regulation of rents charged "by public utility landlords who have voluntarily entered into leases with cable company tenants" did not effect a physical taking).

[65] The Commission has previously side-stepped the question whether that assumption is correct. *See Implementation of Section 302 of the Telecommunications Act of 1996; Open Video Systems*, Second Report and Order, 11 FCC Rcd 18223, ¶ 217 n.490 (1996) ("Because we find that the statute provides just compensation, we need not address whether the takings clause of the Fifth Amendment encompasses the property interests of state and local governments in the same way that it applies to the property interests of private persons."). There is likewise no need to decide the question here.

[66] Not even ALOAP argues that the five-percent fee is not enough to compensate for the burden imposed by the provision of cable service.

To the extent that LFAs assume that the Takings Clause requires compensation on a service-by-service basis, their arguments are unsupported. The bargain struck in the Communications Act is that, regardless of what services are provided, five percent of cable-service revenue is more than enough to compensate LFAs for the burdens imposed *by a cable system.*[68] The LFAs never explain why the five-percent fee of Section 622(b) must somehow be credited solely to burdens imposed by cable service, nor why there must be separate compensation for any incremental burdens imposed by cable modem service.

Some LFAs, in addition to raising a takings claim, base an argument on the Tenth Amendment.[69] Thus, ALOAP contends that federal pre-emption of local authority to regulate cable modem services unlawfully "commandeers" state and local property in the services of a federal regulatory program.[70] But there is no commandeering within the meaning of Tenth Amendment jurisprudence. The Supreme Court's Tenth Amendment decisions — including *Printz v. United States*[71] and *New York v. United* States[72] — have recognized violations only where the Federal Government sought to place the implementation of a federal regulatory

[67] *See supra*, pp. 19-20.

[68] *See* 47 U.S.C. § 541(a)(2) ("[a]ny franchise shall be construed to authorize *the construction of a cable system* over public rights-of-way . . . .") (emphasis added); *id.* § 542(b) ("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 in such period from the operation of the cable system to provide cable services") (emphasis added).

[69] U.S. Const. Amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

[70] ALOAP Comments at 53-54.

[71] 521 U.S. 898 (1997).

[72] 505 U.S. 144 (1992).

program on the shoulders of state or local officials.[73] As the Court held, such commandeering of state officials is particularly loathsome to our federalism because it "is the very principle of separate state sovereignty that such a law offends."[74] That concern is not implicated where federal law preempts a second franchise requirement. Such a law does not require state and local officials to do anything — it merely forbids them from interfering with a federal regulatory program.

3. The LFAs Are Wrong in Contending That There Can Be No Pre-emption Unless by a Congressional Statement That Is Express.

The LFAs argue that preemption must be expressly authorized by an unambiguous Act of Congress. They say that this is so for a number of reasons: because of the so-called rule of constitutional doubt, because of the Supreme Court's *Gregory v. Ashcroft* decision,[75] and because of various provisions of the Communications Act.[76] The LFAs miss the point. The doctrines on which they rely are interpretive maxims that help courts decide under what circumstances ambiguous acts of Congress should be deemed to have preempted local regulation. These maxims have nothing to say about the preemptive authority (granted by express Act of Congress) of a federal administrative agency. Besides, preemption here *is* express. For all the reasons already explained, the Communications Act plainly prohibits LFAs

[73] *See Printz*, 521 U.S. at 932-33 (Federal Government may not compel state officers to conduct background checks on prospective gun purchasers); *New York*, 505 U.S. at 188 (Federal Government may not compel States to enact legislation providing for the disposal of radioactive waste).

[74] *Printz*, 521 U.S. at 932.

[75] 501 U.S. 452 (1991).

[76] *See, e.g.*, ALOAP Comments at 54-56; PCTA Comments at 7, 26-29.

from preventing cable operators to provide cable modem service, an interstate communications service.[77]

In any event, each of the maxims on which the LFAs rely is inapplicable by its own terms. *First*, the doctrine of constitutional doubt applies only if "the alternative is a serious likelihood" that the measure under review "will be held unconstitutional."[78] As already shown, there is no appreciable chance — much less a serious likelihood — that the Commission might run afoul of the Tenth Amendment: the LFAs' claims under that amendment are entirely misguided. The same is true of the LFAs' claims under the Takings Clause. Takings of property do not violate the Constitution: only uncompensated takings do. Even assuming that any property has been taken here, the taking is richly compensated: LFAs are entitled to levy a franchise fee of five percent of cable service revenue. Absent so much as an attempt to show that this fee falls short of "just compensation," the doctrine of constitutional doubt does not come into play.[79]

Second, LFAs are wrong in claiming that *Gregory v. Ashcroft* mandates reading Title VI as not pre-empting state regulation of cable modem service. In *Gregory*, the Supreme Court held that Acts of Congress will not be interpreted to intrude upon the inner sanctum of state sovereignty — "decision[s] of the most fundamental sort for a sovereign entity" and that "go to the heart of representative government" — unless Congress's intent to that effect is

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[77] *See supra*, pp. 17-22.

[78] *Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998); *see also Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 212 (1998) (constitutional doubt canon does not apply where statute is unambiguous).

[79] *Cf. Verizon Communications, Inc. v. FCC*, 122 S. Ct. 1646, 1679-80 (2002) ("[T]he general rule is that any question about the constitutionality of ratesetting is raised by rates, not methods, and this means that the policy of construing a statute to avoid constitutional questions where possible is presumptively out of place when construing statutes prescribing methods.")

unambiguous.[80] *Gregory*'s so-called "plain statement" rule is inapplicable here. In light of the Interstate Commerce Clause,[81] whether instrumentalities of interstate commerce may physically intrude upon a State's territory has not traditionally been regulated by the States — and decisions concerning that issue are certainly not within the core of state sovereignty.[82] Besides, as already explained, cable modem service involves no physical intrusion at all, and the licensing of interstate communications services is certainly not within the core of state prerogatives.

Third, PCTA argues that explicit authorization to pre-empt is required by Section 2(b) of the Communications Act, which provides that, "subject to the provisions of . . . title VI, nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to . . . intrastate communication service by wire or radio of any carrier."[83] But, by its terms, this provision is triggered only by FCC regulations affecting "intrastate communication." Cable modem service is an interstate communication service.[84] Moreover, Section 2(b) covers only communications by common carriers — not cable operators.[85] In any event, Section 2(b) is

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[80] 501 U.S. at 460-61 (internal quotation marks omitted).

[81] U.S. Const. Art I, § 8, Cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States . . . .").

[82] *City of Dallas v. FCC*, 165 F.3d 341, 347-49 (5th Cir. 1999), on which various LFAs rely, did not consider States' traditional lack of power to regulate interstate commerce. It is not clear that the communications there involved (video signals over OVS systems) were interstate, nor that the parties had informed the Fifth Circuit that they were.

[83] 47 U.S.C. § 152(b). *See* PCTA Comments at 10. PCTA argues that "[t]he Commission may only preempt local regulation of telecommunications carriers which involve both interstate and intrastate communications pursuant to what is referred to as the 'impossibility exception' carved out of Section 2(b)(1) of the Communications Act in *Louisiana Public Service Commission v. FCC*, 476 U.S. 355 . . . (1986)." *Id.* No other LFA makes this argument.

[84] *See Declaratory Ruling* ¶ 59.

[85] *See NARUC v. FCC*, 525 F.2d 630, 647 (D.C. Cir. 1976) ("§ 152(b) only has application to common carriers"), *cert. denied*, 425 U.S. 992 (1976); *see also NARUC v. FCC*, 533 F.2d 601, 607 n.25 (D.C. Cir. 1976).

specifically made "subject to the provisions of . . . title VI," which, as we have already explained, expressly limit regulation by LFAs.[86]

Finally, ALOAP argues that, under Section 636,[87] "preemption of local and state authority . . . must be express, not implied."[88] ALOAP contends that the legislative history and Section 636 show that the Act preserves local authority over a cable operator's use of public rights-of-way.[89] Section 636(a) provides that regulations that are "consistent with the express provisions of this subchapter" are unaffected.[90] ALOAP construes this provision to mean that, "[i]n the absence of an express provision requiring preemption, . . . local authority is preserved."[91] But this reverses the meaning of the section. Section 636 does not require express pre-emption of local authority — it requires express authorization for the exercise of local authority. ALOAP ignores Section 636(c), which provides that any provision of state or local law or any franchising agreement "which is inconsistent with this subchapter shall be deemed to be preempted and superceded."[92]

[86] PCTA (at 28) also relies on Section 601(c)(1) of the Telecommunications Act of 1996 ("1996 Act"), but that provision is even further afield. The provision — which states that "[t]his Act and the amendments made by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments," 47 U.S.C. § 152 note — addresses the pre-emptive effect of only the 1996 Act, not of pre-existing parts of the Communications Act.

[87] 47 U.S.C. § 556.

[88] ALOAP Comments at 29; *see id.* at 47.

[89] *Id.* at 28-29.

[90] 47 U.S.C. § 556(a).

[91] ALOAP Comments at 29.

[92] 47 U.S.C. § 556(c).

IV. LFAs MAY NOT IMPOSE FRANCHISE FEES ON REVENUE DERIVED FROM CABLE MODEM SERVICE.

In our opening comments, we demonstrated that, as both a matter of policy and a matter of law, LFAs should not be permitted to require cable operators to pay an additional franchise fee on revenue derived from cable modem service. As a matter of policy, it makes little sense to permit the imposition of a special tax on a product whose increased consumption has become a national priority.[93] As a matter of law, a fee imposed on cable modem service would unquestionably constitute a "franchise fee" for purposes of Section 622(g), and would therefore be prohibited by Section 622(b).[94] Several LFAs contradict this reasoning, but their arguments are misguided.

A. LFAs Are Wrong in Arguing That Additional Franchise Fees Should Be Allowed as a Matter of Policy.

Various LFAs argue that it would be good policy to allow LFAs to charge franchise fees on cable modem service. Some of these commenters claim that efficiency is enhanced when cable operators are made to pay for the economic inputs that they use.[95] These LFAs would have the Commission ignore that cable operators already pay for their use of public rights-of-way by paying the franchise fee permitted by Section 622. Indeed, the amount that cable operators pay in franchise fees is generally well in excess of LFAs' cost of making available the public rights-of-way used.[96] To make cable operators pay again for the same use of the same public rights-of-

[93] *See* AOL Time Warner Comments at 1517.

[94] 47 U.S.C. § 542(b), (g); *see* AOL Time Warner Comments at 33-34.

[95] *See, e.g.*, ALOAP Comments at 57-59.

[96] Section 253(c) of the Communications Act, 47 U.S.C. § 253(c), limits fees imposed on telecommunications carriers to the cost of providing access. *See, e.g.*, *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1176, 1177 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 809 (2002); *Qwest Communications Corp. v. City of Berkeley*, 146 F. Supp. 2d 1081, 1100 (N.D. Cal. 2001). And

way would not enhance efficiency. Rather, it would create inefficient incentives to forgo use of public rights-of-way by cable operators willing to pay the true costs. Thus, permitting LFAs to impose additional franchise fees would diminish, not enhance, efficiency.

LFAs also complain that the *Declaratory Ruling* will deprive them of a significant source of revenue.[97] That complaint is easily overdone: cable modem service revenue is still only a small portion of cable operators' overall revenue.[98] That said, if the penetration of cable modem service continues to grow, it may well be that a five-percent tax on revenue derived from cable modem service would one day amount to a sizable sum. But that, by itself, is hardly a basis on which to craft federal communications policy. And it surely is no basis for allowing a patchwork of LFA assessments on cable operators only, and not on providers of comparable services – particularly when cable operators are already richly compensating LFAs for their use of public rights-of-way by paying a franchise fee of five percent of cable service revenue.

That is precisely the conclusion that Congress reached in 1996. Section 622 reflects Congress's judgment that cable operators should pay a single franchise fee of five percent of gross revenues from cable service, even if cable operators earn additional revenues from other services.[99] The limitation to revenues earned from the operation of a cable system "to provide cable services" reflects Congress's judgment (1) that it may be possible to provide non-cable

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fees thus limited are generally much smaller than cable franchise fees. *See, e.g.*, Cox Comments at 45 ("Many telecommunications service providers...make far smaller (if any) payments for permission to use the public streets in precisely the same manner.").

[97] *See, e.g.*, ALOAP Comments at 26; King County Comments at 1-3; Mt. Hood Comments at 7; MARC Comments at 2.

[98] *See, e.g.*, City Coalition Comments at 24 (speaking of "the relatively low penetration of cable modem service (estimated to be less than 10% nationally) among the 70 million subscribers served by cable operators").

[99] 47 U.S.C. § 542(b).

services over existing cable systems; (2) that such innovation should be encouraged; (3) that the additional services would not appreciably add to the burdens on public rights-of-way; and (4) that existing franchise fees — whose amount was already greater than the true cost of the burden on public rights-of-way — are more than enough to compensate for use of public rights-of-way already and should not be allowed to grow even further as revenue increases.[100] LFAs' quarrel with that policy judgment is better addressed to Congress than to the Commission.

Some LFAs also contend that the *Declaratory Ruling* may facilitate evasion of franchise fees.[101] This contention is unfounded. Cable operators bill cable services and cable modem services as separate line items. Thus, determining the amount billed for cable services is made no more difficult by the provision of cable modem service. And the contention that eliminating franchise fees on cable modem service will facilitate increases in the fees charged to subscribers ignores that cable-modem service is provided in a highly competitive marketplace, in which market forces require that providers pass any cost decreases on to the consumer.

B. LFAs Are Wrong in Arguing That They Should Be Permitted To Levy an Additional Franchise Fee as a Matter of Law.

LFAs advance several unpersuasive theories as to why Section 622(b) does not bar franchise-fee taxation of cable modem service.[102] First, ALOAP contends that 622(b) does not bar franchise fees on cable modem service because "cable modem service includes cable services."[103] ALOAP states that, "as broadband technology evolves, it is expected to provide an alternative means for delivery of video services and other services that fit well within the

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[100] *See* AOL Time Warner Comments at 16 (discussing history of five-percent limit).

[101] *See* Port Arthur, Texas Comments at 4; Nashville Comments at 19; Gregory Franklyn Comments at 1; Mt. Hood Comments at 12.

[102] 47 U.S.C. § 542(e).

definition of cable service."[104] The short answer is that the Commission was well aware of that expectation when it adopted the *Declaratory Ruling*.[105] The true nature of ALOAP's argument is an attempt to revisit the Commission's classification decision. As already explained, this rulemaking proceeding is not the proper forum.[106]

Second, PCTA and ALOAP contend that the *Declaratory Ruling* in effect gives the 1996 amendment to Section 622(b) retroactive effect, which, they say, is disfavored as a matter of statutory interpretation.[107] These LFAs claim that this is so in the sense that the Commission has made an "implied determination that the 1996 amendments to Section 622 were intended by Congress to apply retroactively to preempt existing franchising agreements."[108] But applying the amendment to Section 622(b) that added the phrase "to provide cable services" to franchise agreements that existed prior to the amendment does not involve any disfavored retroactivity.

To be sure, the Supreme Court has stated that, absent express language indicating such intent, courts interpreting statutes usually should not presume that Congress intended to give its enactments retroactive effect.[109] But the scope of that interpretive rule is limited. Virtually all changes in legal rules can be painted as retroactive in the sense that "they tend to alter the value

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[103] ALOAP Comments at 43.

[104] *Id.*

[105] *See, e.g.*, *Declaratory Ruling* ¶ 10 (cable modem subscribers can "view streaming video content at a higher resolution and on a larger portion of their screens than is available via narrowband") *(footnote omitted)*.

[106] *See supra*, pp. 6-8.

[107] *See* PCTA Comments at 40 n.26; ALOAP Comments at 66.

[108] *See* PCTA Comments at 40 n.26.

[109] *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("[C]ongressional enactments . . . will not be construed to have retroactive effect unless their language requires this result.")

of existing assets and thus the return on past investments."[110] That is not enough: to qualify as "retroactive" for purposes of the interpretive rule, an amendment must alter "the past legal consequences of past actions."[111]

The 1996 amendment to Section 622(b) does not meet that test. It affects franchise fee obligations only to the extent that those obligations accrued after 1996. Fees collected prior to 1996 are unaffected. Thus, the amendment to Section 622(b) did not change any past legal consequences of franchise agreements — it changed their prospective consequences by limiting the revenues on which franchise fees could be assessed. The practical consequences of the LFAs' theory conclusively prove the correctness of this reasoning. Many franchise agreements have durations of 15 years or more. Thus, under the LFAs' theory, the 1996 amendment might not take effect for another decade. It is implausible that Congress meant to enact such a strange delayed-action statute.

Third, various commenters assert that LFAs that currently charge a franchise fee of less than five percent of cable service should be permitted to charge a franchise fee on revenue derived from cable modem service at least to the point of filling the "five percent of cable service revenue" bucket.[112] They misread the statute. Plainly, the purpose of the 1996 amendment was to prohibit all fees on revenue derived from cable modem service.[113] Besides, the practical

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[110] *Bergerco Canada v. United States Treasury Dep't*, 129 F.3d 189, 192 (D.C. Cir. 1997).

[111] *Id. (internal quotation marks and emphasis omitted.)*

[112] *See, e.g.*, ALOAP Comments at 66-67; New York Comments at 8-9.

[113] The legislative history confirms this. *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

consequences of the LFAs' theory are remarkable. In this theory, an LFA whose franchise agreement permits it to charge a fee of four percent of total revenue (including cable service revenue and cable modem service revenue) would be permitted to charge a four-percent fee on cable modem service revenue, but only to the extent that the amount would not be greater than one percent of cable service revenue. It is difficult to believe that Congress intended such a bizarre scheme.[114]

Fourth, New York and ALOAP also contend that, by adding the phrase "to provide cable services" to Section 622(b), Congress meant to prohibit only fees labeled "cable franchise fee" — while still permitting other kinds of fees available under local law, subject only to the limit of Section 253(c).[115] Although ALOAP relies on legislative history for this argument,[116] it in effect concedes that it must overcome an additional obstacle: it acknowledges that, if a franchise fee on cable modem service falls within Section 622(g)'s definition of "franchise fee," it is still pre-empted. That is why ALOAP argues that a franchise fee on cable modem service would not be

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derives for providing new telecommunications services over its system that are different from the cable-related revenues operators have traditionally derived from their systems.").

[114] *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 191 (1991) (statutes should not be interpreted to have bizarre consequences); *R.G. Johnson Co. v. Apfel*, 172 F.3d 890, 895 (D.C. Cir. 1999) (where the literal application of a statute will produce "a result demonstrably at odds with the intentions of its drafters," the intention of the drafters should control) *(internal quotation marks omitted)*.

[115] New York Comments at 7; ALOAP Comments at 44.

[116] In particular, ALOAP relies on a fragment in the Conference Report stating: "The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to . . . charge fair and reasonable fees." H. R. Conf. Rep. No. 104-458, at 180 (1996). By its terms, this fragment appears to refer only to telecommunications service provided by cable operators over facilities other than a cable system. Section 622(b), which covers only franchise fees imposed "with respect to any cable system," would not limit such fees (although Section 253(c) still would).

"imposed . . . on a cable operator . . . solely because of [its] status as such."[117] According to ALOAP, "the fee is imposed on the operator not because of the operator's status as a provider of cable services, but because the operator is using the public rights-of-way to provide non-cable services."[118]

The simple answer to this argument is that, so long as providers of cable modem service are the only providers of Internet access subject to a franchise fee, the last step in ALOAP's argument plainly fails. A tax imposed only on cable operators plainly would be "imposed . . . on a cable operator . . . solely because of [its] status as such."[119] It is perhaps conceivable that a tax on all forms of high-speed Internet access — for example, a tax on both cable modem service and DSL — might qualify as a "tax . . . of general applicability" for purposes of Section 622(g)(2)(A) and would thus fall outside the pre-emptive scope of Section 622(b).[120] But ALOAP is not suggesting that any of its members is considering adopting (or is even authorized to adopt) such a generally applicable tax on Internet access. Besides, even if such a tax would not be captured by Section 622(b), it would plainly be pre-empted by the Internet Tax Freedom Act ("ITFA").[121]

Several LFAs advance two meritless arguments as to why franchise fees on cable modem service would not be barred by ITFA.[122] On the one hand, LFAs argue that such a fee would not come within ITFA's definition of "tax": "any charge imposed by any governmental entity for the

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[117] ALOAP Comments at 46.

[118] *Id.*

[119] 47 U.S.C. § 542(g)(1).

[120] 47 U.S.C. § 542(g)(2)(A).

[121] 47 U.S.C. § 151 note (§ 1101(a)(1)).

purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred."[123] A franchise fee on cable modem service, these LFAs argue, would merely be imposed in consideration for the specific privilege of using public rights-of-way. But a fee cannot be "imposed for" something one already has. Franchised cable operators are already entitled to use public rights-of-way. Thus, a fee on cable modem-service revenue would plainly be imposed for a different end: "generating revenues for governmental purposes."[124]

On the other hand, LFAs contend that a franchise fee on cable modem service would fall within an ITFA exception for "any franchise fee . . . imposed by . . . a local franchising authority, pursuant to section 622."[125] But, if a fee is "imposed . . . pursuant to section 622," that fee is obviously subject to the restrictions set forth in that section — which means that it is permissible only insofar as it taxes cable service revenue. And, if it is not "imposed . . . pursuant to section 622," then it is subject to ITFA's bar. LFAs cannot have it both ways.

Finally, PCTA argues that the Commission should not and legally may not forebear enforcement of Title II regulation within the Ninth Circuit.[126] The unstated premise of PCTA's argument appears to be that, if cable modem service is a telecommunications service, LFAs are somehow in a stronger position to demand franchise fees. But Section 622(b) plainly applies with equal force to cable systems being used to provide telecommunications services. Moreover,

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[122] *See*, *e.g.*, ALOAP Comments at 56-57; Washington, D.C., Comments at 14; Illinois NATOA Comments at 2; New Orleans Comments at 12; PCTA Comments at 39.

[123] 47 U.S.C. § 151 note (§ 1104(8)(A)(i)).

[124] That is all the more clear because the proposed franchise fee on cable modem service would be measured not by the value of public rights-of-way but, rather, by a cable operator's revenue.

[125] 47 U.S.C. § 151 note (§ 1104(8)(B)).

[126] *See* PCTA Comments at 35-39.

Section 253(c) — which, according to PCTA, "provides a 'safe harbor' affirming the longstanding authority of local government to manage its rights-of-way and require . . . compensation"[127] — by its terms provides a safe harbor only from requirements imposed by Section 253 itself.[128]

C. The Commission Should Make Express That Past Payments Need Not Be Returned.

In our opening comments, we explained that the Commission should make clear that fees on cable modem service that cable operators collected prior to the *Declaratory Ruling* need not be refunded. The Commission clearly has jurisdiction to decide the issue under its authority to administer and interpret Section 622. The issue is one of national importance and a general rule would avoid confusion, inevitable litigation, and piecemeal and possibly inconsistent resolutions.[129] Many LFAs agree.[130]

A few LFAs nonetheless contend that the question is not one of national importance.[131] For example, ALOAP minimizes the issue on the theory that, in most cases, the "voluntary payment doctrine" should protect municipalities from liability for fees collected prior to the *Declaratory Ruling*.[132] However that may be, we do not agree that the availability of this and other defenses renders Commission intervention unnecessary. Even ALOAP concedes that a finding by the Commission that parties "were acting in good faith" would help insulate

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[127] *Id.* at 38.

[128] *See* 47 U.S.C. § 253(c) ("Nothing in this section affects . . . .").

[129] *See* AOL Time Warner Comments at 36-40.

[130] *See, e.g.*, Fairfax County Comments at 5-6; MARC Comments at 2.

[131] *See* ALOAP Comments at 64-67; New Jersey Board of Public Utilities Comments at 4; City Coalition Comments at 32-33; *see also* PCTA Comments at 40 (suggesting without argumentation that the Commission should refrain from exercising jurisdiction on this issue).

municipalities and cable operators from vexatious litigation.[133] Plainly, a determination by the Commission that Section 622 pre-empts such litigation or that the *Declaratory Ruling* has no retroactive effect should be even more efficacious to that end.

The Bovas likewise suggest that the issue of liability is better left to be resolved by the courts. It is of course no coincidence that the Bovas are the named plaintiffs in a class-action lawsuit in which they seek to recover past franchise fees on cable modem service.[134] It is precisely because of vexatious litigation like theirs that the Commission should intervene. In any event, the Bovas present no persuasive arguments for their self-serving position. Their argument (at 6-7) that "the issue involved is not one of national policy" is plainly wrong: the issue affects virtually every cable operator and every LFA. Likewise, the Bovas' argument (at 7) that "Commission expertise is not implicated in . . . this dispute" is wrong: plainly, the extent to which conclusions about the regulatory state of affairs before the *Declaratory Ruling* are justified squarely implicates the Commission's expertise, as do the interpretation of Section 622 and the practical consequences of vexatious litigation.

Leaving aside the jurisdictional issue, only the Bovas and Kenneth Simpson argue that fees previously collected on cable modem service should be returned to consumers.[135] But, as our opening comments explain, the Commission should not make the *Declaratory Ruling* apply

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[132] *See* ALOAP Comments at 65.

[133] *Id.* at 66.

[134] *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). The Bovas' suit was recently dismissed. *See Bova v. Cox Communications, Inc.*, No. 7:01CV00090, 2002 WL 1575738 (W.D. Va. July 10, 2002) (rejecting theory that Section 622 creates a private right of action).

[135] *See* Bova Comments at 9-11; Kenneth Simpson Comments at 1.

retroactively to fees paid prior to the ruling.[136] Moreover, Section 622(c)(1) permits cable operators 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."[137] Franchise fees on cable modem services charged to subscribers prior to the *Declaratory Ruling* were "assessed as a franchise fee," and thus cable operators cannot be held liable under state law for having listed and collected them as such.[138]

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[136] *See* AOL Time Warner Comments at 39-40.

[137] 47 U.S.C. § 542(c)(1).

[138] *See* AOL Time Warner Comments at 38-39.

CONCLUSION

For all the reasons outlined above, the Commission should maintain the longstanding federal deregulatory approach towards information services and refrain from imposing any regulations on cable modem service at this time. There are no compelling reasons for reconsideration of the *Declaratory Ruling's* determination that cable modem service is an interstate information service. Furthermore, this proceeding should not be used as a predicate for relieving incumbent local exchange carriers of regulation. The Commission should rule that (1) cable operators do not need to obtain additional information service franchises, (2) that local franchising authorities may not assess franchise fees on cable modem service and (3) that cable operators need not refund to subscribers any such fees previously collected.

Respectfully submitted,

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Date: August 6, 2002

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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

AFFIDAVIT OF JEFFREY M. KING

STATE OF VIRGINIA,)
) ss.:
COUNTY OF FAIRFAX,)

JEFFREY M. KING, being duly sworn, deposes and states as follows:

1. I am Time Warner Cable's ("TWC's") Executive Vice President, Technology & Data Operations. In addition, I am President and CEO of Road Runner, TWC's broadband service provider affiliate. I have worked in the cable industry since 1972. I became President and CEO of Road Runner in December 2000. My duties include overseeing all technological aspects of TWC's high-speed-data ("HSD") service. I make this affidavit in support of TWC's reply comments in this proceeding.

2. I have reviewed *The Impact of Cable Modem Service on the Public Right of Way* by Andrew Afflerbach and David Randolph, which was submitted in this rulemaking as an attachment to the comments of the Alliance of Local Organizations Against Preemption (and to

which I will hereafter refer as "the Report"). The basic thrust of the Report is that cable operators providing cable-modem service burden public rights-of-way more heavily than they would if they provided only video services. As explained more fully below, I disagree with that conclusion. The burdens to which Afflerbach and Randolph point were caused by cable operators' upgrading their cable systems to a so-called "hybrid fiber coax" ("HFC") architecture. These upgrades would have occurred even if cable-modem service had never been invented.

A. Background.

3. Before cable operators began upgrading their systems to an HFC architecture, they relied primarily on coaxial wire carrying radio frequency ("RF") signals. A coax-only architecture required a large number of "cascading" amplifiers — sometimes 30 or more deep. The drawback of such an architecture is that, each time an RF signal is amplified, it degrades: not only the signal proper but also any distortion is amplified. Thus, coax-only systems' transmission fidelity, and therefore their picture quality, was suboptimal. Moreover, higher frequency RF signals are particularly vulnerable to signal degradation. Thus, in pre-HFC systems, the amount of practically available cable spectrum, and therefore the amount of channels, were limited.

4. In HFC systems, the carrier medium consists partly of fiber-optic cable and partly of coaxial wire. The head-end is connected by fiber to "nodes." The nodes are then connected to a few hundred customer premises by traditional coaxial cable and cascading amplifiers. The fiber part of an HFC system eliminates many of the amplifiers that were necessary in a coax-only architecture. The elimination of some amplifiers and the introduction of fiber increases

fidelity (thereby producing a sharper picture) and allows use of higher frequencies (thereby expanding the amount of available spectrum and thus available channels). In addition, because amplifiers are the most vulnerable part of a cable system, HFC — by reducing amplifier cascades — sharply reduces the risk of outages.

B. HFC Upgrades Were Not Driven by Cable-Modem Service.

5. Most cable operators embarked upon their HFC-upgrade programs at a time when cable-modem service was still but a faint glimmer in the eyes of a few CableLabs engineers. For example, TWC decided to upgrade its systems to HFC in 1991, and it began work in 1992. TWC's reasons for upgrading had nothing to do with cable-modem service. Rather, the driving forces behind the upgrade were increased channel capacity, better picture quality, and enhanced reliability.

6. There also was significant pressure from regulators to upgrade. For example, a 1995 "social contract" with the FCC required TWC to spend $4 billion to upgrade its systems. *Social Contract for Time Warner*, Memorandum Opinion and Order, 11 FCC Rcd 2788, 2862-63, App. B (1995). The social contract required that "[f]iber-to-the-node [*i.e.*, HFC] architecture will be deployed to improve signal quality and reliability." *Id.* at 2862. Local franchising authorities ("LFAs") also required upgrades. For example, TWC's franchise agreement with New York City expressly requires an HFC architecture. *See* Franchise Agreement between the City of New York and Time Warner Cable New York, App. A, § 3.0 ("System Capacity").

7. The cable-modem phenomenon largely postdated the time when cable operators committed to upgrade their systems to the HFC architecture. The trade press did not even

mention cable-modem service until late 1993. *See, e.g.*, *Communications Daily*, Nov. 26, 1993, at 6 ("At next week's Western Cable Show in Anaheim, Compuserve and Continental Cablevision are expected to announce plans to test" a service using a "cable modem unveiled by Zenith earlier this year."); Richard Karpinski, *Talking Interactive*, Telephony, Dec. 13, 1993, at 48 ("So called cable modems, being tested by a number of cable operators, will offer 10-Mb/s links directly to PCs."). TWC did not begin trials of cable-modem service until 1995 and did not offer cable-modem service commercially until September 1996.

8. Once cable operators had committed to upgrade to HFC, the decision to begin offering cable-modem service did not impose new burdens on public rights-of-way. Cable-modem signals are transmitted in precisely the same way as video signals. Cable Modem Termination Systems ("CMTSs") and cable modems translate digital computer signals into the same kinds of signals as conventional video signals. Just like video signals, cable-modem signals are transmitted first as optical signals over fiber, and then as RF signals over coax. Afflerbach and Randolph's suggestion that cable-modem signals somehow can tolerate less degradation than video signals (*see* Report § 2.1.4) is thus wrong: the signals are identical and indistinguishable.

9. Nor does cable-modem service require cable operators to place additional equipment on publicly owned real estate. All the additional equipment required is placed on privately owned premises. Routers and servers are placed at the Internet Service Provider's regional data center ("RDC") (in TWC's case, at the Road Runner RDC). CMTSs are placed at the head-end or at "hubs" (all located on real estate owned by the cable operator). Splitters and modems are placed at the subscriber's premises. No additional equipment is placed at the node

or anywhere else on public rights-of-way. The node (the part of the system where fiber meets coax) does include "optical receivers": electronic equipment that translates an optical signal to an RF signal and *vice versa*. But cable-modem service does not require different or more numerous optical receivers. Because cable-modem signals are the same as video signals, no additional equipment is required.

10. In sum, the upgrade to HFC was not driven by cable-modem service. And, once an HFC architecture was adopted, cable operators could provide cable-modem service without adding any new plant or equipment burdening public rights-of-way.

C. HFC Systems Providing Cable-Modem Service Do Not Burden the Public Rights-of-Way More Heavily.

11. Perhaps cognizant that the upgrade to HFC would have occurred even if cable-modem service had never been invented, Afflerbach and Randolph also set themselves a less ambitious goal: to show that HFC systems providing cable-modem service impose a greater burden on public rights-of-way than HFC systems providing video service only. *See* Report §§ 2-3. They assert that this is so for three reasons.

12. *First*, Afflerbach and Randolph assert that, because of cable-modem service, cable operators have opted for smaller and thus more numerous "nodes" than they otherwise might have. *See* Report § 2.1.1. Their assertions are wrong.

13. Each of the cable-modem subscribers on a node shares the same data channels. Cable-modem signals travel "downstream" (to the subscriber) in a regular 6 MHz channel, and "upstream" (to the head-end) in a separate 1.6 or 3.2 MHz channel. Thus, cable-modem service usually requires less than 10 MHz out of the 700 MHz or more that may be available

on a system. But, because of the bandwidth-efficient nature of IP communications, this is more than enough: assuming normal residential cable-modem use (*i.e.*, normal web-surfing and e-mailing activity), a single node can accommodate hundreds of customers.

14. Because users on the same node share the same upstream and downstream channels, it is possible that, if a particular node has an unusually high penetration of heavy cable-modem-service users, transmission speeds might decline to undesirably low levels. But that problem can be solved by allocating a second 6 MHz channel. Another way of solving the problem is to double the number of optical receivers in a particular vault. Just as with an additional 6 MHz channel, there is no additional burden on public rights-of-way: the incremental equipment is housed in existing facilities.

15. The real restraint on node size has little to do with cable-modem service — it is that there can be only so many cascaded amplifiers between the node and the home. Add too many amplifiers, and an HFC system would have the same drawbacks as a coax-only system. That basic fact limits the number of subscribers that can be served from a single node: the node must be close enough to the subscriber to permit a relatively short amplifier cascade.

16. In the future, "video on demand" ("VOD") may set additional limits on node size. VOD is expected to be a very popular service that is now being rolled out commercially. The service allows subscribers to order movies and play, pause, and stop them as though viewed from a DVD player. VOD consumes vastly more bandwidth than cable-modem service. That is not much of a problem insofar as the fiber-optic plant connecting the head-end to the nodes is concerned: there, bandwidth is relatively plentiful. But it is problematic in the coax plant connecting the node to the home, where bandwidth is more constrained. It is possible to

compress at most about 12 video signals in a single 6 MHz channel. Thus, 12 VOD-viewing households on a node consume an entire 6 MHz channel. To enable 100 households on a node to view VOD movies simultaneously, then, as many as 10 channels might be required. Because channel capacity is always scarce, that may be more than is available.

17. *Second*, Afflerbach and Randolph assert that cable operators are in the process of extending their cable plant to previously uncabled business districts, which — they surmise — is "presumably for advanced two-way services." Report § 2.2. Again, they are wrong.

18. Overwhelmingly, cable-modem service is provided to *residential* customers. Among TWC's roughly 2.4 million cable-modem subscribers, there are only about 70,000 business subscribers — under 3 percent of the total. In most central business districts, the number of video customers is vastly greater than the number of cable-modem-service customers. Moreover, to the extent cable operators provide cable-modem service to businesses, it is primarily to small businesses: travel agents, tax preparers, real-estate agents, *etc*. Such businesses usually are not located in downtown business districts or business parks. Rather, they are found in strip malls and "Main Street" areas. Those areas, which tend to be in close proximity to residential areas, usually are already cabled. Moreover, in such areas, there usually are bars, hotels, and restaurants, which often are interested in cable for video reasons.

19. To the extent that cable operators are extending their plant to downtown business districts or business parks, they usually do so at the insistence of LFAs. Franchise agreements often require cable operators to make cable service available throughout their service areas.

20. Insofar as there are cable operators that extend their plant to business districts voluntarily, this is driven primarily by video — not cable-modem — service. Businesses

located in downtown and business park office buildings tend to be large firms. Such businesses usually are not interested in cable-modem service. For data-carriage needs, they tend to rely on T-1 lines and the like. Businesses of this nature may, however, be interested in video service. This development has accelerated with the rising popularity of video-programming services featuring daytime programming that is business-oriented in nature.

21. *Finally*, Afflerbach and Randolph posit that cable operators are increasingly constructing redundant facilities — in particular, multiple fiber cables feeding the same node, multiple optical receivers in the same node, and more powerful back-up power facilities. Report § 2.3. Afflerbach and Randolph suggest that cable operators have taken these steps because they "will not be able to serve business customers if they provide unreliable Internet . . . services." *Id.* Afflerbach and Randolph do not offer any evidence for this supposition, and there is none.

22. As already explained, cable-modem service is overwhelmingly a consumer product. Cable operators do not usually provide cable-modem service to large businesses. It is even rarer for large businesses to rely on cable-modem service for applications in which 100% reliability is required (*e.g.*, corporate networks, bank teller machines, *etc.*). Thus, the notion that cable operators' reliability standards are somehow dictated by the data-related needs of large business customers is fanciful.

23. To the extent that cable operators have striven to attain greater service reliability, that effort has little to do with cable-modem service and everything to do with traditional video service. Video service is still by far the most important part of cable operators' businesses: the vast majority of cable operators' revenue is attributable to video service. Increased reliability is

essential to cable's ability to compete with direct broadcast satellite and other multichannel video programming distributors.

Jeffrey M. King

Sworn to before me this

5th day of August 2002.

Jina M. Haas
Notary Public

My Commission Expires April 30, 2006