

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

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In the Matter of)	
)	
Inquiry Concerning High-Speed Access to the)	GN Docket No. 00-185
Internet Over Cable and Other Facilities)	
)	
Appropriate Regulatory Treatment for)	CS Docket No. 02-52
Broadband Access to the Internet Over)	
Cable Facilities)	
_____)	

REPLY COMMENTS OF THE ALLIANCE OF LOCAL ORGANIZATIONS AGAINST PREEMPTION

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SUMMARY

The industry's comments in this proceeding are an extended exercise in contradiction. A large and influential industry that has achieved enormous success under a regulatory regime that expressly relies on the exercise of local authority now claims that maintaining that regime with respect to cable modem service would be unreasonable and unlawful. At the same time, the industry rejects any suggestion that it should be regulated in the same fashion as its competitors. There is no basis in fact or law for the rejection of local franchising authority over cable modem services, and the Commission is bound by the Constitution and the Communications Act to uphold that authority.

The industry's comments also obscure a fundamental point: this proceeding is not just about the regulation of cable modem service. There are three principal elements in the relationship between local governments and service providers. First, local governments have the right and responsibility to preserve public property by imposing conditions on the use of the public rights-of-way. Second, local governments have the right and responsibility to protect the public fisc by obtaining compensation or rent for the use of the public rights-of-way. And third, they have the right and responsibility to regulate a business service, as reasonably necessary to protect the interests of their residents who subscribe to the service. The Commission's authority to alter local rights depends on the nature and source of those rights.

The Commission's Authority To Preempt Is Limited.

As a threshold matter, to justify any effort to preempt local authority, the Commission must be able to show that preemption will advance federal policy goals. By the Commission's own admission, deployment of cable modem service is well advanced. Even the industry

commenters acknowledge this. The fundamental issue is not deployment, but demand for the service.

Furthermore, the Communications Act offers no authority for preemption, and actually affirms local authority regarding cable modem service. The industry commenters argue that the source of local franchising authority over cable modem service is derived from and limited by Title VI of the Communications Act. But this is not true. In reviewing the closely analogous case of the Commission's Open Video System rules, the Fifth Circuit ruled that the Commission could not preclude local franchising of OVS operators, because while the Cable Act "may have expressly *recognized* the power of localities to impose franchise requirements, it did not *create* that power" *City of Dallas v. FCC*, 165 F.3d 341, 348 (5th Cir. 1999) (emphasis in original). None of the commenters even attempts to address the effects of this holding. Nor do the commenters address the effect of Section 601 of the Telecommunications Act of 1996, which precludes any argument that the Communications Act allows any preemption of local authority without an express statement of Congressional intent.

The provisions that commenters do cite to support preemption are insufficient to overcome Section 601 or the reasoning of the Dallas decision. For example:

- Section 706 of the 1997 Act contains no express mandate for preemption. Furthermore, in its implementation of Section 706 the Commission has repeatedly found that cable modem service is flourishing.
- Section 230 of the Communications Act likewise contains no preemptive mandate. It deals only with the screening of offensive material on the Internet.
- Section 253 expressly preserves local authority over the use of the public rights-of-way by telecommunications providers. It does not apply to local authority regarding cable modem service in any way, even by implication.
- The Commission's authority under Title I of the Communications Act is insufficient to justify preemption, because Title I only allows the Commission to exercise authority ancillary to its other powers. The Commission's powers over information

services themselves being quite limited, the Commission's ancillary authority is insufficient to preempt local authority.

- Similarly, the mere classification of cable modem service as an interstate information service is insufficient to preclude all local authority. The classification does not, for example, affect local property rights, and the Commission has no inherent power to take local property.
- The “dormant Commerce Clause” doctrine does not apply, because the Communications Act itself is an exercise of the commerce power.
- Nor does the First Amendment authorize preemption. Franchising and compensation requirements are not restrictions on speech, and the First Amendment does not authorize the taking of property.

Local Governments Have the Authority to Charge Cable Modem Franchise Fees.

Leaving aside the Commission's lack of authority to preempt, there is no justification for any attempt to preempt local authority to obtain compensation for the use of the public rights-of-way. Industry commenters assert that franchise fees are inappropriate because their systems do not impose any additional burden on the public rights-of-way. This argument is wrong for two reasons. First, fundamental economic principles require that users of property pay fair market value for that use. If cable modem service providers are allowed to use public property to extract value, but are not required to pay rent related to that value, the result will be distortions in the market and misallocation of right-of-way resources. Second, from an engineering perspective, there are real differences between a cable system designed to provide cable modem service, and a system that is designed to deliver only video services. And systems capable of delivering cable modem service impose a different and greater burden on the public rights-of-way.

Nor does it make any sense to argue that fees should be banned because they may be “revenue producers.” Rental fees “produce revenue” in excess of costs every day. Furthermore, the industry commenters present no actual evidence that the fees they pay exceed local

government costs. Local governments expend enormous sums on acquiring, improving and maintaining the public rights-of-way every year.

Section 622 of the Cable Act does not forbid franchise fees on cable modem service providers or their revenues. In fact, Section 622(g) expressly allows local governments to adopt fees other than cable franchise fees.

Furthermore, the Commission's classification alone should not be enough to affect the issue of compensation. Operators should not be permitted to pay less for the use of property than they willingly contracted because the Commission changes the nomenclature. This is an arbitrary and unjust result.

Local Governments Have the Authority To Enact Franchising Requirements for Cable Modem Service Providers.

Service providers rely primarily on two provisions to argue against franchise requirements, Section 621(a)(2) and Section 624. Neither applies. The purpose of Section 621(a)(2) is merely to state that a cable franchise permits access to the public rights-of-way and to certain private easements. It is not a definition of what services a franchisee may offer. Section 624 limits the authority of a local government to regulate the services, facilities and equipment of a cable operator – but if cable modem service is not a cable service, then Section 624 does not apply.

Industry commenters also say that additional franchises are not needed, because a cable franchise provides all the protection a local government requires. But this is not an argument in favor of preemption: how can a local government rely on a cable franchise to deal with cable modem issues if its authority over cable modem service has been preempted? As soon as the Commission preempts, the application of the cable franchise to cable modem service presumably ends. Furthermore, local governments do potentially have different interests or concerns, and

there are actual design and construction differences between the two types of systems, so there is in fact no duplication.

Local Regulations Governing Customer Service and Privacy Must Be Respected.

The Commission's central mission is protection of consumers from market abuses by providers not subject to effective competition. Local governments share this mission. This docket must not result in consumers losing effective recourse against irresponsible or unresponsive cable modem service providers.

Section 632 currently allows local governments to regulate customer service, without reference to the type of service. And Section 631 expressly allows regulation of privacy in connection with "other services." Consequently, there can be no preemption regarding these issues unless local regulation conflicts with federal law. Furthermore, because cable modem service dominates the broadband market, preemption of local requirements would leave consumers unprotected.

Finally, the Commission must leave the question of repayment of past franchise fees to state and local law, because state and local law adequately addresses the subject and because Title I does not grant the Commission authority over cable modem franchise fees.

The Commission has decided that cable service and cable modem service are mutually exclusive, and that decision has consequences. Now the only way to preserve and protect local authority in the wake of the Declaratory Ruling is to recognize that cable modem service has no special privileges and is subject to the same local laws and regulations as other businesses seeking privileged use of the public rights-of-way.

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The Alliance of Local Organizations Against Preemption (“ALOAP”) respectfully submits these reply comments.¹

INTRODUCTION

The industry’s comments in this proceeding are an extended exercise in contradiction. A large and influential industry that has achieved enormous success under a regulatory regime that expressly relies on the exercise of local authority now claims that maintaining the same regime for cable modem service would be unreasonable and unlawful. At the same time, the industry rejects any suggestion that cable modem service should be regulated in the same fashion as

¹ In addition to the parties listed in the initial comments, the following communities are supporting these reply comments: Chula Vista, California; Fort Worth, Texas; Minneapolis, Minnesota; Newton, Massachusetts; Niles, Illinois; North Suburban Cable Commission, Minnesota; and Phoenix, Arizona.

potential competitors. The industry's legal arguments are flawed. There is no basis in fact or law for the rejection of local franchising authority over cable modem services, and the Commission is bound by the Constitution and the Communications Act to uphold that authority.

I. LOCAL FRANCHISING WILL NOT DELAY CABLE MODEM DEPLOYMENT AND INVESTMENT.

The industry chants in favor of Commission preemption of local authority, repeating over and over that local governments are impeding broadband deployment. The industry never offers any proof. Given the opportunity to make its case in this docket, the industry again chants in unison, but provides no evidence. In their initial comments, various industry representatives made unsubstantiated assertions that local franchising will harm broadband deployment and investment. But those commenters present no factual support and contradict their own arguments. All parties agree that the cable modem industry is growing by leaps and bounds. The Commission's own most recent findings in this area belie the industry's assertions: The number of cable modem lines grew by 36% in the second half of 2001, nearly doubling in 2001 alone. There are now 7.1 million cable modem lines in the country.² Local franchising demonstrably did not hinder the growth of the cable industry before the advent of cable modem service, nor has it during the past five years as those 7.1 million cable modem lines were being installed. The industry has no foundation for its speculation that local franchising will hinder deployment in the future. The Commission must ignore the chanting, however loud, and focus on the facts.

² *Federal Communications Commission Releases Data on High-Speed Services for Internet Access*, Public Notice, at 1 (rel. July 23, 2002), available at <http://www.fcc.gov/wcb/iatd/comp.html>.

A. The Industry’s Comments Rely on Speculation and Not Facts.

Most cable industry participants claim that local regulation will hamper cable modem build-out and investment, but fail to explain how the industry has achieved such phenomenal results under this very regime over the past five years. For example:

- Cox states that to allow local governments to regulate cable modem service “would be disastrous to the future of cable modem service.”³ But Cox fails to show how it has suffered these consequences prior to the March Declaratory Ruling, or to explain how it has achieved such success in deployment under this same regime. Cox argues that local regulation would be especially burdensome as the cable modem network infrastructure has no local boundaries, and could require redesigning the current networks and operational support systems.⁴ This is the same infrastructure Cox constructed under existing franchise agreements and in conformance to local boundaries under the terms of those agreements. The company provides no examples, analysis, or description of the extent of network redesign that it believes is required because of existing local franchise boundaries. Cox also asserts that “numerous LFAs have stated their intent to prevent cable operators from providing cable modem service”⁵ if operators fail to obtain a franchise, pay franchise fees, or provide open access. Cox does not identify these “numerous LFAs” nor does it explain whether the LFAs are simply objecting to Cox breaching existing contractual or legal obligations.

³ Comments of Cox Communications at 55.

⁴ *Id.* at 56.

⁵ *Id.* at 57.

- AT&T states that “[o]ne of the most persistent dangers to the optimal development of cable systems has been the tendency of franchising authorities to view cable systems as ‘a convenient revenue-producing enterprise’”⁶ which AT&T alleges is a “type of local, discriminatory plundering.”⁷ AT&T fails to explain how the cable industry has managed not only to survive, but to succeed so well in the face of such allegedly rapacious behavior. AT&T’s argument is nothing more than rhetoric. The company provides only one solitary and inaccurate example of an “onerous” local government requirement.⁸
- AOL Time Warner applauds the Commission for raising the issue, but offers no evidence that local regulation has actually hindered deployment.⁹ AOL Time Warner also claims that allowing local governments to require franchises for the provision of information services will “open the floodgates to all kinds of onerous and disparate regulation” that would create a “crazy-quilt” of regulation that would hamper broadband roll-out.¹⁰ Again, this is an odd argument from a company currently operating successfully under thousands of local franchises. AOL Time Warner is still so focused on “open access” requirements that they cannot separate those from the requirement that a cable operator provide the facility within the local jurisdiction (which has nothing to do with the number of ISPs permitted to access that facility).

⁶ Comments of AT&T at 45.

⁷ *Id.* at 46.

⁸ *Id.* at 42-43.

⁹ Comments of AOL Time Warner at 7-9.

¹⁰ Comments of AOL Time Warner at 13.

- Cablevision mentions some “burdensome franchising and fee requirements” that local governments are requesting, but does not identify any franchising authorities that are actually imposing such requirements. Nor does Cablevision submit any evidence of the effect of such requirements on deployment or investment.¹¹ Cablevision states that local regulation will lead to differences in billing and privacy requirements, and will require customer service training to record customer questions and complaints. Cablevision fails to state that it already trains and responds to customer questions and complaints regarding its existing services today.¹² Furthermore, Cablevision does not explain the difference from the current regulatory scheme for cable service, or how the existing scheme has hindered deployment of traditional cable service.
- Finally, Charter complains about the “bedlam” that local governments are imposing upon the cable modem industry. First, it discusses the “overwhelming number of demand letters from LFAs marking the beginning of what appears to be a coordinated LFA campaign,” and then cites only five instances where local governments have sent letters to the company discussing the effect of the Declaratory Ruling.¹³ Then, the company alleges that “at least one well-known municipal consultant plans to conduct non-compliance hearings across the country and to impose substantial ‘penalties’ on cable operators who fail to pay franchise

¹¹ Comments of Cablevision at 13-14.

¹² *Id.*

¹³ Comments of Charter at 18-19. It would appear that Charter is easily “overwhelmed,” if it can only cite five instances.

fees”¹⁴ without naming the consultant or the communities which would allegedly be involved in such hearings. What Charter fails to disclose is that it is Charter who unleashed the bedlam by sending letters out to franchise authorities stating that it would refuse to adhere to pre-existing contractual agreements in light of the Commission’s Declaratory Ruling. In many communities across the country such statements by a franchised cable operator could be construed to be a willful breach of contract. Then, Charter discusses the range of liquidated damages provided for in some of its franchise agreements,¹⁵ but it is unclear from the filing whether any communities are actually seeking to impose such damages at this time. In fact, if Charter had been found in violation of an existing franchise agreement, it is likely that it would be keenly aware of which communities were alleging such a breach. The Commission should reject Charter’s conspiracy theories and decide this matter on the basis of actual facts, not unsubstantiated speculation.¹⁶

¹⁴ *Id* at 19.

¹⁵ *Id.* at 19-20.

¹⁶ We would also remind the Commission of several key points. First, the final decision on the issue of cable modem franchise fees was not decided in the Declaratory Ruling, but was left to the NPRM. Despite the pronouncement of the Bureau Chief at the press conference, cable operators were not absolved of all obligations to pay for the use of rights-of-way through franchise fees agreed to under franchise agreements. Second, all existing agreements are subject to state contract law and are enforceable until such time as the Commission issues a final order on the NPRM resolving the question of payment of fees. Third, under current law, local and state governments are entitled to take the position that the Commission has no jurisdiction to preclude the collection of fees; accordingly, a local government that chooses to permit a cable operator to continue the use and enjoyment of the rights-of-way under a pre-existing contract is enabling and supporting the provision of the broadband services even though the local government might otherwise be in a position to require a new and separate agreement for that “non-cable” use in light of the Commission’s declaratory ruling. Finally, all local governments have the right and obligation to protect the property interests in their rights-of-way and each has the right to provide appropriate notice of a potential breach of contract.

The industry's comments as vague, exaggerated and unsubstantiated. Without specific evidence, without a showing that the alleged examples would both harm deployment in individual instances and constitute a significant threat to deployment in the aggregate, the Commission must ignore the industry's claims. Finally – and most important – the Commission also must acknowledge the purely speculative nature of the industry's claims in the face of the actual statistics regarding deployment.

B. The Current Status and Success of the Industry Proves that Deployment Concerns Are Not a Basis for Preempting Local Regulation, and Any Finding Otherwise Would Be Arbitrary, Capricious and Contrary to the Evidence.

Until quite recently, the cable industry believed cable modem service to be a cable service.¹⁷ Many franchises addressed the provision of cable modem service, and imposed fees on the use of the rights-of-way to provide cable modem service.¹⁸ The industry entered into these agreements freely and for its own reasons, and without complaint. The result: widespread deployment and the highest penetration of any broadband service, reaching approximately 73% of U.S. households, according to the statistics used by the Commission in this NPRM.¹⁹ Based

¹⁷ See, e.g., Comments of Comcast, to the *Notice of Inquiry* (“Cable Modem NOI”) in GN Docket No. 00-185, at 16 (Dec. 1, 2000) (“Comcast has long maintained that cable Internet service is properly classified as a ‘cable service’ under the expanded definition adopted in the 1996 Act.”); Comments of NCTA in the Cable Modem NOI at 6-8; Comments of Cox in the Cable Modem NOI at 125; Comments of AT&T in the Cable Modem NOI at 8, 12-19.

¹⁸ The cable industry, almost universally, collected franchise fees on cable modem service prior to the Commission's Declaratory Ruling in this proceeding. After the Declaratory Ruling, the industry sent letters to franchising authorities signaling their intent to stop collecting such fees. Attached hereto to Exhibit A are letters to various communities, all of which indicate the industry's prior practice of collecting fees. See, e.g., Letter from Robert McCann, Time Warner Cable, to Steve Brock, Farmington Hills, MI (March 28, 2001) at 1 (“Time Warner Cable has been paying franchise fees to the City based on revenues from cable modem services in the good faith belief that these services were “cable services” under applicable laws and regulations.”). Operators represented in the Exhibit include AOL Time Warner, Comcast, AT&T and Gans Multimedia, but this list is not exhaustive.

¹⁹ NPRM at ¶ 1.

on the huge growth in the number of cable modem lines reported by the Commission in its most recent High Speed Services Report, cited above, this number may be even higher today. The best evidence available thus shows that claims that local regulation will dampen deployment are not true. The Commission should dismiss such claims as unsupported and contrary to fact.

Consequently, based on the lack of evidence to the contrary, the Commission should find – indeed, the Commission must find – that local government regulation does not discourage investment and innovation in cable modem service. Any other finding would be contrary to the evidence, and therefore contrary to the requirements of the Administrative Procedure Act. The purpose of notice and comment rulemaking is to enable the Commission to make an informed decision, based on relevant information presented by interested parties. That purpose would fail, however, if the agency were free to ignore the information submitted: “[t]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public.”²⁰ Further, the Supreme Court has found that “an agency rule would be arbitrary and capricious if the agency . . . offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.”²¹

The Commission is required to “draw ‘reasonable inferences based on substantial evidence.’”²² Otherwise, the Commission’s decision cannot stand on appeal: “[W]here the

²⁰ *American Civil Liberties Union v. FCC*, 823 F.2d 1554, 1581 (D.C. Cir 1987) (citation omitted). See also *Home Box Office v. FCC*, 567 F.2d 9, 35-36 (D.C. Cir. 1977), *cert. denied* 434 U.S. 829 (1977).

²¹ *Motor Vehicles Mfrs. Ass’n of Am. v. State Farm Mut. Auto Ins.*, 463 U.S. 29, 43 (1983).

²² *Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001), *cert. denied*, 122 S. Ct 644 (2001), quoting *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 666 (1994). See also *Century Communications Corp. v. FCC*, 835 F.2d 292, 300-02 (D.C. Cir. 1987) (rejecting FCC’s judgment where supported by “scant” evidence); *Bechtel v. FCC*, 957

record belies the agency's conclusion, [the court] must undo its action."²³ Similarly: "[W]e will not uphold an agency's action where it has failed to offer a reasoned explanation that is supported by the record."²⁴ Further, "[A] regulation perfectly reasonable and appropriate in the face of a given problem may be highly capricious if that problem does not exist."²⁵

C. Further Deployment Will Actually Be Enhanced by Local Regulation.

The figures cited above, as well as ALOAP's opening comments at 9-26, demonstrate that local regulation has had no negative effects on the deployment of or investment in cable modem services. Further, the industry has not pointed to any instance where deployment was in fact delayed by local franchising requirements, local fees for use of the rights-of-way, or local regulation.²⁶ The industry's few examples are entirely unpersuasive. For example, Charter and AT&T complain that the City of Seattle has amended its "Cable Customer Bill of Rights" to

F.2d 873, 881 (D.C. Cir. 1992) (enunciating agency's responsibility to present evidence and reasoning supporting its substantive rules).

²³ *Petroleum Communications, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994).

²⁴ *American Tel. & Tel. Co. v. FCC*, 974 F.2d 1351, 1354 (D.C. Cir. 1992). Other circuits agree. See, e.g., *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 760 (6th Cir. 1995) (FCC must provide at least some support for predictive conclusions); *Northwest Pipeline Corp. v. FERC*, 61 F.3d 1479, 1485-86 (10th Cir. 1995) (agency decision may be arbitrary and capricious if there is no rational connection between the facts found and the choice made); *People of California v. FCC*, 905 F.2d 1217, 1230 (9th Cir. 1990) (agency action is in violation of APA if agency explanation runs counter to evidence); *Consumers Union of Am., Inc. v. Consumer Prod. Safety Comm'n*, 491 F.2d 810, 812 (2nd Cir. 1974) (agency must not ignore evidence placed before it by interested parties).

²⁵ *Turner Broadcasting* at 664, quoting *Home Box Office* at 36.

²⁶ We note that although the industry commenters oppose any local open access requirement, they do not appear to cite the decision of the City of Portland to require open access in connection with the AT&T-TCI merger as an example of the misuse of local regulatory authority. This is wise, because that case illustrates just the opposite: the City of Portland's action brought open access to the fore and opened a national debate on an issue that other levels of government had ignored. Since that time, the Commission itself has taken detailed steps to prevent the monopolization of the cable modem platform. Furthermore, the legal issue in that

address cable modem service privacy issues.²⁷ Both companies neglect to mention a number of important facts. For example:

- The City has been applying its customer service provisions to cable modem service since 1999; AT&T has never expressed any significant objections to the provisions to City staff; and the City believes they have been working well.
- Not only does AT&T continue to provide cable modem service in Seattle,²⁸ but it has excellent penetration. Out of about 220,000 households, there are about 150,000 cable subscribers, and 42,000 cable modem subscribers.
- The City did not adopt the new privacy provisions unilaterally; the amendments are the result of a year of drafting and discussions with the cable operators serving the City.

The ordinance requires cable modem operators to resolve outages in a timely fashion; meet performance specifications advertised by the provider; notify customers of planned outages; provide instruction on the use of cable modem service; and provide a pro rata credit for those customers who wish to disconnect their cable modem service. Charter describes this ordinance as “onerous,” and believes the justification for such an ordinance is “labored at best.”²⁹ In reality, the ordinance addresses a strongly-perceived need,³⁰ and is a reasonable response to a

case turned on the City’s authority in connection with telecommunications services – it did not deal with the franchising of cable modem service or cable modem franchise fees.

²⁷ Comments of Charter at 20-21; Comments of AT&T 42-43.

²⁸ Charter does not serve subscribers anywhere in the City.

²⁹ Comments of Charter at 21.

³⁰ Seattle, WA, Ordinance 120775, was enacted because “the City has determined that amendments are in order to make the Cable Customer Bill of Rights more responsive to Seattle citizens.” *See* preamble to Ordinance No. 120775, *available at*

serious problem. No responsible citizen could consider the issues identified above as unreasonable concerns. The more important question is why customer service in the City was so poor that the Seattle City Council felt the need to act. By forcing operators to address these basic concerns, the ordinance will actually promote consumer confidence in the cable modem service, and much like the other examples compiled in our initial comments,³¹ will ultimately help advance deployment.

As noted in our initial comments,³² even the Commission has recognized that local requirements can speed deployment. In fact, there is reason to be concerned that absent local requirements, the cable industry will attempt to redline service areas.³³ For example, Broward County, Florida, has noticed that the upgrades to its system necessary to provide cable modem service are being performed in more affluent areas first. A map that illustrates this trend is attached hereto as Exhibit B. Broward County has since brought this to the attention of its franchisee, which has agreed to complete the upgrade for the entire unincorporated areas of the system by March 2004. This could not have happened if local authorities had been pre-empted. Local governments have a strong interest in rapid, fair and full deployment of cable modem services throughout their franchise areas. Far from hampering deployment and investment, as the Broward example illustrates, local governments actually seek to ensure that cable operators extend their cable modem services to reach all communities and demographic groups.³⁴

<http://clerk.ci.seattle.wa.us~public/CBOR1.htm>. The City Council adopted the privacy provisions in response to public concerns, after AT&T issued a privacy policy.

³¹ Comments of ALOAP at 14-16.

³² Comments of ALOAP at 11-12.

³³ Comments of ALOAP at 18.

³⁴ Montgomery County Cable Code § 8A-15: "(a) A franchise must have a uniform rate structure for its services throughout the franchise area. A franchise must not deny, delay, or

Preserving local authority is thus fully in accord with the goals of the Telecommunications Act. Section 706 mandates that the Commission shall “encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to *all* Americans. . . .” Before the Declaratory Ruling was issued, local governments were assisting the Commission with this mandate, by negotiating provisions in franchise agreements that required operators to extend cable modem services throughout their respective franchise areas. Interfering with local authority will only free cable operators to Balkanize their service areas – exactly the opposite of what Congress and the Commission intend.

D. Changes in the Cable Industry’s Concentration Cannot Justify Limiting Local Authority.

AOL Time Warner claims that consolidation within the industry is in and of itself sufficient to justify new limits on local authority. It seems that now that the industry has evolved from “mom and pop” operations into “technology sophisticated MSOs that utilize multi-state marketing strategies,” local regulation is presenting the industry with new issues.³⁵ ALOAP does not dispute that in some instances local regulation might affect how a cable operator would market its services. But it does not follow that this would create a great burden on deployment and investment, especially considering that AOL Time Warner already engages in local

otherwise burden service or discriminate against subscribers or users on the basis of age, race, religion, color, sex, sexual orientation, handicap, national origin, or marital status, except for discounts for the elderly and handicapped.

(b) A franchise must not deny cable service to any potential subscriber because of the income of the residents of the area in which the subscriber resides;

Prince George’s County Franchise Agreement with Jones Intercable § 5(c)(15) (“The franchisee shall make cable modem internet access available to all subscribers within two years after renewal.”); *see also* ALOAP’s Initial Comments at 15; discussing Ventura, CA, Franchise § 16.3; Arlington, VA Certificate of Public Convenience and Necessity, § 5.9(c).

³⁵ Comments of AOL Time Warner at 11.

marketing for its cable services. Furthermore, it would seem that the alleged new burdens resulting from the success and growth of the industry would apply equally well to cable services as to cable modem services – yet the Commission respects the traditional role of local franchising for cable services.

This argument amounts to a claim that the industry is now so big that it cannot be responsive to local needs and interests. If true, under Section 626 of the Cable Act, this justifies denial of renewal in every community in the United States. Arguments that the cable industry MSO's are now so big that they must be relieved of local regulation are nonsensical: which is also perhaps why the industry's claims are unsupported by facts.

1. Many National Industries Are Subject to Local Regulations.

Other national businesses – retailers, fast food franchises, gas stations, convenience stores, and innumerable others – operate business locations in multiple jurisdictions throughout the country and still manage to comply with multiple and different local code requirements. National companies of all kinds that enter into agreements with local governments must conform to a whole range of different local regulations, including local procurement codes, local building codes and local right-of-way management codes, to name only a few.³⁶ Is there really something special that makes the cable industry less capable of dealing with these issues? In fact, the industry is still locally-focused, with networks centered around local headends, and programming shaped by particular local must-carry requirements that do not disappear as the

³⁶ *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 174 (2001) (Refusing to allow respondents to exercise federal jurisdiction over local land as it would "result in a significant impingement of the States' traditional and primary power over land and water use."); *Hess v. Port Authority Trans-Hudson Corporation*, 513 U.S. 30, 44 (1994) ("[R]egulation of land use [is] a function traditionally performed by local governments").

MSO's become larger. Indeed, federal law demands this local focus. Must-carry rules require carriage of different programs market-to-market, as do local PEG access requirements.³⁷

Similarly, a provider of access to the Internet, especially a provider with substantial market share, is not a special case. 70% of the country has access to highspeed Internet services today. There is nothing peculiar about cable modem service that requires a different result. Local franchising is no more onerous than any of the other local requirements cited above. The growth of the cable industry is not a reason to exempt cable modem service from local regulation. If anything, large industries are more likely to require regulation as their market power in relation to individual consumers grows. In addition, the industry cannot have it both ways: historically, the need to shelter the young cable industry was used as a reason for protecting it from regulation.³⁸ But since deployment has proceeded apace and the providers of cable modem service are for the most part large, successful companies, this argument no longer works. Size and success are not a justification for preemption of local authority of any kind.

2. *Legislative Action in 1996 Proves Otherwise.*

Congress understood the industry was concentrating in 1996, and nonetheless maintained local responsibility for franchising cable systems. Rather than exempt large companies from regulation, Congress generally (a) created exemptions for smaller companies; and (b) prohibited

³⁷ See 47 U.S.C. §§ 534(a), 535(a), and 531(c).

³⁸ See, e.g., H.R. Rep. No. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.A.A.N. 4655, 4656 (“The Bill establishes franchise procedures and standards to encourage the growth and development of cable systems, and assure that cable systems are responsive to the needs and interests of the local communities they service.”); *Id.* at 20, *reprinted in* 1984 U.S.C.A.A.N. at 4657, (“By establishing a national framework and Federal standards for cable franchising, H.R. 4103 provides the cable industry with the stability and certainty that are essential to its growth and development. In adopting this legislation, the Committee has endeavored to create an environment in which cable will flourish, providing all Americans with access to a technology that will become an increasingly important part of our national communications network.”).

concentration above certain levels.³⁹ In other words, Congress did not think the problem was local regulation – it thought the problem was excessive industry concentration. Hence, the Commission cannot possibly use industry concentration as a ground for justifying preemption of local and state laws.

E. The Fundamental Problem Remains Lack of Demand, Not Lack of Deployment.

If there is a problem, it is not deployment. We respectfully suggest that the NPRM misses the point, because there is ample evidence that the real problem is lack of demand. *See* ALOAP Comments at 20-21. Whether the problem is lack of interest in the available applications, high rates, or something else is a matter for debate and further investigation. But those are not reasons for preemption.

Indeed, if the Commission were to preempt local authority, it would create the risk that deployment would be further delayed, because local efforts to address consumer protection and privacy issues are useful measures for giving customers the confidence that service quality is being maintained and that they have recourse if they are dissatisfied. Consumers know full well that they have little or no choice in the realm of broadband providers, and this influences their decisions over whether to subscribe.

In any event, the problem is demand, not deployment.

³⁹ *See* Pub. L. No. 104-104 §§ 301(c) (amending 47 U.S.C. § 543), 652 (adding 47 U.S.C. § 572).