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BEFORE THE

Federal Communications Commission
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

**REPLY COMMENTS OF
ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION,
INSIGHT COMMUNICATIONS CORPORATION,
AND MEDIACOM COMMUNICATIONS CORPORATION**

The Arizona Cable Telecommunications Association ("ACTA"), Insight Communications Corporation ("Insight") and Mediacom Communications Corporation ("Mediacom") (collectively "Commenters") submit these brief reply comments to address the erroneous arguments set forth by various local franchising authorities.¹

INTRODUCTION

In the *NPRM*, the Commission clearly articulated its desire to create a "rational framework" for the regulation of cable modem services that is pro-deployment and pro-

¹ ACTA is a trade association representing the interests of the cable television industry in the State of Arizona. Insight is the among the 10 largest cable television companies, serving approximately 1.4 million subscribers, principally in the states of Illinois, Indiana, Kentucky and Ohio. Mediacom is also one of the 10 largest cable television companies with approximately 1.6 million subscribers in 23 states.

innovation.² The Commission correctly suggested that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."³

In their initial comments, many local franchising authorities ("LFAs") go to great lengths to convince the Commission of the need to allow local franchising of information services separate and apart from cable franchises. Many also lament the loss of franchise fee revenues that they had been collecting, and claim that they are both entitled to and in need of such additional revenue. The simple fact, however, is that existing cable franchises adequately cover all legitimate local concerns relating to cable systems' occupation of the public rights-of-way, whether or not information services are being provided.

I. NO ADDITIONAL AUTHORIZATIONS ARE NECESSARY TO OFFER INFORMATION SERVICES OVER CABLE SYSTEMS.

Numerous LFAs suggest that cable operators should be required to obtain a separate authorization to offer information services over their existing cable systems.⁴ Such a requirement, however, would be unnecessarily duplicative.

The issue is not whether LFAs have a legitimate interest in managing their public rights-of-way; no question that they do. The issue presented by cable systems' delivery of information

² See *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, FCC 02-77, 17 FCC Rcd 4798, ¶ 6 (rel. Mar. 15, 2002) ("NPRM").

³ *Id.* at ¶ 5.

⁴ See, e.g., Initial Comments of the Public Cable Television Authority et al., GN Docket No. 00-185, CS Docket No. 02-52 (June 14, 2002), at 20-26 ("PCTA Comments") (arguing that, insofar as cable modem service is not a cable service, no authority exists for cable operators to offer cable modem service absent further authorization of local government); see also Comments of the Alliance of Local Organizations Against Preemption, GN Docket No. 00-185 and CS Docket No. 02-52 (June 17, 2002), at 7, 38-40, 60-64 ("ALOAP Comments").

services may be better characterized as one relating to the scope of LFAs' authority to regulate in the name of public rights-of-way management.

To the extent a cable system operates pursuant to a franchise, as federal law says it must, that authorization more than adequately covers all legitimate concerns an LFA may have regarding the cable system's use of the public rights-of-way, regardless of the types of services that system offers. Cable systems' franchises are detailed agreements that are generally the product of protracted discussion and negotiation. LFAs mandate conditions pursuant to which cable systems are permitted to make use of the public rights-of-way.⁵ In addition to establishing terms designed to protect public safety and welfare (*e.g.*, tree trimming requirements, construction notice requirements, requirements that the system's plant be located underground), LFAs ensure that their communities are properly compensated for cable systems' use of the public rights-of-way.⁶ Thus, since existing cable system franchises already address LFAs' legitimate concerns regarding the use of public rights-of-way, any requirement that cable systems obtain a separate franchise to offer non-cable services would necessarily be duplicative.⁷

⁵ *See infra* note 9.

⁶ Beyond the payment of franchise fees, cable operators often are required to provide communities with in-kind consideration, like access equipment and facilities or institutional networks, or other cash consideration, such as access capital grants.

⁷ To the extent allowed by law, LFAs would remain free to require entities that wish to offer information services but do not otherwise have authorization (*e.g.*, franchise) to use the public rights-of-way to obtain local authorizations to build such a network.

II. THE PROVISION OF INFORMATION SERVICES OVER THE CABLE SYSTEM DOES NOT PLACE AN ADDITIONAL BURDEN ON THE PUBLIC RIGHTS-OF-WAY.

Despite the protests of many local franchising authorities,⁸ cable systems' offering of information services does not place any additional burden on the public rights-of-way. It must not be forgotten that many of these very same LFAs mandate upgraded or rebuilt systems as a condition of renewal of a cable franchise.⁹ In addition, many franchises also include most favored nation language which would require a cable system upgrade should the cable operator agree to a system upgrade in other communities. LFAs require that these franchise upgrades happen within a relatively short period of time at the beginning of the franchise or renewal term with major fines and penalties assessed for failure to timely complete such upgrades.¹⁰ Therefore, any major construction that would impact the public rights-of-way is front-loaded. The provision of information services, or any other service, does not change this.

⁸ See e.g., ALOAP Comments at 41-42, Exhibit G; see also PCTA Comments at 31-32; Comments of the City of Philadelphia, CS Docket No. 02-52 (June 17, 2002), at 3-4; Comments of Illinois NATOA, CS Docket No. 02-52 (filed April 29, 2002), at 2.

⁹ See, e.g., City of Boulder, Colorado, Draft Ascertainment Report of Community Cable-Related Needs, prepared by the Office of the City Attorney, Summary, Section 1 <http://www.ci.boulder.co.us/cao/x-ascert.html> (last visited July 29, 2002) (“(2) There is a need and interest for facilities and equipment of ample bandwidth.... [T]he City finds that the community needs 836 to 860 MHz systems, with fiber to the node, small nodes, and minimal active components in any cascade, or systems with similar characteristics in terms of upstream and downstream capacity deliverable to each customer, reliability, upgradeability and the like.... There is a need and interest for Internet facilities and equipment capable of providing speeds of at least 394 Kbs in both directions. As noted above, the system must be flexible enough to increase the capacity deliverable to and from customers over time, without substantial system upgrades.”).

¹⁰ Cox's upgrade of its Fairfax County, Virginia system provides an example of the repercussions cable operators face for failure to complete their upgrades in a timely fashion. See *Cox Communications Fined*, NBC4.com, found at www.nbc4.com/news/1572009/detail.html (last visited August 1, 2002) (reporting the millions of dollars of fines Cox faces for failing to complete its system upgrade in accordance with the franchise).

Stated another way, today's cable systems are designed to be capable of offering a variety of services, such as digital cable, video-on-demand, interactive television, high-speed cable modem service and telephony. Thus, the mere fact that a cable system offers a service today which it was not offering yesterday imposes no additional burden on the public rights-of-way. As noted above, franchises already include provisions designed to minimize public inconvenience and protect public safety no matter which services are offered over the cable system.

III. NO LEGITIMATE REASON EXISTS TO ALLOW LFAs TO ASSESS FRANCHISE FEES ON CABLE MODEM SERVICE REVENUE.

A franchise serves as the authorization for cable systems' occupation of the public rights-of-way.¹¹ In addition to in-kind and other types of consideration (*e.g.*, access equipment, facilities and capital grants, institutional networks, free cable and Internet hook-ups for schools, government buildings and libraries), LFAs charge cable systems "franchise fees" for their use of the public rights-of-way. Federal law limits the amount of franchise fees LFAs can impose on cable systems, capping it at 5 percent of the gross revenue derived from the provision of cable services.¹² As the Commenters have previously noted, a cable system is a cable system regardless of the type of service being offered.¹³ To the extent a franchise requires franchise fees to the maximum amount permitted by Section 542, the LFA is fully compensated for the cable system's use of the public rights-of-way, regardless of the types of services offered over the cable system. Any attempt to impose a separate or additional fee, or broaden the gross revenue

¹¹ 47 U.S.C. § 541(a)(2).

¹² 47 U.S.C. § 542.

¹³ See *NCTA v. Gulf Power Co.*, 122 S. Ct. 782, 786 (2002) ("If one day [a cable operator's] cable provides high-speed Internet access, in addition to cable television service, the cable does not cease, at that instant, to be an attachment 'by a cable television system.'")

base subject to franchise fees, for cable systems' provision of information or other services would therefore violate federal law.

Commenters note that the LFAs' true motivation is simply a quest for additional revenue. The purpose of a franchise fee should only be to defray regulatory costs and to compensate an LFA for managing the public rights-of-way. No one can seriously argue that these costs are not already more than covered by franchise fees on the provision of cable services. Indeed, the amount of franchise fees paid by cable systems continues to increase at a rapid rate as cable systems introduce new revenue-generating cable services. Thus, imposing a franchise fee on cablemodem service is not only unwise public policy, it is not justifiable from a regulatory standpoint.

CONCLUSION

For all of the foregoing reasons, Commenters support the Commission's policymaking goal of encouraging the deployment of broadband by creating a "rational framework" for the regulation of cable modem service. This framework should rely on the market, not government regulation, to drive competition.

Respectfully submitted,

**ARIZONA CABLE TELECOMMUNICATIONS ASSOCIATION,
INSIGHT COMMUNICATIONS CORPORATION, AND
MEDIACOM COMMUNICATIONS CORPORATION**

By: Stuart F. Feldstein
Stuart F. Feldstein
Lisa Chandler Cordell

FLEISCHMAN AND WALSH, L.L.P
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036
(202) 939-7900

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