

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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Notice of Proposed Rulemaking)
)
)
Appropriate Regulatory Treatment for)
Broadband Access to the Internet Over)
Cable Facilities)
)
)
_____)

CS Docket No. 02-52

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS
CONSISTING OF:

- California:** County of San Luis Obispo
- Colorado:** City of Lakewood
- Florida:** City of Valparaiso
- Idaho:** City of Idaho Falls
- Illinois:** City of Marshall
- Massachusetts:** Lowell Telecommunications Corp.
- Michigan:** Ada Township, Alpine Township, Buchanan Township, City of Belding, City of Cadillac, City of Evart, City of Ishpeming, City of Livonia, City of Monroe, City of Tawas City, City of Whitehall, Coldwater Township, Grand Rapids Community Media Center, Gaines Charter Township, Grand Haven Charter Township, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Orleans Township, Vienna Charter Township
- New Jersey:** City of Bayonne
- New Mexico:** City of Santa Fe
- New York:** Town of Kirkwood
- Oregon:** City of Grants Pass
- Pennsylvania:** City of Easton
- Texas:** City of Arlington, City of Benbrook, City of Colorado City, City of Duncanville, City of Grand Prairie, City of Plano, City of Refugio, City of Rockwall

August 6, 2002

John W. Pestle
VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP
333 Bridge Street, N.W.
Grand Rapids, MI 49504
Their Attorneys

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SUMMARY

These reply comments are filed on behalf of Concerned Communities, consisting of communities and PEG/public access organizations in thirteen states.

Concerned Communities disagree with the Commission's conclusion in its Declaratory Ruling that cable modem service is an information service. In fact, the position taken by the cable companies for many years that cable modem service was a "cable service" is correct. As several commenters noted, the legislative history of the Telecommunications Act of 1996 shows that the addition of the words "or use" to the definition of cable service was expressly added to include "information services" (in which category the Commission has now classified cable modem service) as a cable service. Thus, even under this Commission's Declaratory Ruling, cable modem service continues to be a cable service.

Several industry commenters in effect contend that franchising authority comes from Federal law, not state law. In fact, franchising authority comes from state law. As shown by examples from Michigan, franchising authority is specifically conferred by state law (the state constitution) on cities, villages and townships and has been this way since 1908, well prior to the creation of this Commission in 1934. As to cable television, Michigan communities have been franchising cable systems since the 1950's, well prior to this Commission first becoming involved in cable TV in the 1960's and well predating the passage of the Cable Act in 1984.

The authority to issue cable franchises, as with other franchises, thus derives from state law. This prevents this Commission from unilaterally modifying state law franchises to allow

and authorize a new class of service, "information services," not included in the original franchise grants.

Cable modem service results in approximately 15% more rights of way being used by cable company lines. This is because conventional cable service serves only residential areas. Cable modem service, however, is very attractive for businesses and results in cable companies extending their lines into commercial areas (which comprise approximately 15% of the typical communities) where the lines previously did not go.

Under the Fifth Amendment to the US Constitution municipalities are constitutionally entitled to fair compensation for the 15% increase in miles of public rights of way being used. Franchise fees on cable modem service satisfy this constitutional requirement.

Finally, cable companies' customer service on cable modem matters is poor and is currently being addressed by municipalities nationwide. Cable companies have for years complied with the Commission's cable customer service rules in providing cable modem service. Such rules need to continue to apply to cable modem service both to protect consumers and to assist with the rapid rollout of broadband services which is this Commission's goal. However, for such rules to be enforced by municipalities they need to be compensated for doing so by paying franchise fees on cable modem service.

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CS Docket No. 02-52

REPLY COMMENTS OF CONCERNED COMMUNITIES AND ORGANIZATIONS

I. Introduction

A. Concerned Communities: These reply comments are submitted by Concerned Communities and Organizations (“Concerned Communities”) consisting of:

- | | |
|-----------------------|--|
| California: | County of San Luis Obispo |
| Colorado: | City of Lakewood |
| Florida: | City of Valparaiso |
| Idaho: | City of Idaho Falls |
| Illinois: | City of Marshall |
| Massachusetts: | Lowell Telecommunications Corp. |
| Michigan: | Ada Township, Alpine Township, Buchanan Township, City of Belding, City of Cadillac, City of Evart, City of Ishpeming, City of Livonia, City of Monroe, City of Tawas City, City of Whitehall, Coldwater Township, Grand Rapids Community Media Center, Gaines Charter Township, Grand Haven Charter Township, Grand Rapids Charter Township, Holland Charter Township, Laketown Township, Orleans Township, Vienna Charter Township |
| New Jersey: | City of Bayonne |
| New Mexico: | City of Santa Fe |
| New York: | Town of Kirkwood |

Oregon: City of Grants Pass
Pennsylvania: City of Easton
Texas: City of Arlington, City of Benbrook, City of Colorado City, City of Duncanville, City of Grand Prairie, City of Plano, City of Refugio, City of Rockwall

As can be seen from the preceding Concerned Communities consist of communities and organizations in thirteen states consisting of municipalities and PEG/public access organizations (the Grand Rapids, Michigan, Community Media Center) and the Lowell, Massachusetts, Telecommunications Corporation). All have a direct interest in this proceeding and the questions posed by this Commission in its Notice of Proposed Rulemaking.¹

B. Cable Modem Service Classification: Concerned Communities respond as set forth below to comments submitted to date in this proceeding. However, Concerned Communities must note that they respectfully and strongly disagree with this Commission's conclusion in the Declaratory Ruling that cable modem service is an information service. Concerned Communities will not repeat the legal arguments made to date in this proceeding disputing this conclusion but note that they agree with and support the arguments made by ALOAP and other municipal commenters in this proceeding as to why the Commission's conclusion (currently on appeal to the 9th Circuit) is incorrect.

¹ *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, GN Docket No. 00-185, CS Docket No. 02-52, Declaratory Ruling and Notice Of Proposed Rulemaking, ___ FCC Rcd ___, (March 14, 2002) (hereafter referred to as "Declaratory Ruling" for the declaratory ruling portion, "Notice of Proposed Rulemaking" for the notice of proposed rulemaking portion)

1. Original Cable Position Correct: As noted, among others, in the City of New Orleans comments in this docket² the cable industry for years after the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) (hereafter referred to as the “1996 Act”) argued strongly to this Commission and in other proceedings that cable modem service was a “cable service.” Only concurrent with the change in Commissioners following the most recent presidential election did the cable industry do a belated 180-degree turn and contend instead that cable modem service was “an information service.”

The cable industry was correct in its original position. Its change is simply an unprincipled attempt to find a regulatory vacuum for cable modem service (which Congress did not intend) where it would not be subject to the various protections and provisions which Congress has found to be in the public interest and which are embodied in Title VI of the Communications Act of 1934 and applicable state and local laws.

2. “Or Use”: Concerned Communities agree with the point that several municipal commenters made in their comments in this proceeding on the 1996 Act’s addition of the words “or use” to the definition of cable service in Title VI of the Communications Act.³ As these commenters point out, that definition was expressly added to encompass cable modem service. In addition, the legislative history makes clear that the phrase was intended to encompass “information services.” As the Conference Committee said in its report on the addition of the words “or use” to the definition of cable service in the 1996 Act.

² Comments on the behalf of the Utility, Cable and Telecommunications Committee of the City of New Orleans at 8, 10.

³ See, e.g.—Comments of the City Coalition at 13-14.

“The conferees intend the amendment to reflect the ability of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator as well as enhanced services.” H.R. Rep. No. 104-458, 104th Cong. 2d Sess. at 209 (1996) (“Conference Committee Report”) (emphasis supplied)

Congress has thus expressly included “information services” within the definition of cable service. The Commission’s Declaratory Ruling to the contrary is incorrect.

C. Topics Addressed: In these reply comments Concerned Communities, in response to the comments initially filed in this proceeding, will address the following major points:

- Contrary to the statements by industry in its comments, franchising authority comes from state law, not from Federal law such as the Federal Communications Act of 1934.
- Cable modem service results in cable companies using approximately 15% more rights of way than conventional cable service, for which additional compensation is required.
- There have to be adequate customer service protections for cable modem customers.

II. Franchising Authority Comes from State Law, Not Federal Law

The industry comments in this proceeding in effect assume that the source of local franchising authority for cable (and information) services is Federal law, namely, the Communications Act of 1934 and specifically Title VI of it (the Cable Act).⁴ Such industry contentions are incorrect as is set forth below. Instead the correct position is set forth in the comments of the Alliance of Local Organizations Against Preemption which states, in part, that “underlying the Commission’s preemption questions is the presumption that local franchising

⁴ As an example, see Comments of Cox Communications at pages 47, 48 and statements therein such as “Congress drafted Title VI to ‘*define and limit*’ the authority the franchising authority may exercise through the franchise process” Id. at 48 (emphasis in the original, citations omitted).

powers are derived from the Communications Act. That is not the case.”⁵ Concerned Communities reply as follows to show that the position of the industry commenters is incorrect and that of the Alliance is correct.

A. Franchising Authority Comes from State Law, Use of Rights of Way.

1. General. Franchising authority comes from state law and well predates the Communications Act of 1934 (in particular, Title VI thereof). Stated otherwise, the authority to grant franchises⁶ comes from state law. Federal law neither confers franchising authority on entities which otherwise would not have it under state law, nor can Federal law remove the jurisdiction to grant a franchise from state and local entities having such jurisdiction. The preceding principles are well illustrated by the following examples from Michigan, where many of Concerned Communities are located.

2. Example—Michigan Utilities. The main⁷ source of franchising authority in Michigan is Article VII Section 29 of Michigan’s 1963 Constitution which provides as follows:

“No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local

⁵ Comments of the Alliance of Local Organizations Against Preemption at 26 (pagination from electronic version on the Commission’s website).

⁶ The term “franchise” is used in the sense similar to the Title VI definition of the local authorization to construct and operate a cable, telecommunications or utility system, no matter how styled or denominated, cf Communications Act of 1934 §602(9).

⁷ Additional sources of franchising authority may be contained in city or village charters as well.

business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.”

This section of the Constitution is essentially identical to Article VII, Section 28 of the 1908 Michigan Constitution. Under the broad terms of those constitutional provisions the term “utilities”⁸ has been interpreted to cover, among other things:

- electric companies
- telephone/telecommunication companies
- gas companies
- trolley/street railway companies
- cable TV companies

Pursuant to the preceding Constitutional provision and their charters cities, townships and villages in Michigan have issued franchises to entities providing all the preceding types of service.⁹ In fact, cities, townships and villages in Michigan had been issuing franchises for telephone and telecommunications companies for at least two decades prior to the passage of the Radio Act of 1927 which created the Federal Radio Commission (the predecessor to this Commission). And they had been issuing telephone and telecommunications franchises for at least 26 years prior to the passage of the Communications Act of 1934 which created this Commission. As this chronology shows, the franchising authority of cities, townships and villages in Michigan derives from state law, not Federal law.

⁸ Generally defined as “a business affected with the public interest,” which commonly use public rights of way.

⁹ In some instances where the entities in question disputed whether they were “utilities”, the approval was issued under the second sentence of the Constitutional provision which reserves to local units of government the reasonable control of their highways, streets, alleys and public places.

3. Michigan Example—Cable. The preceding is expressly true in Michigan for cable services: Cable television initially developed in the late 1940's in communities not able to receive clear TV reception because of mountainous terrain or sheer distance from TV stations. This Commission first asserted limited jurisdiction over cable TV in 1962.¹⁰ The Commission first established rules in 1965 for cable systems that received TV signals by microwave. In 1966 the Commission first established rules for all cable systems, regardless of whether they were served by microwave or not. These rules were comprehensively revised in 1972 and again in 1980. They were substantially replaced when in 1984 Congress adopted the comprehensive national cable legislation commonly known as the Cable Act, and now appearing as Title VI of the Communications Act of 1934 as amended.

However, from the start—well prior to any Commission involvement—cable TV companies obtained franchises from municipalities in the same manner as other utilities. One example of this is the City of Alpena, Michigan which in 1957 issued a cable TV franchise to Alpena Cable TV, Inc. (copy attached as Exhibit A). As is obvious this franchise predated by five years this Commission's first involvement in cable matters.

The point is further illustrated by the fact that the Cable Act does not confer the authority to issue cable franchises on entities who do not have that authority under state law. For example, in Michigan the Michigan Department of Transportation (MDOT) and county road commissions maintain thousands of miles of highways. Cable companies obtain engineering permits from MDOT and county road commissions to place lines in the rights of way these organizations

¹⁰ This brief synopsis of Federal cable regulation is taken in part from the FCC's May 1993 "History of Wire and Broadcast Communications."

maintain. However, the “franchise” which Section 621(b) of the Cable Act requires cable companies to have is issued only by cities, villages and townships because these are the only entities empowered by Article VII, Section 29 of the Michigan Constitution to issue franchises. The preceding makes clear that the authority to issue cable franchises, as with other franchises, thus derives from state law, not Federal law.

B. Because Cable Franchises and Franchising Authority Are Based on State Law, This Commission Cannot Expand Them To Cover a New Class of Service.

Cable franchises are issued to use public property, namely, the public rights of way, for a specific purpose, namely “to provide cable services.”

This Commission now (in effect) proposes in substance to change essentially every cable franchise in the country to state that unbeknownst to the parties at the time, attached to it was a separate franchise entitling the cable company to provide “information services” of a certain description, but with no other provisions.

Simply put this Commission cannot do this because it would violate state law, property rights and principles of Federalism. Any attempt to do so would strain credulity and violate the 11th Amendment to the Constitution and principles of Federalism.¹¹

The Commission proposed action in this instance must also fail because as described next cable modem service uses more public rights of way than does conventional (multichannel video) cable service.

¹¹ As the Commission should be well aware one of the dominant themes of the US Supreme Court in recent years, and particularly in this most recent year, has been the resurgence of Federalism and the strong bulwark the court is creating against Federal incursion on state and local authority.

III. Cable Modem Services Use Approximately 15% More Rights of Way Than Conventional Cable Service, For Which Additional Compensation is Required

The cable companies in their comments in this proceeding contend that “cable operators make use of no additional rights-of-way in providing cable modem service and that no additional burden or costs are imposed on municipalities by virtue of the provision of such service.¹² These contentions are incorrect as is set forth next.

A. Conventional Cable is Residential Service, not a Business Service.

Conventional cable service—by which is meant multichannel video service—is overwhelmingly a residential service. It is provided to virtually all homes in urban areas. Indeed, it is a rare house in such areas for which conventional cable service is not available.

By contrast, conventional cable service is not typically provided in commercial areas. Strip malls, stores, office buildings and the like are typically and overwhelmingly not served by conventional cable television. The reason is simple—few businesses see any use for having daytime TV in an office or retail environment. So the cable TV companies with few exceptions do not serve commercial areas and their service is not wanted there.

B. Cable Modem Service Targets Businesses. By contrast commercial businesses are a prime market for cable modem service. In fact, this Commission specifically alluded to such commercial cable services in footnote five of its Declaratory Ruling.

The reason commercial or office environments are a prime market for cable modem service is that T1, ISDN or other phone company high speed lines are too expensive for many

¹² See, for example, Comments of the National Cable & Telecommunications Association at 47.

businesses. By contrast, cable modem service—which most cable companies now offer in several premium or enhanced versions targeted at businesses—are relatively inexpensive. And, by contrast with phone companies offerings, cable modem offerings offer a much broader range of choices and prices in terms of bandwidth, speed, suitability for networking and the like.

The result is predictable: With the nationwide rise in cable modem service, municipalities have seen cable companies increasingly extending their lines into commercial areas which they previously did not serve, with cable modem service often being the sole or dominant service provided to such businesses.

Make no mistake about it—what building owners, building tenants and the cable companies are telling municipalities is that it is “cable modem service” which is causing the extension of cable lines to commercial areas, to commercial streets and commercial buildings where cable service had previously not been provided. The result is a substantial increase in the miles of streets being used by cable companies for their lines.

C. Miles of Streets Used Has Increased by Approximately 18%: To provide an approximate quantification of the preceding, the amount of land area in a typical city that is zoned for various classifications is often approximately as follows:

- Residential—Fifty percent
- Commercial and office—Fifteen percent
- All other (agricultural, government, industrial, parks, etc.)—Thirty-five percent

Using these figures, where a cable television company was serving only the residential areas prior to the provision of cable modem service and now has expanded its service to

commercial areas, fifteen percent more of the city is being serviced by cable than before, with a corresponding increase in the miles of public rights of way used.¹³

Thus, as a result of being able to provide cable modem service, cable companies are increasing the miles of public rights of way they use by approximately 15%. This is a large increase. As the Supreme Court has repeatedly ruled, a permanent occupation of property is a taking for which compensation is required under the Fifth Amendment to the US Constitution. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). And as the US Supreme Court has also repeatedly ruled, the takings clause of the Fifth Amendment requires compensation by the Federal government when it takes state or local property. See *United States v. Fifty Acres of Land*, 469 U.S. 24 (1984) (most recent of US Supreme Court cases upholding and applying this principle). Municipalities are thus entitled to compensation for the 15% increase in the miles of public rights of way being used so that the takings clause of the Fifth Amendment of the Constitution is not violated.

Until the Commission's Declaratory Ruling, communities were being compensated at the statutory rate set by Congress for the increased miles of public rights of way being used, namely, by being paid a 5% franchise fee on the cable companies' revenues from cable modem service.

Stated otherwise, municipalities are constitutionally entitled to fair compensation for use of their property. Cable modem service involves an approximate 15% increase in the amount of public property being used by cable companies. Municipalities are entitled to a corresponding

¹³ Concerned Communities agree with ALOAP on the additional use of public property described in its comments in this proceeding which would increase the 15% figure.

increase in the franchise fees they receive and constitutionally must be allowed to obtain such fees, otherwise the Commission's rulings violate the Constitution.

D. Costs Increase by Approximately 15%.

The arguments of industry commenters that municipalities' right of way costs related to cable modem service are adequately being covered by existing cable franchise fees is wrong.¹⁴ Right of way related costs by municipalities are increasing by approximately 15% due to the increased miles of cable lines cable modem service causes described above. These additional costs come in three main categories.

1. Degradation Costs. First, there are degradation costs—the shortened useful life of a street (i.e., more frequent repaving costs) which occurs each time the surface is breached for a trench or other excavation for a cable/modem line. In temperate climates the annual spring “freeze—thaw” cycle wreaks havoc with roads, most notably by creating potholes. More southerly areas of the US have a similar phenomenon due to the scorching heat in the summer. Such degradation is enhanced because it is impossible to completely seal the street to keep out moisture once the street is patched due to a pavement cut for a cable or cable modem line. Thus, every time the pavement is cut, potholes or similar deterioration enviably results.¹⁵

¹⁴ See Comments of the National Cable & Telecommunications Association at pages 48-49 for an example of such contentions.

¹⁵ The degradation is compounded whenever an excavation is made into the street because the soil that is replaced is inevitably different from the adjacent undisturbed soil. The result is that the "vertical column" of soil in the excavated and unexcavated areas are different and expand and contract differently with temperature changes such as summer heat or the freeze-thaw cycle. Thus even if a pavement cut is perfectly patched in July, by next March the street will be uneven, will admit moisture, and the area will rapidly deteriorate.

2. Monitoring and Management Costs. Second, telecommunications lines in the public rights-of-way increase the monitoring and management costs incurred by municipalities. These costs relate to construction permit procedures, inspecting work that is done, monitoring work done by telecommunications providers in the rights-of-way for compliance with permits, codes and applicable law, barricading expenses, engineering costs, legal expenses, and mapping activities. These activities attempt to ensure that the rights-of-way can be used properly, efficiently and safely by *all* users (cars, trucks, pedestrian traffic, cable companies, utilities and others) and that each complies with their respective obligations (for example, provider A does not inadvertently cut provider B's lines). These costs increase with the increasing number of users of the rights-of-way.

3. Increased Construction Cost. Third, municipal costs increase due to the delays and higher costs municipalities incur due to delaying sewer, water, road and similar municipal right-of-way construction projects in order to coordinate installation, construction and maintenance in the rights of way with multiple providers (cable, telephone, electric, other) whose lines are in the rights of way being worked on.

For example, in a road reconstruction project (such as a road widening) coordination involves contacting all the providers with lines in the rights of way, identifying where their lines are located and working with them to make sure their lines are relocated in an orderly fashion to a new location under or beside the highway as it will be reconstructed. Each additional provider complicates the process. Only one provider need be slow in responding to delay a whole

construction project by days or weeks. Costs go up as construction crews sit idle waiting for the last provider to move its lines out of the street that is about to be dug up.

The preceding three types of costs increase roughly proportionally for each additional mile of street used.

4. Increased Costs Not Reimbursed. As is apparent from the preceding, unless municipalities receive franchise fees on cable modem services they will not be reimbursed for the additional costs caused by the provision of cable modem service, let alone receive fair compensation for the additional public property being used. This result is not only unconstitutional, it is bad policy because without such fees the public—namely, Jane and John Taxpayer—will be subsidizing the nation’s cable and cable modem companies. This should not occur.

IV. Cable Modem Customer Service.

Several industry commenters have contended that this Commission must preempt municipalities from establishing or enforcing customer service requirements that are applicable to cable modem service or that at most all that can apply are generally applicable consumer protection requirements in state law (such as those applicable to all retail businesses).¹⁶ These industry contentions are incorrect. As is set forth below customer service is a major issue for cable modem service and this Commission’s cable television consumer protection rules should continue to apply to companies providing cable modem service.

¹⁶ See, e.g. Comments of Comcast Corporation at page 33; Comments of Arizona Cable Telecommunications Association, Insight Communications Corporation and MediaCom Communications Corporation at pages 27 and following.

A. Introduction. Customer service on cable modem matters is a major issue, as described below. This Commission has to provide an effective mechanism for enforcing adequate customer service protections for cable modem customers. If it does not do so this will not only harm customers, it will hinder the provision of the broadband services which the Commission desires to promote because people will not want to trust their important Internet type communications to providers when there is no effective redress when things go wrong.

B. Cable Modem Service is Poor. Municipalities across the country, including Concerned Communities, have received hundreds of thousands of customer service calls relating to cable modem service. Such calls may relate to technical matters or to billing and similar issues (similar to the topics covered by this Commission's cable customer service rules, 47 C.F.R. §§ 76.309, 76.1602, 76.1603, 76.1619, attached as Exhibit B). The main points are two fold.

First, municipalities are fielding a very large number of customer service calls related to cable modem service.

Second, the number of such calls is typically disproportionately high. For example, over half of the calls received by municipalities may relate to cable modem service whereas only 20% of conventional cable customers take cable modem service.

C. Example of Customer Service Issues. To illustrate how cable modem customer service is poor and protections for customers are needed Concerned Communities will simply provide one example. It is set forth at length below and consists of the comments provided by a

professor of computer science at a university to a municipality on the problems he has had with a cable company and its modem service.¹⁷

This message is to describe problems and their possible resolution that I have observed with the cable company's cable modem service.

Background

I am Associate Head of Computer Science at the university, responsible for computing and facilities services. We provide computing for research and teaching for approximately 4000 users. Our network consists of Fast and Gigabit Ethernet, with external links on the campus network (and so to) and to Internet2. When the prior cable company first began offering Terayon S-CDMA modems in late 1997 or early 1998 I investigated them in order to provide advise to faculty and students who might wish to use one at home. My wife started using a cable modem at that time and the cable signal strength at our house is well above the minimum required by the cable modem to achieve low error rates. My wife is still using a second-generation Terayon S-CDMA modem, and has not yet switched to a DOCSIS-compliant modem, but my comments below do not depend on that, as colleagues with DOCSIS-compliant modems have similar experiences.

Quality of Service Shortcomings

Whenever my wife has problems with her cable modem, she asks me to handle it. For about the first year of service, with the first-generation Terayon modem, service quality was good. She could achieve download rates of over 3 Mbps. The prior cable company then put a 1 Mbps restriction on the modem, but doubled the upstream bandwidth and cut the price. Eventually the first modem went bad, with packet loss rates of over 30%. The support staff could readily diagnose this. The second modem worked only intermittently. I was told that the power supply was weak and needed to be plugged directly into the wall. This did not really help (and I thought this was BS anyway), but quality eventually improved. The typical performance was to get close to the 1 Mbps download speed when the system was working, but had frequent brief outages of seconds up to a few minutes, or periods where the network was very slow. This could be measured by observing ping delays to the prior cable company head end (e.g. DNS servers, POP mail server), and delays to the university systems. Over a one day period, the worst-case delays would routinely exceed 1000 ms, when a normal value would be 18-20 ms.

¹⁷ Identifying information has been removed.

Given the design of the Terayon modem and head end, this should not occur. Since the problems were more associated with high-usage times, my belief is that some part of the system was misconfigured and would become saturated. Note that these problems happened within the prior cable company system, so it was not a problem with their uplinks to the Internet. I would periodically call when my wife would complain, but the problems were never diagnosed.

When the current cable company bought the prior cable company, there was a sudden drop in quality of service (QOS). I surveyed our faculty and they also reported a drop in QOS. This could be observed in three ways. First, ping delays to the cable company servers shot up dramatically, e.g. going from 18-20 ms to 40-50 ms. I believe this is because I have heard that many systems were moved from the local office to a regional office. Second, the brief outages increased in frequency. They have since gone down in frequency, but are still present. Third, all the competent the cable company support staff quit. I have heard that is because they were transferred to a regional office. It got so bad that when one of my staff members with a cable modem would call and explain a problem in detail and the likely diagnosis, the cable company's response was to offer them a job! I myself would often know more than the person I was talking to when explaining a problem. The usual response was to tell me to reboot my wife's computer, when I knew for certain that this would not solve the problem. I would usually call since many of the emails to the support staff never received a reply. I understand all too well how hard it is to hire and retain good support staff, but I also know that it is possible if one puts a priority on it. The support quality has gotten slightly better over the past few months, but I could only characterize it as improving from awful to poor. It is still worse than it was before the cable company takeover.

I would recommend the following changes to improve QOS. First, the cable company should be constantly monitoring communications between the cable modems and the head end. The original Terayon modems had this capability, but as far as I can tell, the prior cable company and the current cable company never did continuous monitoring for quality, such as packet loss rates or delays, or at least not in enough detail to detect a problem before the user did. Similarly, they should be constantly monitoring response times and throughput within their entire system, in order to identify and correct bottlenecks. In a properly configured system, delays within the cable company network and servers should never creep up above 1 second, outages should be rare and packets should rarely be lost. In other words, the cable company should be tracking its system utilization to make sure it never exceeds a threshold where QOS starts to sharply decline. This is analogous to monitoring the usage rate of their modem pool, to minimize the probability of a busy signal. Second, the cable company should put a priority on

hiring and retaining competent support staff. In other words, someone like me should be able to talk to the support person answering the phone and not get a BS answer like "reboot the system". (Note that sometimes rebooting is the appropriate solution, but most of the time it is not). Similarly, the cable company should put a priority on hiring and retaining competent network engineers. I know they are hard to hire, hard to retain, expensive and require a lot of training, but they are critical to good QOS. I am not expecting the cable company's service to be the same quality as a campus network. But the feedback from our users is that DSL service is more reliable than cable, although harder to get installed. And although the peak bandwidth of the DSL Silver service is lower, the line utilization is higher and the latency is lower so that users feel it is about the same speed as a cable modem. Since the cost of the university of DSL service is about the same as a cable modem, it is in the cable company's own interest to improve its quality.

If a professor of computer science is getting this level of customer service, some of which he calls "BS," the average consumer is far worse off.

This simple example illustrates the need for strong customer service protections for cable modem customers.

D. The Commission's Cable Customer Service Rules Should Continue to Apply to Cable Modem Service. As indicated in the Notice of Proposed Rulemaking at ¶106, and as indicated by the various comments received in this proceeding¹⁸, until the Declaratory Ruling was issued, cable companies and municipalities treated cable modem service as being a part of "cable service." As such, this Commission's cable customer service rules, attached as Exhibit B, applied to cable modem service.

This Commission should specifically provide that these rules continue to apply despite the Commission's reclassification of cable modem service as a "information service." The

¹⁸ See, e.g. Comments of National Cable & Telecommunications Association at pages 52-53.

problems with customer service described above and in the comments received in this docket indicate the need for such protections. And if the cable companies could provide cable modem service for several years while subject to this Commission's cable customer service rules there is no reason why they should not be subject to these rules (and customers provided the protection of such rules) going forward.

However, Concerned Communities note that under the cable customer service rules this Commission does not enforce them and instead has specifically left their enforcement solely to local units of government. See, e.g.--47 C.F.R. §§ 76.309 (a), 76.1602 (a), 76.1603 (a), 76.1619 (c). Until recently municipalities have undertaken this obligation on behalf of the residents—because until recently cable modem service was considered to be part of cable service.

However, if this Commission expects municipalities to continue to provide customer service assistance on cable modem matters, such as by enforcing rules similar to the cable customer service rules, they have to be provided adequate funding for doing so. Franchise fees on cable modem service can provide such funding.

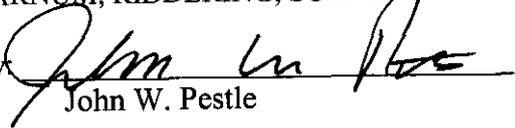
V. Conclusion.

For the reasons set forth above this Commission should act on its Notice of Proposed Rulemaking as set forth in the prior portions of these reply comments.

Respectfully submitted,

VARNUM, RIDDERING, SCHMIDT & HOWLETT LLP

By


John W. Pestle

Attorneys for Concerned Communities and
Organizations

Dated: August 6, 2002

Bridgewater Place
333 Bridge Street N.W.
Grand Rapids, MI 49504
(616) 336-6000

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EXHIBIT A
ALPENA, MICHIGAN 1957 CABLE TV FRANCHISE

AGREEMENT

THIS AGREEMENT made this 12th day of November, 1957, between the City of Alpena, a Municipal Corporation, of Alpena, Michigan, party of the first part, hereinafter referred to as the City, and the Alpena Cable TV, Inc., party of the second part, hereinafter referred to as the Company.

WHEREAS, because of the poor quality of television reception in the City of Alpena, the City is desirous of improving television reception, and

WHEREAS, the Company for the purpose of furnishing the residents of the City and surrounding area with a better quality of television reception proposes to furnish cable television service in this area and such service will require the granting of an easement and right of way over and across city streets, alleys and city property for the purpose of erecting necessary poles and for the laying and stringing of co-axial cable and other wires and devices for the purpose of implementing said service and

WHEREAS, in connection with the furnishing of said television service it may be necessary for the Company to request of the City permission to set poles in special places and for permission to attach wires and cable to city owned utility poles and

WHEREAS, the City is agreeable to granting an easement to the Company for said purposes subject to reasonable rules and

regulations in regard to the exercise of the easement to be granted and subject to the supervision, control and regulation of the Company in regard to its methods of operation and of its rates, charges and costs to the users of said cable television service and which supervision and regulation the Company hereby acquiesces in, now, therefore,

For and in consideration of the mutual covenants and undertakings of the parties hereto, it is hereby agreed as follows:

1. The said City does hereby grant and convey to the Company the nonexclusive right to cross streets and alleys and other city property with a co-axial cable and other wires and devices necessary and convenient to the operation of a television cable system subject to the reasonable regulation of the City Manager with respect to location, minimum heights, safety of devices, method of installation and all other matters in relationship to the exercise of said easement and installation of said cable TV system.

2. In the event the Company shall find it necessary to set its own poles upon city property or upon any streets or alleys within said city, an application for permission to set such pole or poles shall be made in detail to the City Manager and the question of whether or not to erect a particular pole should be granted shall be determined by the City Manager.

3. The Company in the installation and operation of its cable TV system agrees to comply fully with all rules,

regulations and ordinances of the City and statutes of the State of Michigan including the payment of all applicable license and inspection fees.

4. The Company shall erect its cable and appurtenances and maintain the same in conformity with the terms and conditions of the Michigan Public Service Commission Order 1679 and amendments thereto and other public authority having jurisdiction and the Bell System Practices Code of AG C & G Series or any amendments thereto and in full conformity of all applicable statutes of the State of Michigan.

5. In consideration of the easement and permission granted to the Company by the City and the Company recognizing the duty of the City to protect the citizens of the City in reference to the installation of said cable TV system, covenants and agrees with the City as follows:

1. All agreements for service to individual subscribers shall be made in writing and subject to the approval of the City and the subscriber shall be furnished a copy thereof.

2. All agreements shall clearly specify the amount to be charged by the Company for the installation of the connection to the cable system, the amount of monthly service charge and all other details and conditions governing discontinuance, termination, change of service, temporary suspension or change of location and all other matters appurtenant to said undertaking.

3. A copy of the standard form of agreement together with any amendments and revisions thereof that may become necessary (and which would be applicable to future subscribers) shall be filed with the City Clerk.

4. After the above requirements have been met and service has been installed and the subscribers have paid or contracted to pay the agreed installation charge, the monthly service fee shall not be increased by the Company except under the following conditions and in the following manner:

a. Application shall first be filed with the City Council requesting an amendment to said subscriber agreement to permit a raise in the existing monthly service fee.

b. In the event the Company shall file such an application for an increased monthly service charge to existing subscribers, the City Council is hereby authorized to conduct such hearings as may be necessary to determine the necessity of any increased charge or charges and it shall be necessary for the Company to establish to the satisfaction of the Council that operational costs and other standard costs factors justify an increase in the monthly service charge. In considering any such application filed by the Company, the City shall consider all cost factors and requirements based upon good accounting practices which the Michigan Public Service Commission applies in connection with an application for rate increases for public utilities.

5. The Company shall, within sixty days from date of this agreement, furnish evidence to the City of adequate capitalization of the Company sufficient to finance the construction of the proposed cable TV system in the City of Alpena which capitalization finance shall be subject to the approval of the City and upon failure of the Company to furnish such evidence

within the time limited, this agreement shall terminate forthwith and be of no further force and effect.

6. The Company shall not solicit or accept from the residents of the City of Alpena any installments or payments for or on account of the proposed cable installation or "drop" charges until after the necessary transmission lines and tower have been erected and installed and a merchantable television signal is capable of reception within the limits of the City of Alpena. The determination of whether or not the proposed television signal is sufficient and adequate shall be subject to the final approval of the City and in the event the proposed television signal that is to be produced within the city limits of Alpena is not approved by the City within six months from date of this agreement, the City shall have the right and option to cancel and annul this agreement.

7. In the event the Company shall obtain approval of its television signal from the City, and prior to laying, constructing or installing any cable or transmission lines or erecting any poles in the City of Alpena or performing any work necessary for that purpose, it shall apply for a permit to the City Manager who shall grant a permit subject to the rules, regulations and supervision he may prescribe and before any of the proposed installation work is to be commenced, the Company shall furnish sufficient bond to the City which bond shall be conditioned upon the Company's performance of such installation work without damage to city property and public liability.

8. The Company shall have the right to install an underground cable TV transmission system subject to the issuance of permits for such installation and work from the City Manager and upon the filing of sufficient bonds indemnify the City for damage to its property and public liability.

9. In the event any problems or situations arise which are not specifically covered by this agreement, the Company agrees to submit the same to the City for final determination which decision shall be binding on the Company.

10. This agreement and easement shall not be assigned, transferred, mortgaged or hypothecated by the Company without expressed written consent of the City.

11. This agreement is declared binding on the successors and assigns of the parties hereto.

IN WITNESS WHEREOF the parties have hereunto set their hands and seals the day and year first above written.

In Presence Of: CITY OF ALPENA, a Municipal Corporation.

William F. Knapp

BY: Philip D. Brown
Its Mayor

Edward C. Quinn

Edward C. Quinn
Its Clerk

George W. Walker

ALPENA CABLE TV, INC.
BY: Alfred Bollinger
Its President

James H. [unclear]

James H. [unclear]
Its Secretary

EXHIBIT B

COMMISSION CABLE CUSTOMER SERVICE RULES

**CODE OF FEDERAL REGULATIONS (C.F.R.)
TITLE 47--TELECOMMUNICATIONS
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
PART 76--MULTICHANNEL VIDEO AND CABLE TELEVISION SERVICE**

Subpart H--General Operating Requirements

§ 76.309 Customer service obligations.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (c) of this section against cable operators. The franchise authority must provide affected cable operators ninety (90) days written notice of its intent to enforce the standards.

(b) Nothing in this rule should be construed to prevent or prohibit:

(1) A franchising authority and a cable operator from agreeing to customer service requirements that exceed the standards set forth in paragraph (c) of this section;

(2) A franchising authority from enforcing, through the end of the franchise term, pre-existing customer service requirements that exceed the standards set forth in paragraph (c) of this section and are contained in current franchise agreements;

(3) Any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted herein; or

(4) The establishment or enforcement of any State or municipal law or regulation concerning customer service that imposes customer service requirements that exceed, or address matters not addressed by the standards set forth in paragraph (c) of this section.

(c) Effective July 1, 1993, a cable operator shall be subject to the following customer service standards:

(1) Cable system office hours and telephone availability--

(i) The cable operator will maintain a local, toll-free or collect call telephone access line which will be available to its subscribers 24 hours a day, seven days a week.

(A) Trained company representatives will be available to respond to customer telephone inquiries during normal business hours.

(B) After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day.

(ii) Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis.

(iii) The operator will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards above unless an historical record of complaints indicates a clear failure to comply.

(iv) Under normal operating conditions, the customer will receive a busy signal less than three (3) percent of the time.

(v) Customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

(2) Installations, outages and service calls. Under normal operating conditions, each of the following four standards will be met no less than ninety five (95) percent of the time measured on a quarterly basis:

(i) Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to 125 feet from the existing distribution system.

(ii) Excluding conditions beyond the control of the operator, the cable operator will begin working on "service interruptions" promptly and in no event later than 24 hours after the interruption becomes known. The cable operator must begin actions to correct other service problems the next business day after notification of the service problem.

(iii) The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (The operator may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

(iv) An operator may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

(v) If a cable operator representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time which is convenient for the customer.

(3) Communications between cable operators and cable subscribers--(i) Refunds--Refund checks will be issued promptly, but no later than either--

(A) The customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or

(B) The return of the equipment supplied by the cable operator if service is terminated.

(ii) Credits--Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

(4) Definitions--

(i) Normal business hours--The term "normal business hours" means those hours during which most similar businesses in the community are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours.

(ii) Normal operating conditions--The term "normal operating conditions" means those service conditions which are within the control of the cable operator. Those conditions which are not within the control of the cable operator include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages, and severe or unusual weather conditions. Those conditions which are ordinarily within the control of the cable operator include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods, and maintenance or upgrade of the cable system.

(iii) Service interruption--The term "service interruption" means the loss of picture or sound on one or more cable channels.

* * * * *

Subpart T--Notices

§ 76.1602 Customer service--general information.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (b) of this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.

(b) Effective July 1, 1993, the cable operator shall provide written information on each of the following areas at the time of installation of service, at least annually to all subscribers, and at any time upon request:

- (1) Products and services offered;
- (2) Prices and options for programming services and conditions of subscription to programming and other services;
- (3) Installation and service maintenance policies;
- (4) Instructions on how to use the cable service;
- (5) Channel positions of programming carried on the system; and
- (6) Billing and complaint procedures, including the address and telephone number of the local franchise authority's cable office.

(c) Subscribers shall be advised of the procedures for resolution of complaints about the quality of the television signal delivered by the cable system operator, including the address of the responsible officer of the local franchising authority.

§ 76.1603 Customer service--rate and service changes.

(a) A cable franchise authority may enforce the customer service standards set forth in paragraph (b) of this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.

(b) Customers will be notified of any changes in rates, programming services or channel positions as soon as possible in writing. Notice must be given to subscribers a minimum of thirty (30) days in advance of such changes if the change is within the control of the cable operator. In addition, the cable operator shall notify subscribers 30 days in advance of any significant changes in the other information required by § 76.1602.

(c) In addition to the requirement of paragraph (b) of this section regarding advance notification to customers of any changes in rates, programming services or channel positions, cable systems shall give 30 days written notice to both subscribers and local franchising authorities before implementing any rate or service change. Such notice shall state the precise amount of any rate change and briefly explain in readily understandable fashion the cause of the rate change (e.g., inflation, change in external costs or the addition/deletion of channels). When the change involves the addition or deletion of channels, each channel added or deleted must be separately identified. For purposes of the carriage of digital broadcast signals, the operator need only identify for subscribers, the television signal added and not whether that signal may be multiplexed during certain dayparts.

(d) A cable operator shall provide written notice to a subscriber of any increase in the price to be charged for the basic service tier or associated equipment at least 30 days before any proposed increase is effective. The notice should include the name and address of the local franchising authority.

(e) To the extent the operator is required to provide notice of service and rate changes to subscribers, the operator may provide such notice using any reasonable written means at its sole discretion.

(f) Notwithstanding any other provision of part 76 of this chapter, a cable operator shall not be required to provide prior notice of any rate change that is the result of a regulatory fee, franchise fee, or any other fee, tax, assessment, or charge of any kind imposed by any Federal agency, State, or franchising authority on the transaction between the operator and the subscriber.

Note 1 to § 76.1603: Section 624(h) of the Communications Act, 47 U.S.C. 544(h), contains additional notification requirements which a franchising authority may enforce. [Section 624(h) states "A franchising authority may require a cable operator to do one or more of the following: (1) Provide thirty (30) day's advance written notice of any change in channel assignment or in the

video programming service provided over any such channel. (2) Inform subscribers, via written notice, that comments on programming and channel position changes are being recorded by a designated office of the franchising authority.”]

Note 2 to § 76.1603: Section 624(d)(3) of the Communications Act, 47 U.S.C. 544(2)(3), contains additional notification provisions pertaining to cable operators who offer a premium channel without charge to cable subscribers who do not subscribe to such premium channel.

Note 3 to § 76.1603: Section 631 of the Communications Act, 47 U.S.C. 551, contains additional notification requirements pertaining to the protection of subscriber privacy.

§ 76.1619 Information on subscriber bills.

(a) Effective July 1, 1993, bills must be clear, concise and understandable. Bills must be fully itemized, with itemizations including, but not limited to, basic and premium service charges and equipment charges. Bills will also clearly delineate all activity during the billing period, including optional charges, rebates and credits.

(b) In case of a billing dispute, the cable operator must respond to a written complaint from a subscriber within 30 days.

(c) A cable franchise authority may enforce the customer service standards set forth in this section against cable operators. The franchise authority must provide affected cable operators 90 days written notice of its intent to enforce standards.