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August 6, 2002

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

VIA COURIER

Marlene H. Dortch, Secretary  
Federal Communications Commission  
236 Massachusetts Avenue, NE – Suite 110  
Washington, D.C. 20002

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

Dear Ms. Dortch:

Enclosed please find an original and four copies of Charter Communications, Inc.'s Reply  
Comments in the above-referenced docket.

Respectfully submitted,



Paul Glist

Enclosure

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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

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**REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.**

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August 6, 2002

## Summary

Charter has spent \$3.5 billion, and the industry as a whole \$1,000 per subscriber, to upgrade, rebuild and expand cable systems, to develop new products and services, and to deploy digital converters and cable modems. This is only the latest chapter in a long history of continuous service and technical innovations driven by risk capital investment.

Internet Service Providers, websites, local franchising authorities (“LFAs”), and representatives of consumers all have their hands out looking to appropriate this investment that cable has made in broadband infrastructure. Each treats the cable industry’s efforts to reap rewards from risky investment as some form of misfeasance warranting a cumbersome regulatory regime.

LFAs seek to expand their franchise authority to regulate not just the cable systems’ use of public rights of way but the interstate information services that ride on them. The LFAs’ requests merit extreme skepticism.

- So many excesses have emerged from LFAs chronically overreaching their franchise authority—excessive fees, grants, transfer restraints, renewal imbroglios, fallow I-nets, and barriers to competing Local Exchange Carriers (“LECs”)—that Congress, the Commission, and courts have routinely been required to reign them in.
- LFAs are not “losing” franchise fees: because of cable operators’ innovation, municipal revenue from cable franchise fees has exploded since the 1984 Act from \$200 million to \$2.04 billion, with no corresponding increase in the LFAs’ costs of “managing” the rights of way.
- LFAs seek to discriminate: LFAs do not “franchise” a 900 number flowing through an Incumbent LECs’ lines, nor do they tax DSL or wireless Internet providers who provide similar broadband services.

- Charter demonstrates empirically that the portrait LFAs paint of cable modem services “burdening” the rights of way is false, deliberately misleading, and contradicted by the LFAs own consultants’ testimony in other government settings. The plant upgrades they “complain” about as attributable to cable modem service are performed to provide bandwidth and reverse capacity necessary for core video channels, cause no disruption to the rights of way, and are thoroughly overseen by the local permitting process, no matter what services travel over the wires.
  - LFAs offer no coherent policy theory for franchising cable modem services. No common law or statutory right provides them the authority to regulate and impose fees on an interstate information service, and the selective regulation of cable modem service would violate cable operators’ First Amendment rights and the Internet Taxation Freedom Act.
- Further express preemption by the Commission is desirable to assure the stability and certainty of the investment climate in cable communications. It is especially important that the Commission prevent local regulation of cable modem customer service and privacy policies. The expectations of consumers and the demands of a competitive market alone have led Charter to invest \$60 million (and growing) to provide innovative customer care for modem customers—such as centralized, specialized “Tier 2” regional call centers for technical support; web portals; client software; and new CSR diagnostic tools—that is tailored to modem customer needs and habits that are quite distinct from those of video customers. Modem calls take longer and cover the entire range of potential PC problems: software, settings, caches, equipment and more. Customer expectations of cable modem service are shaped by experiences with computer businesses, such as Microsoft, or Dell. Charter’s remarkable success in building a replacement

network and migrating @Home subscribers within two months is strong testimony to the power of a competitive market to spur quality care.

LFAs are not the proper custodians of this business. They do not regulate competitors, lack the relevant experience, and can create massive (needless) costs and conflicts in a nationally centralized service. Whatever the condition of the video services market in 1992 that led the Commission to grant LFAs leave to regulate customer service for video, it does not justify LFA regulation of modem care. Indeed, LFAs have already signaled an intention to use “customer service” jurisdiction to adopt highly damaging rules, such as outlawing the Quality of Service (“QoS”) that enables the priority of video streaming, IP telephony packets, and discounted “tiered” modem service. Like cable modem customer service, local regulation of cable modem privacy issues would only result in a balkanized patchwork of regulations raising the cost of providing broadband and deterring investment in such services.

Proponents of forced access provide nothing but doomsday speculation, innuendo, and a rallying cry of “parity” to justify an intrusive forced access regime. Charter is negotiating an agreement with third party ISPs to offer a choice among multiple ISPs on test Charter systems, demonstrating that the market is providing third party access. No evidence of broadband market failure exists. Nor do theoretical justifications for “open access” withstand scrutiny. The intellectual premise of “open access” is that only ISPs and edge devices can be relied upon to innovate in broadband services, and that the cable industry can and should only supply dumb, simple, and cheap pipes. This postulate is remarkably blind to the cable industry’s history of taking risks on investments and effectively deploying innovation, and reflects an astonishing lack of confidence in marketplace competition. The marketplace is working and the cable operators’ deployment and innovation in broadband services are several of the reasons why this market is

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**REPLY COMMENTS OF CHARTER COMMUNICATIONS, INC.**

**I. INTRODUCTION.**

Pursuant to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above captioned matter, Charter Communications, Inc. ("Charter") submits the following Reply Comments regarding the provision of Internet access service over cable television systems.<sup>1</sup>

Charter and the cable industry have made massive investment in their cable networks, stepping up to the 1996 Act's challenge to build facilities-based competition. Through 2001, *Charter spent \$3.5 billion* to upgrade, rebuild and expand its cable systems, to develop new products and services, and to deploy digital converters and cable modems.<sup>2</sup> The cable industry

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<sup>1</sup> *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling and Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, CS Docket No. 02-52, 67 Fed. Reg. 18848 (Apr. 17, 2002) [hereinafter *Cable Modem Order and NPRM*].

<sup>2</sup> Charter Communications, Inc., 2001 SUMMARY ANNUAL REPORT at 17 (stating that Charter also plans on spending \$2.5 billion in 2002 to upgrade and rebuild systems in order to offer advanced services to its customers and for normal recurring capital expenditures), available at [http://media.corporate-ir.net/media\\_files/NSD/CHTR/reports/ar01.pdf](http://media.corporate-ir.net/media_files/NSD/CHTR/reports/ar01.pdf).

as a whole spent an estimated \$60 billion, or \$1000 per cable subscriber to deploy broadband.<sup>3</sup> Through continuous service and technical innovations driven by risk capital investment, cable operators have developed and deployed cable modem service. This innovation in cable modem service is only the latest advancement in the cable industry. Cable has been consistently characterized by the addition of new services through cutting edge technology beginning with remote analog television signal distribution to evolving digital services, such as video-on-demand (“VOD”). Although the deployment of cable modem service has been successful, now is not the time to chill the broadband market with a regulatory policy reversal.

Internet Service Providers (“ISPs”),<sup>4</sup> websites,<sup>5</sup> LFAs,<sup>6</sup> and consumer representatives<sup>7</sup> all have their hands out looking to appropriate this investment cable has made in broadband infrastructure. Each treats the cable industry’s efforts to reap rewards from its investment risks as some form of misfeasance. The Consumer Federation of America (“CFA”) even treats cable’s invention of a new broadband connection as evidence of a “failure” to have any success in the narrowband Internet market<sup>8</sup>—a shocking misunderstanding of how successful intermodal competition is supposed to work.<sup>9</sup> This claim is equivalent to faulting Direct Broadcast Satellite (“DBS”) as failing to effectively compete against cable operators in the Multichannel Video

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<sup>3</sup> Press Release, NCTA, Cable Industry Pledges Strong Support for Digital TV Transition Plan (May 1, 2002), available at <http://www.ncta.com/press/press.cfm?prID=260&showArticles=ok>.

<sup>4</sup> See generally Earthlink Comments.

<sup>5</sup> See generally amazon.com Comments.

<sup>6</sup> See, e.g., Alliance of Local Organizations Against Preemption (“ALOAP”) Comments; City Coalition Comments; City of New York Comments.

<sup>7</sup> See Consumer Federation of America, Texas Office of Public Utility Counsel, and Media Access Project (collectively “CFA”) Comments; American Civil Liberties Union (“ACLU”) Comments.

<sup>8</sup> See CFA Comments at 35.

<sup>9</sup> The CFA also ignores policy papers issued by the Commission demonstrating how well hands-off regulation has been, for example, for the development of the Internet backbone. See MICHAEL KENDE, THE DIGITAL HANDSHAKE: CONNECTING INTERNET BACKBONES, OPP WORKING PAPER NO. 33 at 1, 15 (Sept. 2000) (stating that the market for Internet backbone services is best governed by commercial interactions between private participants and that the deregulatory environment has advanced the growth of the Internet backbone); see also JASON OXMAN, THE FCC

Programming Distribution (“MVPD”) industry because it does not use commercial leased access cable channels to reach customers.<sup>10</sup>

The Commission should not be distracted by these ploys to harvest the cable industry’s investment and infrastructure in broadband. Instead, the Commission must keep a steady course of maintaining a climate conducive to investment in competitive facilities. An affirmation of the Commission’s current deregulatory approach towards broadband development will support sustained investment in broadband and facilities-based competition.

In its Reply Comments, Charter will focus on why the Commission should limit State and local governments from regulating cable modem service, and why continued reliance on the market is essential to foster continuous innovation and investment in broadband.

## **II. THE COMMISSION MUST LIMIT THE POWER OF LOCAL FRANCHISING AUTHORITIES OVER CABLE MODEM SERVICE.**

### **A. LFAs’ Historical Exercise of Cable Franchising Authority Cautions Against Extending It To Information Services.**

The fundamental request of local franchising authorities in this docket is that the Commission undo its classification of cable modem service as an “information service,” or at least preserve local government authority over, and the imposition of franchise fees on, information services that flow through the cable system. Unfortunately, neither the LFAs’ historical exercise of cable franchising authority, nor their announced plans for “franchising” cable modem service, warrant such indulgence.

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AND THE UNREGULATION OF THE INTERNET, OPP WORKING PAPER NO. 31 at 3 (July 1999) (“the FCC has had an important role to play in creating a deregulatory environment in which the Internet could flourish”).

<sup>10</sup> In fact, DBS has captured an 18.2 percent market share, and is highly competitive in the MVPD market using its own infrastructure, a core component of facilities-based competition. See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, 17 F.C.C.R. 1244 ¶ 13 (FCC Jan. 14, 2002).

## 1. LFAs chronically overreach their franchise authority.

Cable operators are thoroughly subject to extensive local control through the cable franchise process, which grants permission to place physical facilities in the public rights of way.<sup>11</sup> So many excesses have emerged from this franchise relationship that Congress, the Commission, and the courts have routinely been required to reign in local government to permit the market to govern technical standards;<sup>12</sup> to let the Commission regulate signal carriage;<sup>13</sup> to permit the creation of optional “tiers” of cable service;<sup>14</sup> to impose caps on franchise fees and public access concessions;<sup>15</sup> to create certainty in the renewals and transfers essential to upgrades

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<sup>11</sup> As already noted in the record, all cable franchises provide for local rights of way management through the imposition of insurance requirements, general permitting procedures, and all zoning and public safety ordinances, and impose specific system upgrade obligations on the operator. See AOL Time Warner Comments at 13-14; Cox Communications Comments at 38, 42-47; Pietri Declaration at ¶¶ 10, 22, 23.

<sup>12</sup> See *In re Amendment of Part 76 of the Commission's Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of a Moratorium of Nonfederal Standards*, Report and Order, 49 F.C.C.2d 470, 477-480 (1974), *aff'd*, *City of New York v. FCC*, 486 U.S. 57 (1988) (upholding the Commission's preemption of local technical standards); *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 F.C.C.R. 5296 ¶¶ 137, 141 (1999) (finding that LFAs may not mandate the technology used in the provision of cable communications); *In re Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, CS Docket No. 96-85 ¶¶ 12, 14 (Apr. 22, 2002) (same).

<sup>13</sup> See *Amendment of Part 76 of the Commission Rules and Regulations Relative to the Advisability of Federal Preemption of Cable Television Technical Standards or the Imposition of A Moratorium on Non-Federal Standards*, Notice, 46 F.C.C.2d 175, 178 (1974) [hereinafter “*Clarification of the Cable Television Rules*”]; *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *Time Warner Entertainment Co. v. F.C.C.*, 56 F.3d 151, 197-98 (D.C. Cir. 1995).

<sup>14</sup> See *In re Community Cable TV, Inc.*, 95 FCC 2d 1204 (1983), *recon. denied*, *In re Community Cable TV, Inc.*, Memorandum Opinion and Order, 56 RR 2d 735 (1984), *cited with approval in Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984).

<sup>15</sup> See *Clarification of the Cable Television Rules*, 46 FCC 2d at 206; *City of Miami, Florida, Petition for Special Relief*, 56 RR 2d 458 (June 29, 1984); 47 U.S.C. §§ 542(b), 545(a) (limiting franchise fees to five percent of gross cable service revenues and stating that any requirement for PEG that is commercially impracticable is invalid); *In re Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Memorandum Opinion and Order, 104 FCC 2d 386 ¶ 18 (June 5, 1986) (stating that the Commission will address franchise fee matters to limit LFAs' imposition of franchise fees when such matters are of national importance); *Charter Communications, Inc., v. County of Santa Cruz*, 133 F. Supp. 2d 1184, 1212-1213 (N.D. Cal. 2001); *appeal docketed*, No. 01-15846 (9th Cir. 2001) (disallowing certain consultant and application fees because such fees violated the franchise fee cap); *Time Warner Entm't Co. v. Briggs*, 1993 U.S. Dist. LEXIS 1196 (D. Mass. 1993) (holding that the city could not impose additional fees on the operator that exceeded the franchise fee cap); *Naperville v. Jones Intercable*, 1997 WL 433628 at \*13-14 (N.D. Ill. 1997) (holding that PEG contributions for or in support of the use of PEG access facilities constitute franchise fees and thus are subject to the 5% cap).

and clustering;<sup>16</sup> and to stave off new franchising regimes for competitive telephony, to name only a few cases.<sup>17</sup> From this context, one can hardly help but feel amusement at the claims by municipalities that it was they who invented high speed Internet access.<sup>18</sup> LFAs did not buy the footprint, hire the engineers, capitalize the business, or create the new business model necessary for cable modem service. To the contrary, they have served as advocates for their parochial interests, rather than for development of national facilities-based competition.<sup>19</sup> Several examples illustrate this point.

Under conventional Title VI franchising, LFAs insist on I-nets without plans for use of such networks.<sup>20</sup> LFAs demand a large quantity of public access (PEG) channels in prime channel locations, for example, 10% of system capacity, or up to 40 channels, rather than

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<sup>16</sup> See 47 U.S.C. §§ 521(5), 546 (providing process and operator rights in renewal); *County of Santa Cruz*, 133 F. Supp. 2d at 1218 (providing that transfers may not be arbitrarily denied); *Eastern Telecom Corp. v. Borough of East Conemaugh*, 872 F.2d 30, 35 (3<sup>rd</sup> Cir. 1989) (“The Cable Act establishes a significant federal law property expectation in the renewal of a franchise.”).

<sup>17</sup> See 47 U.S.C. §§ 253(c), 541(b)(3) (limiting the ability of LFAs to impose franchise fees and requirements on competitive telephony providers); *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9<sup>th</sup> Cir. 2001) (recognizing Congress’ intent to limit municipal regulation of competitive telecommunications providers, and stating authoritatively that Section 253(a) is a “virtually absolute” preemption on municipal franchise requirements); *In re TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, 12 F.C.C.R. 21396 (FCC 1997), *recon. denied*, 13 F.C.C.R. 16400, ¶ 43 (FCC 1998) (providing that the cable operator need not obtain or abide by an additional franchise to provide competitive telephony services).

<sup>18</sup> See ALOAP Comments at 3, 7-8, 16, 18, 21-24 (claiming that LFAs created demand for cable modem service, stimulated the growth of the broadband market, increased consumer confidence in the product, and that such service would not have been deployed without LFA prompting). See also City Coalition Comments at 4, 25, 26 (detailing the positive effects of local regulation to include even development and deployment of broadband services, prompt resolution of customer complaints, a minimum level of customer service, and positive market conditions for cable modem service); Public Cable Television Authority, City of Escondido, CA, City of Glendale, CA, *et al.* (collectively “PCTA”) Comments at 14-15; Metropolitan Government of the City of Nashville and Davidson County, TN, City of Minneapolis, MN, *et al.* (collectively “Metro Cities”) Comments at 11-16; City of Cleveland, OH Comments at 1-2 (stating that the City is promoting broadband deployment with initiatives like free service to schools and non-profit neighborhood computer centers).

<sup>19</sup> In fact, most publicly traded cable companies list local government regulation as a liability for the company. See Charter Communications Inc. SEC Report 10-K at 35 (Dec. 31, 2001) (providing the customary cautionary statements including the fact that local government regulation is an unknown factor in the business); AOL Time Warner Inc., SEC Report 10-K at 28 (Dec. 31, 2001) (stating the same).

<sup>20</sup> In past renewal proceedings, both Portland, Oregon and Denver, Colorado requested INETs without plans for such networks.

recognizing that every PC can serve as a PEG station.<sup>21</sup> LFAs insist on receiving franchise fees far above maximum federal limits, such as requiring 5 percent plus 2 percent of gross revenues for PEG “funds,”<sup>22</sup> in addition to consultant fees and application fees. In fact, Charter successfully litigated the unlawful imposition of consultant and application fees in the Ninth Circuit.<sup>23</sup> LFAs seek franchise fees on telephony service by pretending that no discounts apply to revenues from discounted “bundles” of services.<sup>24</sup> (Likewise, LFAs demand franchise fees on bundled Internet.<sup>25</sup>) Other LFAs establish schedules of “customer service” penalties designed to fill city coffers, rather than producing any customer benefits.<sup>26</sup>

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<sup>21</sup> See David Gram, “*Adelphia Ordered to Beef Up Line Extensions*,” Associated Press State & Local Wire (May 10, 2000)(wherein the staff of the Vermont Public Service Board proposed that the cable operator provide 10% of its transmission capacity to PEG channels in the cable franchise renewal); see also Communications Daily (July 16, 2001)(reporting Vermont proposal to have cable operators put aside 10% of their broadband capacity for PEG services); Communications Daily (July 9, 2001)(reporting that the Alliance for Community Media called upon Congress to implement the Vermont rule on a national level for PEG support). On an upgraded system, this capacity grant could support up to 40 PEG channels. See Testimony of Julie Modlin, Columbia Telecommunications Corporation at Vermont Public Service Board, Docket Number 6101, Adelphia Communications Corporation Regarding Mountain Cable Company’s Requests for Renewal of Its Various Franchise Agreements at 127 (Oct. 21, 1999).

<sup>22</sup> See Cable Communications License with City of Tucson, Arizona, § 15(g); City of Coral Gables, Ordinance No. 3278 Regarding Cable Television Franchises, § 16 (Nov. 7, 1997); Cable Franchise of Starpower Communications with Arlington County, Virginia § 9.2 (requiring a PEG fund of three percent of gross revenues in addition to a five percent franchise fee requirement).

<sup>23</sup> See *County of Santa Cruz*, 133 F. Supp. 2d at 1212-1213.

<sup>24</sup> See *Cable Franchise Agreement Between The City of Walnut Creek, California and Seren Innovations, Inc.*, § VIIB (Sept. 21, 1999)(requiring that in the computation of franchise fees, revenues from tied, bundled or combined cable and non-cable services shall first be allocated to cable service to the full extent which would have been charged by the operator if the subscriber received only cable services).

<sup>25</sup> See, e.g., ALOAP Comments at 42-46; City Coalition Comments at 21; PCTA Comments at 18-19; Metro Cities Comments at 18-19; City of Philadelphia Comments at 5-6; Utility Cable & Telecommunications Committee of the City Council of New Orleans Comments at 4-13; City of Fairfax, VA Comments at 4; The Parish of Jefferson Political Subdivision in the State of Louisiana Comments at 3-4; Upper Darby Township Telecommunications Commission Comments at 1; Taylorsville Community Association Comments at 1; Girard Township, PA Comments at 1; King County Information and Telecommunications Services Division Comments at 1; Regional Telecommunication Commission and the North Shore Cable Commission of Wisconsin Comments at 1; City of Bakersfield, CA Comments at 1; City of Port Arthur, TX Comments at Section 2; City of Cleveland, OH Comments at 2.

<sup>26</sup> Examples include a city ordinance that authorizes liquidated damages ranging from \$200 to \$1,000 per day for violations of technical standards, customer service requirements or the requirement to provide certain data or reports. Another city has required in a franchise agreement with Charter liquidated damages of \$5,000 for a second violation of certain customer service standards, and \$10,000 for subsequent violations. Similarly, a third city has imposed liquidated damages of \$400 per day plus enforcement costs for technical standards violations, to \$500 per violation per day for noncompliance with customer service rules.

## 2. LFAs frustrate the deployment of advanced services.

Whether intentionally or unintentionally, LFAs even frustrate the deployment of “advanced services” unless and until they are paid off. For instance, several Michigan municipalities tried to impose high franchise fees on competitive telephony service providers that used the public rights of way. A state court eventually found that the City of Dearborn could not exact a profit from the provider in the form of franchise fees,<sup>27</sup> but other Michigan cities who played the same game—such as Troy—caused competitive service providers to bypass them. Similarly, at the peak of battles over local ordinances demanding “open access,” AT&T had to suspend the deployment of cable modem service in those communities that sought to impose forced access, an obvious indication of an uninviting investment climate.<sup>28</sup> In contrast, in East Lansing, Michigan, the City imposed a \$500 fee and a per foot charge only on *entities whose facilities passed through the City without providing competing services* in the City. As a result, the City attracted competitive providers to serve its community, and the cable operator was able to quickly roll out its high speed data service in this community.<sup>29</sup>

LFA claims that they are trusted promoters of the Internet and information services simply do not withstand scrutiny. LFAs do not “franchise” a 900 number flowing through an Incumbent Local Exchange Carrier’s (“ILEC”) lines. LFAs do not tax cable’s broadband competitors, such as DSL providers who also use the public rights of way or wireless Internet

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<sup>27</sup> See *TCG Detroit v. City of Dearborn*, No. 98-803937-CK (Circuit Court, Hamilton County, June 17, 1999). The state court held that the state statute prohibited the City from imposing the franchise fees and other considerations in excess of its actual costs of regulation. The court explained that the municipality could not set fees, as municipalities formerly did, in a private landowner manner where the fee would be set using the rental value of property based on the market value of the land or what the market would bear.

<sup>28</sup> See LINDA HAUGSTED, JOE ESTRELLA, “*For Want of Care, Access Wars Arose*,” MULTICHANNEL NEWS at 36 (May 8, 2000)(stating that MediaOne had to threaten to not upgrade its network in Somerville Massachusetts because the community was requiring forced access as part of its transfer review and approval process).

<sup>29</sup> See David Kaut, “*Cable Concerned Local Fees May Thwart Telephony Push*,” State News Service (Sept. 13, 1995).

providers who provide similar broadband services. Yet they seek to impose a discriminatory “franchise” and tax on an interstate information service flowing through cable lines. This is the antithesis of promotional conduct.

### 3. LFAs are not “losing” franchise fees.

LFA requests to extend their franchising power to information services must be approached with caution. The LFAs are not “losing” franchise fees. Municipal revenue from cable franchise fees will not decrease, even if cable modem service is not subject to franchise fees. In 1984, through the legislative process, the LFAs agreed to a 5% franchise fee cap. Municipal revenue from franchise fees collected on cable services has exploded since the 1984 Act and continues to increase because of cable operators’ innovation.<sup>30</sup> LFA franchise fees increase with every digital tier, every VOD purchased, and stay strong as enhanced offerings like cable modem service help cable operators keep subscribers from defecting to competing MVPDs that pay no franchise fees.<sup>31</sup> LFAs’ dire predictions of severe “loss” of revenues from cable modem services are rhetorical. The claims (inflated to the hundreds of millions of dollars by some cities) are exaggerated—the entire amount documented in this record is miniscule.<sup>32</sup> In

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<sup>30</sup> Franchise fees equaled \$200 million in 1984 and grew to \$2.04 billion in 2000. This is a tenfold increase. National Cable & Telecommunications Association, *Cable Television Operators: Wired To The Future* (January 2001). Franchise fee payments continue to rise due in part to the addition of advanced cable services such as digital cable and video-on-demand.

<sup>31</sup> See e.g., “MSOs Agree: Bundling Works,” *Multichannel News* (July 16, 2002) (stating that the provision of bundled services reduces customer churn) at [http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc\\_id=94754](http://www.tvinsite.com/multichannelnews/index.asp?layout=story&doc_id=94754); Matt Stump, *Cable Ops Touting VOD as Anti-Churn Weapon*, *BROADBAND WEEK* (Mar. 4, 2002) at [http://www.broadbandweek.com/news/020304/020304\\_cable\\_cableops.htm](http://www.broadbandweek.com/news/020304/020304_cable_cableops.htm) (“MSOs that have offered VOD for several years, such as Charter Communications Inc. and Insight Communications Co., say they’ve collected hard evidence that the product reduces digital churn, or the number of people who give up on digital cable after trying it out.”).

<sup>32</sup> Individual cities have submitted that they have collectively received \$2,130,377.34 in franchise fees that can be attributed to cable modem revenue. See Comments of Murfreesboro, TN at ¶ 2; Des Plaines, IL at ¶ 2; Pocatello, ID at ¶ 2; South Portland, ME at ¶ 2; Northwest Suburbs Cable Communications Commission, A Minnesota Joint Powers Entity Created by the Cities of Brooklyn Center, Brooklyn Park, Crystal, Golden Valley, Maple Grove, New Hope, Osseo, Plymouth, and Robbinsdale, Minnesota at ¶ 2; Fort Worth, TX at ¶ 2; Richland County, SC at ¶ 2;

addition, the claims take into account none of benefits LFAs accrue merely by permitting cable operators to continue to innovate, while the cost of maintaining the rights of way and the value of the rights of way land have not increased at the same rate.<sup>33</sup> Extending franchise fees still further would be quite contrary to the public interest in stimulating broadband.

#### 4. LFA provincialism must be arrested.

LFAs are, by definition and orientation, local. Without periodic intercession by the Commission, they will elevate parochial interests above national interests. The “social contracts,” for which LFAs seek credit as fathers of broadband,<sup>34</sup> were not a product of LFA interest in the advancement of broadband Internet services. They were rate case settlements negotiated between the Commission and cable operators, out of reach of LFAs, who were rightly regarded as more interested in Basic Service Tier rate cases than in national rebuilds to expand channel capacity.<sup>35</sup> In fact, even in this docket, LFAs seem to celebrate “good old fashioned

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Springfield, MO at ¶ 5; ALOAP Comments at 25-26 (discussing franchise fees “losses” of Grand Rapids Community Media Center and Austin, Texas).

This amount is miniscule in comparison to the amount of franchise fees cable operators have paid and will continue to pay on cable services. *See supra* note 30.

<sup>33</sup> *See In Re Coast to Coast Telecommunications, Inc v. City of Birmingham, MI*, Case No. U-12354 (Mich. PSC Oct. 24, 2000)(finding that the assumptions in the methodology that determined the city’s costs of maintaining the rights of way were faulty because they included for example the costs of street and sidewalk construction and the allocation of costs on a spatial basis, and that the related cost-fees imposed on telecommunications providers had no relationship to the telecommunications facilities’ use of the rights of way); *In re Metromedia Fiber Network Services, Inc. v. City of Dearborn, MI*, Case No. U-12797 (Mich. PSC August 16, 2001)(finding that the city’s rights of way fees imposed on telecommunications providers were excessive especially in light of the fact that the costs included in the fees incorporated the costs of maintaining public libraries as well as a portion of the costs of enacting and enforcing speed limits on the City’s streets as part of fees for the use of the rights of way). *See also* Paul Davidson, *Cities, Feds Force Firms to Pay for Rights-of-Way*, USA TODAY (July 7, 2002) at <http://www.usatoday.com/money/covers/2002-07-02-telecom-right-of-way.htm> (reporting on a challenge to NOAA’s valuation of its property for use by Global Crossing for telecommunications plant).

<sup>34</sup> *See* PCTA Comments at 14-15 (stating that LFA upgrade requirements and Commission-approved social contracts worked better than a free market to ensure that communities received cable modem service).

<sup>35</sup> *See e.g., In re Social Contract for Comcast Cable Communications, Inc.*, Order, 13 F.C.C.R. 3612 (FCC 1997).

analog” as just fine, and (falsely) portray modem service as a “burden” on the right of way.<sup>36</sup>

LFAs are simply not avid proponents of broadband.

When the Commission sought to encourage new services in 1972 and 1974 in the cable television industry, it forbid franchise fee assessments on new or auxiliary lines in the cable business, like pay TV.<sup>37</sup> This limitation was and is part of “structured dualism,” where the Commission shapes the national regulatory climate for cable communications through preemptive rulings, even when it comes to terms of franchises and “bargained for” franchise fees. Accordingly, if, as AOL Time Warner suggests,<sup>38</sup> the cable-provided broadband industry is in transition from one sole “pay” (Internet) channel to multiple “pay” (Internet) channels that will deliver third party ISPs on the cable plant, the same kind of regulatory incubator, which limits franchise fees for the promotion of new cable-provided services, is appropriate.

**B. The Provision Of Cable Modem Service Does Not Impose An Additional Burden On The Public Rights Of Way.**

LFAs have premised their case for franchising information services on the claim that modem service is a “burden” on the rights of way.<sup>39</sup> In fact, the rebuilds and construction they cite as attributable to modems actually are attributable to the bandwidth and reverse capacity

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<sup>36</sup> See ALOAP Comments at 41-42 (stating that “cable modem systems are different from cable-only systems, impose greater burdens on local governments, and make more extensive use of public property”). In essence, this comment champions the provision of mere video services by expressing distress at the “burden” on local governments and on the rights of way imposed by the provision of cable modem service. See also Andrew Afflerbach, David Randolph, “The Impact of Cable Modem Service on the Public Rights-of-Way,” June 2002 at 20 [hereinafter “*CTC Report*”] (stating that additional equipment in the right of way is necessary for the provision of cable modem service and that this equipment is not needed for advanced video services).

<sup>37</sup> See *In re Amendment of Part 74, Subpart K of the Commission Rules and Regulations Relative to Community Antenna Television Systems*, Cable Television Report and Order, 36 F.C.C.2d 143, ¶¶ 177, 186 (FCC 1972) (finding that under the circumstances, a deliberately structured dualism of federal and local regulation is warranted and franchise fees will be limited by federal standards); *Clarification of the Cable Television Rules* at ¶¶ 95-96 (FCC 1974) (finding that gross subscriber revenues for franchise fee determinations may not include per-program or per-channel charges, and that income derived from auxiliary cable services may not be assessed franchise fees to encourage national cable experimentation in ancillary services).

<sup>38</sup> See AOL Time Warner Comments at 19-21.

necessary for additional downstream video channels, upstream signaling for pay-per-view (“PPV”) and monitoring, the node size needed for VOD, and the reliability to compete effectively with DBS. The construction issues they recite are ordinary incidents of any construction—and these issues are not managed through the regulation of services or the payment of increased franchise fees, but by the application of the local permitting process that cable operators follow for all projects, regardless of the photons and electrons that flow through their systems.

**1. Rebuilds are not attributable to cable modem service.**

The case for the burdened right of way is presented most explicitly by the Alliance of Local Organizations Against Preemption (“ALOAP”). ALOAP premises its argument on a report by Lee Afflerbach and David Randolph of Columbia Telecommunications Corporation (“CTC”). As detailed in the Declaration attached as Exhibit 2, CTC’s report is grossly mistaken in attributing system upgrades and right of way “burdens” to the offering of cable modem service.<sup>40</sup>

CTC claims that cable systems as they stood in the early to mid-1990s were well suited to deliver video, Impulse Pay-Per-View (“IPPV”), interactive set top features, and VOD without the kinds of upgrades being undertaken for “advanced services,” such as Internet and telephony.<sup>41</sup> In fact, cable systems at that time did not have the bandwidth or reverse capacity to offer the additional downstream video channels, the reliable upstream signaling needed for PPV and monitoring, the node size needed for VOD, or the reliability to compete effectively with

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<sup>39</sup> See e.g., City Coalition Comments at 22; ALOAP Comments at 9, 41; CTC Report, *passim*; City of Seattle Comments at 4; PCTA Comments at 30-31; D.C. Office of Television and Telecommunications Comments at 9.

<sup>40</sup> See Pietri Declaration, *passim*.

DBS and other multi-channel video competitors. These systems needed to be upgraded for video.<sup>42</sup>

As for the upgrades and construction that CTC attributes to cable modem service, CTC has confused the ordinary features of cable system engineering—such as optical fiber, overlashing, or service to commercial accounts—with cable modem service. Well before cable modem service, cable operators used fiber to replace the microwave links owned by third party carriers who charged a fee to import broadcast signals; to replace CARS links; to decrease amplifier cascades, increase reliability, and to increase bandwidth in distribution plant.<sup>43</sup> Fiber upgrades are also necessary to support the reverse path needed for the interactivity that is used for PPV and VOD services. Cable systems have used overlashing as a construction technique for decades. Cable systems have always provided video service to commercial accounts. Whether plant is aerial or underground, and where service is provided, are usually dictated by the franchise.

The position CTC advances to the Commission also stands in striking contrast to what CTC (and similar municipal “consultants”) tell the rest of the world. To the Commission in this docket, CTC argues that plain vanilla coaxial systems are just fine for video. However, CTC praised the Brunswick, OH operator for installing fiber for improved video services—to increase overall system capacity, reliability and signal quality, to reduce amplifier cascades, and to reduce overall plant maintenance.<sup>44</sup> In its report prepared for the American Civil Liberties Union

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<sup>41</sup> See CTC Report at 20 (stating that systems that existed in the early 1990s were fully capable of offering the range of video-only services that are offered today over American cable systems and only minimal upgrading is necessary on these systems to provide digital services, IPPV and other interactive set top features).

<sup>42</sup> See Pietri Declaration at ¶ 8.

<sup>43</sup> *Id.* at ¶ 9.

<sup>44</sup> *CTC Brunswick Ohio Report* at 6, 19, 26, 29-30 (Nov. 1995)(praising the fiber optic nodes used to deliver video programming stating that the implementation of additional fiber optic nodes would reduce overall plant maintenance

("ACLU"), CTC explained that plant that has not been upgraded since 1995 cannot offer advanced services such as digital or VOD services.<sup>45</sup> CTC previously rejected objections based on the aesthetic appearance of overlashed cable that they now raise with the Commission.<sup>46</sup> Despite explicit limitations in the Commission's *Cable Reform* order against LFAs attempting to dictate fiber installation and node size,<sup>47</sup> CTC also routinely presses for small nodes without regard to cable modem service. For example, CTC's Julie Modlin suggested a node size of 200 when testifying in Vermont.<sup>48</sup> Other LFAs often seek to specify exact (small) node sizes, whether or not cable modem service is present.<sup>49</sup> Not infrequently, LFA captive "consultants" also find a "need" for node locations that coincidentally precisely match the I-Net needs of the local school system.

CTC's exaggerated parade of equipment horrors is divorced from the reality of system engineering. CTC has ignored the fact that optical nodes replace existing distribution amplifiers, that amplifiers have become lighter and more compact, that tap replacement is needed to pass 750 MHz of bandwidth, that all active electronics need to be powered, and that standby power provides more reliability to the entire plant.<sup>50</sup> None of this is attributable to cable modem

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by eliminating long amplifier cascades, would improve overall system performance, and that "[a]dditional *channels* and services cannot be added without replacing existing plant equipment with higher bandwidth equipment"). This upgrade was done before the operator provided cable modem service.

<sup>45</sup> See Technology Analysis of Open Access and Cable Television Systems, Prepared for the American Civil Liberties Union, Columbia Telecommunications Corporation, at 8, 13, 15, 40 (Dec. 2001).

<sup>46</sup> In the *CTC Brunswick Ohio Report*, CTC stated that "[a]lthough it is not aesthetically appealing and makes it somewhat difficult to access plant equipment for maintenance, the shadow cable can provide a convenient replacement for damaged cable." *CTC Brunswick Ohio Report* at 15.

<sup>47</sup> *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 F.C.C.R. 5296 ¶¶ 137, 141 (1999); *In the Matter of Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 17 F.C.C.R. 7609, at ¶¶ 12, 14 (Apr. 22, 2002).

<sup>48</sup> See Testimony of Julie Modlin, Columbia Telecommunications Corporation at Vermont Public Service Board, Docket Number 6101, Adelpia Communications Corporation Regarding Mountain Cable Company's Requests for Renewal of Its Various Franchise Agreements at 118 (Oct. 21, 1999) ("*Modlin Testimony*").

<sup>49</sup> See Charter Cable Franchise with Caldwell County, NC, Exhibit C (stating that the neighborhood group average of homes would be 500).

<sup>50</sup> See Pietri Declaration at ¶¶ 25-35.

service, as CTC is telling the Commission. In fact, CTC in reports to franchising authorities has demanded that drops be replaced as a routine matter of system upgrade.<sup>51</sup> In front of franchising authorities, CTC has recognized that back-up power could be installed within existing housing already in the public right of way.<sup>52</sup> CTC compounds its misleading Commission report by confusing telephony with cable modem service, and by presenting photographs of unfinished construction as though it were a complete, finished product. Routing cables through service areas is an expertise of cable operators. Its competent completion has nothing to do with the regulation or taxation of cable modem service.

**2. The construction process is managed by the local permitting process, not through the regulation of services or the payment of increased franchise fees.**

What CTC and ALOAP also gloss over is that whatever impact there is from system construction, this “impact” is already addressed through engineering standards and the existing permit process. The construction process itself is managed not through the regulation of services or the payment of increased franchise fees, but by the application of the local permitting process. These permit rules vary from community to community, but they might typically require items such as this:

- Application to the governmental agency and issuance of a permit for specific projects, unless a blanket permit is otherwise provided.
- Signage at the site identifying the project.
- Traffic cones and/or traffic management (*e.g.*, flagman).

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<sup>51</sup> Anne Arundel County, Comcast Cable Television System Technical Evaluation Prepared by Columbia Telecommunications Corporation at 2, 17 (May 16, 2002); Columbia Telecommunications Corporation Report to the City of Oakland, CA at 2-3 (May 23, 2000).

<sup>52</sup> See *Modlin Testimony* at 146.

- Time of year or time of day constraints. For example, some major commuter roads may not be closed during rush hour, or some resort communities will not authorize projects during tourist season.<sup>53</sup>

When cable operators build, they follow the local permitting process.<sup>54</sup> Even if there were additional aerial equipment installed, this aerial plant has no impact on the public right of way. The outside plant is suspended on poles typically owned and managed by utilities, and cable operators train their crews to comply with the applicable safety codes.

**3. Engineering capacity for future services is good engineering, not something to be punished.**

In addition to being factually incorrect, CTC is presenting a very strange engineering proposition. It is contending that the cable industry should engineer systems without anticipating future demands on the system, leaving itself dependent on a subsequent upgrade with additional construction costs and disruption. This is not how competent engineers approach engineering design. Even CTC recognizes—when it is talking to franchising authorities—that proper engineering requires some anticipation of the need for future bandwidth, and is something to be praised, not scorned or taxed. In Vermont, CTC's Julie Modlin testified:

The construction of the system is a – is a large one time or fairly one time or one – a large implementation that will cause disruption through [out] the community as well with the new construction, and – and generally a community would want to limit the amount of – of interference, interruption of service and construction in the rights-of-way at a particular time so that there is a requirement to build a system that's forward thinking enough that you don't have to go back and rebuild it in another couple of years to provide the new services and the services that are

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<sup>53</sup> Pietri Declaration at ¶ 38.

<sup>54</sup> If there ever was a true "burden" imposed by cable modem services above the general use of the rights of way for cable services, the burden has been lifted because according to ALOAP, 88 % of the upgrades necessary for cable modem service have been completed. See ALOAP Comments at 13.

demanded. This type of upgrading is more cost-effective and more – I guess less disruptive.<sup>55</sup>

How CTC and LFAs can offer the opposite opinion to the Commission is a mystery.

What is equally hard to fathom is the ultimate position CTC seems to be supporting. CTC and ALOAP apparently believe that if cable operators attempt to engineer in bandwidth to accommodate future services, and thereby minimize disruption to the public right of way, then they should pay the local franchising authority additional money for having not imposed another round of construction on the public right of way. As a policy proposition, this is mystifying.

**C. LFAs Advance No Credible Theory Of Franchising Or Franchise Fee Authority Over Interstate Information Services.**

LFAs have a heavy burden of justifying local franchising of and franchise fees on interstate information services given the record of rising franchise fees, construction concerns fully covered by the cable franchise, and their chronic pattern of sacrificing national interests for local parochial concerns. If there is no policy basis for justifying the extension of their regulation to interstate information services, surely they must offer a coherent legal theory for such extension. In fact, the LFAs have failed utterly to offer any coherent theory for franchising cable modem service.

**1. All franchise rights are granted by the existing cable franchise.**

Under Section 621(b), cable operators must have a cable franchise in order for their cable system to occupy the public rights of way.<sup>56</sup> Cable modem service is the transmission of photons and electrons over the same facilities required for a cable system. The transmission of photons and electrons for cable modem service does not somehow magically transform any cable system

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<sup>55</sup> *Modlin Testimony* at 43-44.

<sup>56</sup> 47 U.S.C. § 541(b).

facilities into a new kind of system. To the contrary, Section 621(b) *mandates* that each franchise “shall be construed to authorize the construction of a cable system over public rights-of-way,” with no limitations on service.<sup>57</sup> Accordingly, cable operators with valid franchises may lawfully provide information services under their cable system franchises.<sup>58</sup>

The LFAs offer nothing under federal law but wishful thinking and empty string cites.<sup>59</sup>

- Contrary to the LFAs’ arguments, Sections 624(b)(1)&(2) specifically provide that Requests for Franchise Proposals may not establish requirements for information services, and then permit enforcement only for broad categories of video programming or other services, leaving information services outside of the ambit of LFA enforcement. This barrier applies over and above the interstate nature of the information service.
- Section 634 authorizes the Commission to establish EEO rules and has no bearing on the franchising of interstate information services.
- Because cable modem service is an information service, LFAs may not rely on authority over cable services as authority to regulate information services. As such, Section 636(b) is limited to “cable services,” which pursuant to the Declaratory Ruling, no longer includes interstate information services provided through cable modem service.<sup>60</sup>
- One commenter cited 47 U.S.C. § “540(c)(1)(B),” a section that does not exist. If the intended cite was Section 626 of the Cable Act, Charter notes that this statute does not expand the substantive scope of LFA authority to telephony, Internet, or any other “service.” Rather it provides a procedure for renewing Title VI franchises.

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<sup>57</sup> *Id.* See also 47 U.S.C. § 522(9) (stating that a “franchise” is an authorization to operate a “cable system”).

<sup>58</sup> This is also consistent with the common-law basis for installing communications facilities in pre-existing compatible easements, in that such lines do not represent an additional servitude on the underlying property. The law of property recognizes that even the addition of a communications wire to existing easements —let alone photons and electrons over an existing wire—does not affect any property right retained by the owner of the underlying property. This is a widely accepted rule of property law now accepted in the Restatement. See, e.g., Third Restatement of the Law – Property (Servitudes), Section 5.9 - Division of Benefits in Gross (adopted May 1998). See also *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674 (N.Y. 1976).

<sup>59</sup> See, e.g., ALOAP Comments at 30-32; PCTA Comments at 17-19, City Coalition Comments at 25-26.

<sup>60</sup> The LFAs cite a series of “authorities” as though the Commission had not issued the Declaratory Ruling. For example, New Orleans’ comments track the language of *FCC Local and State Government Advisory Committee Recommendation No. 26*. This recommendation asserts that the for-profit use of public property must be fully compensated, and that classifying cable modem service as an “information service” does not preclude it from also being a “cable service.” However, the Commission explicitly held in the *Declaratory Ruling* that cable modem service is an information service and *not* a cable service, and full compensation does not mean excessive or for-profit regulation. Commenters also cite a well-known piece of legislative history from Representative Dingell, and NCTA advocacy pieces that cable Internet-based services are subject to cable franchise fees. They are inapplicable following the Commission’s Declaratory Ruling that cable modem service is an information service.

LFA recourse to the 1984 Act legislative history in support of their position that they have authority to collect franchise fees and require franchises for information services also is misplaced.<sup>61</sup> The 1984 Act expressly permits cable operators to offer non-cable services and to remain cable systems, so that cable operators could continue to innovate.<sup>62</sup> Congress permitted *public service commissions* authority to require *informational* tariffs for common carrier offerings over cable,<sup>63</sup> but granted LFAs, at most, regulatory authority over broad categories of *video* services.<sup>64</sup>

In 1996, Congress in no way expanded LFAs' oversight of information services. Instead, Congress carved out *telecommunications* from Title VI and recognized whatever rights municipalities might have to regulate *telecommunications* carriers' use of the public rights of way fell under Section 253.<sup>65</sup> Because cable operators offering cable modem services are not telecommunications carriers, these amendments did nothing to enhance LFA authority to regulate interstate information services. To the contrary, by amending the definition of franchise fees in Section 622, Congress confirmed its intent to limit local authorities' ability to collect franchise fees on information or telecommunications services, and to regulate only "cable

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<sup>61</sup> See ALOAP Comments at 38, n.68, 44-46, 62.

<sup>62</sup> See *Heritage Cablevision Assoc. of Dallas, L.P. v. Texas Util. Elec. Co.*, 6 F.C.C.R. 7099, 7107 (1991), *recon denied*, 7 F.C.C.R. 4192 (1992), *aff'd*, *Texas Util. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993) (wherein the D.C. Circuit upheld the Commission's decision to allow the operator to provide new, advanced services over its cable system and to still enjoy the protections of the Pole Act as a cable system); *National Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327, 2002 U.S. LEXIS 491 \*\* 21(2002) (stating that the Act contemplates cable innovation and that even before the 1996 amendments to the Act, the operator would not lose protections of the Act by providing new services).

<sup>63</sup> LFAs also cite Section 621(d)(1) in support for their authority to regulate non-cable, information services. However, Section 621(d)(1) addresses informational tariffs intended to cover telephony offerings, not interstate information services. In fact, this section explicitly denies local regulators what they are seeking – the right to control entry, exit, terms, and rates for information service providers. H.R. REP. NO. 98-934 at 61 (1984).

<sup>64</sup> See Cable Communications Policy Act of 1984, H. REP. NO. 98-934 at 29 (Aug. 1, 1984). ("This limited, evolutionary approach protects cable companies from unnecessary regulation, while reserving for **state and Federal officials** the authority they need to address the issue of competition between telephone and cable companies and the need to preserve universal telephone service.") (emphasis added).

<sup>65</sup> 47 U.S.C. §§ 253(c), 541(b)(3).

services.”<sup>66</sup> Thus, the 1996 amendments confirm Congress’ intent to limit LFAs’ power to regulate non-cable services.

**2. LFAs have no historical basis for regulating interstate information services.**

Many LFAs, lacking support in Title VI, seek refuge in a claim of a historic police power exercised to control occupation of the right of way. Their obvious starting point is the Fifth Circuit’s decision in *City of Dallas*, that Commission action to excuse Open Video Systems (“OVS”) from Title VI franchising did not necessarily preempt any residual police power to “franchise” the construction of an OVS system in the public right of way.<sup>67</sup> However, the cities have two fatal problems with this argument. First, Title VI already authorizes what physical occupation there is of the rights of way by cable systems. Contrary to the LFAs’ argument, Section 636(a) provides that even police power must be exercised consistently with Title VI.<sup>68</sup> Thus, the exercise of police powers would not override the limitations of the Act, such as limits against regulating information services or a cap on franchise fees limited to revenues from “cable services.” If amorphous police powers trumped Congress’ express, preemptive, Commerce Clause efforts to rationalize cable franchising, then all the cable case law since 1984 is wrong.

The second fatal flaw is that *City of Dallas* does not create inchoate franchising authority out of whole cloth. The cities must find it by recourse to state law. Not one LFA has cited state

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<sup>66</sup> See H.R. CONF. REP. NO. 104-458 at 180 (1996) (“Subsection (b) amends 622(b) of the Communications Act by inserting the phrase ‘to provide cable services.’ This amendment makes clear that the franchise fee provision is not intended to reach revenues that a cable operator derives for providing new telecommunications services over its system, but only the operators’ cable-related revenues.”). Some Commenters rely upon Section 622(h). Section 622(h) of the Act operates as a general savings clause for taxes or fees on entities *other than cable operators* “for cable or other communications services provided by such person over a cable system for which charges are assessed to subscribers but not received by the cable operator.” Congress amended this section to inform LFAs that their appropriate realm of regulation is cable services. Whatever continuing validity this vestige of the 1984 Act may have to embolden an LFA to tax amazon.com, it has no bearing on modem fees assessed directly on a cable operator.

<sup>67</sup> See *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999); PCTA Comments at 26-29.

or other authority that would fill this tall order. The authority would have to permit LFAs to “franchise” interstate information services that are riding over a previously franchised facility, under a federally preemptive law that (i) forbids LFA restraints on information services, and (ii) requires that every existing franchise be construed to authorize the presence and operation of the facility without service limitations. This authority does not exist.

If there were any doubt about their lack of authority, their own histories confirm that LFAs do not franchise information services. LFAs never required and never had the authority to require separate franchises for previous information service providers, such as providers of customer premises equipment (“CPE”) and voicemail services. Likewise, LFAs did not require these providers to apply for additional permits or separate authorizations to use the public rights of way to provide their information services, even though they were using the telecommunications network located in the public rights of way. LFAs have not historically used their police power to regulate information services and have cited no authority illustrating that such power exists to permit them to regulate interstate information services.

No LFA has cited a state statute even purporting to grant general authority to franchise interstate information services. Where it is addressed, states have created regulatory regimes that explicitly remove local authority to impose taxes or fees on cable modem service.<sup>69</sup>

Nor does the common law provide the LFAs general authority to franchise interstate information services. The LFAs would have the Commission believe that they own the public rights of way, and should (or some even claim must) be allowed to profit by imposing “rent” on

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<sup>68</sup> See 47 U.S.C. § 556(a).

<sup>69</sup> See, e.g., Michigan Metropolitan Extension Telecommunications Rights-Of-Way Oversight Act, 2002 Mich. Pub. Acts 48 (Senate Bill 880) (eliminating local taxes and fees on telecommunications providers, and creating a state-administered fee structure that explicitly excludes cable modem service revenues).

communications providers that occupy the public rights of way,<sup>70</sup> erroneously relying on various 5th and 10th Amendment arguments.<sup>71</sup> It is well established, however, that local governments only hold public rights of way in trust for the public, not as a proprietary interest.<sup>72</sup> Moreover, as the Commission is well aware, Title VI limits LFAs' power over public rights of way management to the franchising and permitting processes of cable systems in which construction permits, franchise agreements and franchise fees more than adequately protect local interests. The Commission should conclude that LFAs have no basis in history, statute, or common-law to

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<sup>70</sup> See, e.g., ALOAP Comments at 50-53; City Coalition Comments at 18-23.

<sup>71</sup> See ALOAP Comments at 47-56; Metro Cities Comments at 7-9; PCTA Comments at 7.

<sup>72</sup> In the rare instances where local authorities may technically hold the public right of way as a fee owner, they nonetheless are permitted only to regulate the time, place and manner of construction, not to exercise proprietary, "private property owner" profit making motives. See *City and County of Denver v. Qwest Corporation*, 18 P.3d 748, 761 (Colo. 2001) (holding that municipal governments hold rights of way only in their governmental capacity, and consequently are not entitled to the same compensation obtained by the owners of private property); *AT&T v. Village of Arlington Heights*, 620 N.E.2d 1040, 1042, 1044 (Ill. S.Ct. 1993) ("Today we rule that municipalities do not have a proprietary interest in the public streets and may not raise revenue by coercing telephone companies into franchise agreements. Municipalities do not possess proprietary powers over the public streets. They only possess regulatory powers. The public streets are held in trust for the use of the public. While numerous powers and rights regarding public streets have been granted to municipalities by the General Assembly, they are all regulatory in character, and do not grant any authority to rent or lease parts, or all, of a public street"); *City of Zanesville v. Zanesville Telegraph and Telephone Co.*, 59 N.E. 781, 785 (Ohio S. Ct. 1901) ("A municipal corporation, though holding the fee in its streets, has no private proprietary right or interest in them which entitles it to compensation, under the constitution, when they are subjected to an authorized additional burden of a public nature"); *City of Albany v. State*, 250 N.Y.S.2d 300, 302 (App. Div. 1964), *aff'd* 15 N.Y.2d 1024 (1965) ("We have no difficulty in finding that both the land held for street purposes... and that used for water supply purposes... were held in a governmental rather than a proprietary capacity.") (citations omitted); *New Jersey Payphone Ass'n v. Town of West New York*, 130 F. Supp. 2d 631, 638 (D.N.J. 2001), *aff'd*, 2002 U.S. App. LEXIS 15240 (3d Cir. July 26, 2002); *People v. Kerr*, 27 N.Y. 188, 199 (1863) (stating that municipalities hold the public rights of way in "trust for the benefit of the public. . ." and "[t]he interest is exclusively publici juris, and is, in any aspect, totally unlike property of a private corporation, which is held for its own benefit and used for its private gain or advantage"); *State v. Simpson*, 397 P.2d 288, 291 (Alaska 1964) (stating that "title to streets created by dedication is held by the municipality in trust for the public and not in a proprietary capacity"); *Village of Kalkaska v. Shell Oil Co.*, 446 N.W.2d 91, n.18 (Mich. 1989) ("the cities have no proprietary interest in city streets as their private property. . . .")(citing *Detroit v. Detroit City R. Co.*, 43 N.W. 447 (Mich. 1889)); *City of International Falls v. Minnesota Dakota & Western R. Co.*, 134 N.W. 302, 304 (Minn. 1912) ("The city has no proprietary rights in its streets. Whatever rights it has it holds merely in trust for the public use. It is not entitled to compensation when a railway company acquires a right of way across its streets"); *County of Marin v. Superior Court of Marin*, 53 Cal.2d 633, 638 (Cal. 1960)("All property under the care and control of a county is merely held in trust by the county for the people of the entire state"); *Burlington Light & Power Co. v. City of Burlington*, 106 A. 513, 516 (Vt. 1918) ("[The City] has no property right in land taken for a highway. It does not even own the easement, which is in the public. If an additional burden is created by a line of poles and wires in the streets, the city has no proprietary right of compensation"). See also 12 McQuillin Municipal Corporations § 34.13, n.3 (3d Ed 1995). See generally 4a Nichols on Eminent Domain § 15.02[2] (3d Ed. 1994).

require additional franchise authority for or fees on information services provided over cable systems.

**3. Any regulations LFAs seek to impose on cable modem providers would be discriminatory.**

Even if LFAs were able to require cable operators to obtain information services franchises, such action would constitute unlawful discrimination.<sup>73</sup> Because broadband information services are available via cable modem, DSL and wireless platforms,<sup>74</sup> an information services franchise requirement imposed solely on cable operators would be facially discriminatory.<sup>75</sup> These regulations also would discriminate against cable modem service providers in violation of the First Amendment.

In *Comcast Cablevision of Broward County, Inc. v. Broward County*, the court concluded that because cable modem service shares a common network, and the use of this network by third parties would have an irrevocable impact on the cable operator's ability to deliver additional content, the County's forced access requirement violated cable operators' First

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<sup>73</sup> See, e.g., ALOAP Comments at 61-64 (requiring additional local authorization or franchises to provide information services); PCTA Comments at 24-26 (arguing that further municipal authorization is necessary for the cable operator to provide information services); City Coalition Comments at 17-19 (requiring the cable modem operator to obtain an information services franchise, license or permit).

<sup>74</sup> *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report, FCC 02-33, ¶ 14 (FCC 2002) [hereinafter *Third 706 Report*].

<sup>75</sup> The Commission also has addressed the analogous issue of LFAs requiring additional franchises for telecommunications services provided over cable systems in *TCI Cablevision of Oakland County, Inc. In re TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, 12 F.C.C.R. 21396 (FCC 1997) ("*TCI Cablevision*"). In *TCI Cablevision*, the City of Troy, Michigan in effect attempted to impose new "telecommunications franchise" requirements on cable operators but not on ILECs. *Id.* at ¶ 28. In that case, the Commission held that the City of Troy had violated Section 621(b)(3)(B) by imposing telecommunications conditions on grants for cable permits and stated that a local authority's "discriminatory application of telecommunications regulation" was "especially troubling." *Id.* at ¶ 107. In the Commission's Order on Reconsideration in that case, the Commission stated that the condition that the City of Troy was attempting to impose was "substantively . . . a service limitation and [such limitation] cannot be imposed consistent[ly] with section 621(b)(3)(B)." *TCI Cablevision of Oakland County, Inc.; Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. Secs. 541, 544(e), and 253*, 13 F.C.C.R. 16400, ¶ 43

Amendment rights.<sup>76</sup> In contrast, the First Amendment theory of forced access proponents is premised on elaborately circular logic. For example, the Media Access Project posits that cable should be a passive conduit, thereby defining away any First Amendment rights of cable to be free from government constraints.<sup>77</sup> If one were to apply this logic to ISPs, then ISPs that provide passive transport to the entirety of the web<sup>78</sup> would themselves have no First Amendment rights either.

Pretending that First Amendment rights are held exclusively by anybody-but-cable has been a discredited view well before *Broward*. A “State imposed easement”<sup>79</sup> over communications media has never been permitted, especially as a “prophylactic” measure.<sup>80</sup> Speculation runs rampant in essays such as Feld’s, although such essays eventually admit, “[c]able operators aren’t filtering URLs to prevent customers from reaching unaffiliated content sites. The problem is that they could ... From a First Amendment point of view, however, the potential to discriminate and the incentive to do so warrant prophylactic action.”<sup>81</sup> By that logic, all daily newspapers, all studios, and all networks should be nationalized, as a precaution against censorship.

This odd preference for government controls rather than private ownership of media is completely antithetical to the First Amendment. Whether or not the Commission agrees with the *Broward* court’s constitutional analysis, it must agree that due to the underlying cable plant

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(FCC 1998). A similar state of affairs will arise if LFAs are permitted to require cable operators to obtain franchises to provide information services.

<sup>76</sup> 124 F. Supp. 2d 685, 687, 692-94 (S.D. Fla. Nov. 8, 2000).

<sup>77</sup> See Media Access Comments at 12 (citing H. Feld, “Whose Line is it Anyway? The First Amendment and Cable Open Access,” 8 CommLaw Conspectus 23, 28, 33 (Winter, 2000)).

<sup>78</sup> Feld at 28.

<sup>79</sup> *Id.* at 24.

<sup>80</sup> There is no market failure in broadband and all claims of anti-competitive behavior are speculative. See *infra* Section V.B.

<sup>81</sup> Feld at 38.

technology, a technological blunder—such as adopting a government order locking in a particular technology or business arrangement—can have grave repercussions in constraining the delivery of new and innovative services over the cable system. Such repercussions do little to provide the incentives for technological investment and innovation that the Commission and Congress seek to promote.<sup>82</sup>

#### **4. The ITFA precludes LFA exercise of discriminatory taxation power.**

Even if LFAs had clear taxation authority under state law—and none have offered such authority for the record—imposition of a discriminatory tax on cable would violate the Internet Tax Freedom Act. The Internet Tax Freedom Act (“ITFA”) expressly prohibits discriminatory additional fees imposed on Internet service providers, including cable modem service providers. The LFAs’ assertion that they have authority to impose additional franchise fees on cable operators because such fees are expressly permitted under the ITFA<sup>83</sup> is incorrect for several reasons. First, the ITFA expressly exempts only those franchise fees collected on cable service revenues.<sup>84</sup> Because cable modem service is an information service, any fees imposed on cable modem service are not expressly authorized by the ITFA. Second, even if the ITFA permitted LFAs to collect franchise fees on cable modem services, LFAs are prohibited from collecting additional fees on cable modem services where they have already imposed a five percent franchise fee.<sup>85</sup> Thus, the ITFA exception only carves out Title VI franchise fees, and the exception cannot apply if an operator is already paying five percent of gross revenues of cable

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<sup>82</sup> See 47 U.S.C. § 157 nt. (wherein, the Commission under Section 706 of the 1996 Act, must encourage the provision of new technologies and service to the public by employing various regulatory methods including removing barriers to infrastructure development); *Cable Modem NPRM and Order* at ¶ 4 (stating the goals of this proceeding include the encouragement and development of broadband for the public).

<sup>83</sup> See, e.g., ALOAP Comments at 56-57; PCTA Comments at 39.

<sup>84</sup> See Internet Tax Freedom Act §1104(8)(B); 47 U.S.C. § 542(b).

<sup>85</sup> 47 U.S.C. § 542(b).

services under Section 622(b). The Commission should confirm that franchise fees imposed on cable modem services are not authorized by the ITFA.

**D. The Commission Has The Authority To Preempt And To Forbear From Regulating Broadband Services Provided Over Cable Systems.**

The Declaratory Ruling had the salutary effect of removing cable modem services from much of the regulation of Title VI, but it is becoming clear in this docket that further express preemption is desirable to assure stability and certainty of the investment climate. Many LFAs challenge the Commission's power to preempt.<sup>86</sup>

However, these challenges to the Commission's preemptive powers under Title I are unavailing. Historically, the Commission has used its Title I powers to preempt the information service field to allow market forces to regulate the information services market.<sup>87</sup> These markets have been very competitive ever since under this deregulatory regime,<sup>88</sup> and Commission studies have previously noted how the statutory "hands-off" policy has animated the Commission's successful policy towards enhanced services.<sup>89</sup> This hands-off policy applies to both local and federal regulation.

Likewise, the Commission has the basis to forbear from regulating broadband services provided over cable systems where Title II of the Act might otherwise apply. Under Section 10,

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<sup>86</sup> See, e.g., ALOAP Comments at ii-iii, 5, 37, 60-61 (challenging the Commission's authority to preempt local regulation of cable modem service); City Coalition Comments at 17 (stating that regardless of its regulatory classification, local regulation of cable modem service is permitted under state law); PCTA Comments at 7; Metro Cities Comments at 5-8.

<sup>87</sup> In finding that CPE and enhanced data services are not common carrier services but information services, the Commission asserted its Title I power to advance this communications market. See *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214-18 (D.C. Cir. 1982), cert. denied sub nom, *Louisiana Public Service Comm'n. v. FCC*, 461 U.S. 938 (1983) (holding that the Commission may use its ancillary powers to regulate enhanced and CPE services, that its preemptive regulations need not be heavy handed, and that the Commission may defer to marketplace regulation).

<sup>88</sup> See *California v. FCC*, 905 F.2d 1217, 1234 (9<sup>th</sup> Cir. 1990) (stating that the Commission found in *Computer III* that the enhanced services market was "extremely competitive").

<sup>89</sup> FCC STAFF REPORT, INDUSTRY MONITORING SESSIONS CONVENED BY CABLE SERVICES BUREAU, *Broadband Today* at 43, 45 (Oct. 1999) ("*Broadband Today*"); see also 47 U.S.C. § 230(b)(2).

the Commission “shall” forbear from applying regulations or provisions of the Act to telecommunications carriers or telecommunications services upon determining that certain criteria—amply evidenced in this docket—are fulfilled.<sup>90</sup>

For example, the Commission relied on its Section 10 forbearance authority in requiring mandatory detariffing of interstate and international interexchange carriers.<sup>91</sup> In upholding the domestic detariffing orders, the D.C. Circuit encouraged the Commission to embrace the free marketplace rather than regulation. Specifically, the court stated:

Tariff filing, in other words, in the Commission’s view is an undesirable deviation from the market—at least where there are no market imperfections. Petitioners contend that the Commission could not foreclose a permissive detariffing without more justification than simply a desire to embrace the free market. We think, however, the Commission was entitled to value the free market, the benefits of which are rather well established.<sup>92</sup>

Under the first prong of Section 10, the Commission had determined that it was appropriate to forbear from requiring tariffs of nondominant interexchange carriers because nondominant carriers cannot impose unjust or unreasonable prices or terms. To impose unreasonable prices or terms would result in a loss of market share, and the Section 208 complaint process is an adequate remedy for any illegal prices or terms.<sup>93</sup> Under the second prong, the Commission found it would be highly unlikely that carriers lacking market power

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<sup>90</sup> Section 10 criteria includes: (1) enforcement of the regulations or provisions are unnecessary to ensure that the carrier’s or a service’s charges, practices, classifications or regulations are “not unjustly or unreasonably discriminatory;” (2) enforcement of the regulations or provisions are unnecessary to protect consumers; and (3) forbearance is “consistent with the public interest.” 47 U.S.C. § 160(a). Section 10 also requires the Commission to consider market conditions and whether or not forbearing would promote competition. 47 U.S.C. § 160(b).

<sup>91</sup> *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934*, Second Report and Order, 11 F.C.C.R. 20730 (FCC 1996), *on reconsideration*, Order on Reconsideration, 12 F.C.C.R. 15014 (1997), Second Order on Reconsideration and Erratum, 14 F.C.C.R. 6004 (1999), *aff’d MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000) (upholding the FCC’s domestic detariffing orders). *In re 2000 Biennial Regulatory Review; Policy and Rules Concerning the International, Interexchange Marketplace*, Report and Order 16 F.C.C.R. 10647 (FCC 2001) (implementing mandatory international detariffing).

<sup>92</sup> *MCI Worldcom*, 209 F.3d at 766.

<sup>93</sup> *Second Report and Order*, *supra* note 91 at ¶ 21.

could successfully charge rates, or impose terms and conditions that violate Sections 201 and 202 of the Communications Act and thus, tariffs were not necessary to protect the consumer.<sup>94</sup> In fact, it found that requiring tariffs might harm consumers by impeding the development of vigorous competition.<sup>95</sup> Finally, it found that detariffing was in the public interest because tariffing discouraged competition among carriers and detariffing is “the most pro-competitive, deregulatory system.”<sup>96</sup>

Forbearance by the Commission in the context of broadband services provided over cable would be more than adequately supported by the extensive record created in this proceeding. First, the voluminous record in this proceeding is void of any unjust or unreasonable discrimination by cable operators with regard to broadband services provided over cable, and cable operators are not dominant in the provision of broadband services.<sup>97</sup> Second, the vigorously competitive broadband services market has ensured just and reasonable rates and terms for broadband services.<sup>98</sup> Moreover, regulation of broadband services provided over cable would actually harm consumers because it would chill further investment in the deployment of broadband services. Third, forbearance is consistent with the public interest because it would allow cable operators—a driving force behind the competitive broadband services market—to

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<sup>94</sup> *Id.* at ¶ 36.

<sup>95</sup> *Id.* at ¶ 37.

<sup>96</sup> *Id.* at ¶ 52. Specifically, the Commission found that tariffing “impedes vigorous competition in the market for such services by: (1) removing incentives for competitive price discounting; (2) reducing or taking away carriers’ ability to make rapid, efficient responses to changes in demand and cost; (3) imposing costs on carriers that attempt to make new offerings; and (4) preventing consumers from seeking out or obtaining service arrangements specifically tailored to their needs.” *Id.* at ¶ 53 (footnotes omitted).

<sup>97</sup> Even though the cable modem service market is nascent, the record demonstrates that cable operators, in response to market forces, are implementing non-discriminatory practices. *See, e.g.*, Cox Comments at 34; Comcast Comments at 11-13 (discussing multiple ISP platforms).

<sup>98</sup> *Broadband Today*, at 42, 46 (“As deployment of DSL, satellite, and wireless advances, in large part spurred by rapid cable modem deployment, consumers will have alternative platforms to use for high speed data access, telephony and video services. We have already seen evidence that these alternative technologies are attracting new subscribers at an exponential rate, and that *prices for these new services are falling.*”) (citation omitted, emphasis added)

continue to bring innovative and improved services to the consumer. Forbearance may be imposed on a national level, covering all States and their political subdivisions, particularly for a service the Commission is attempting to protect against balkanized regulation.<sup>99</sup> Accordingly, a Commission decision to forbear clearly is supported by the record.

**E. Cable Operators Acted In Good Faith In Previous Payments Of Franchise Fees On Cable Modem Service.**

In the wake of the recently dismissed *Bova* litigation,<sup>100</sup> plaintiff's lawyers in this case have sought to engender additional class actions. They challenge the Commission's evidentiary support for its finding of "good faith" in previous cable operator collection of franchise fees on cable modem revenue, and seek to remove the Commission from any role in determining the propriety of such fees collected and paid to LFAs.<sup>101</sup> In one last gasp of municipal greed, ALOAP argues that because cable operators voluntarily paid franchise fees on cable modem service revenue, they are therefore unable to recover those payments from the LFAs even if class action claimants prevail.<sup>102</sup>

The LFAs may be dealt with readily. The voluntary payment doctrine likely does not apply in the LFA-cable operator context because the 5% cap in Section 622 is measured on a life of the franchise basis (where overpayments in early years are credited to later years), and it preempts state laws and defenses.<sup>103</sup> If the voluntary payment doctrine applies at all, it is reciprocal and applies to the payments that subscribers also made to the cable operators.<sup>104</sup>

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<sup>99</sup> See *Cable Modem NPRM and Order* at ¶ 97 (expressing concern about patchwork local regulation that could discourage innovation and investment in cable modem services).

<sup>100</sup> See *Bova v. Cox Communications*, 2002 U.S. Dist. LEXIS 12481 at \* 14 (W.D. Va. July 10, 2002)(dismissing the complaint for want of jurisdiction).

<sup>101</sup> Kimberly D. Bova and William L. Bova Comments at 8, n. 4 & n. 6.

<sup>102</sup> See ALOAP Comments at 65.

<sup>103</sup> See H. REP. NO. 98-934 at 64.

<sup>104</sup> See, e.g., *Hassen v. MediaOne of Greater Florida, Inc.*, 751 So. 2d 1289 (Fla. Ct. App. 2000); *Sanchez v. Time Warner, Inc.* No. 98-211-CIV-T-26A, 1998 U.S. Dist. LEXIS 22011 (M.D. Fla. Nov. 4, 1998); *Telescripps Cable*

With respect to Bova's claim that the Commission has no role to play here, the Commission's authority in this area is well settled.<sup>105</sup> There also can be little doubt that prior franchise fees were collected and paid in good faith. Good faith is "an intangible and abstract quality with no technical meaning or statutory definition, and it encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud or to seek an unconscionable advantage."<sup>106</sup> Cable operators provided cable modem service over their cable systems with support from Commission publications and case law.<sup>107</sup> The record is void of any facts that demonstrate that cable operators' payments were not in good faith or resulted from any malice.

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*Co. v. Welsh*, 542 S.E.2d 640 (Ga. Ct. App. 2000), *cert denied*, No. S01C0560, 2001 Ga. LEXIS 461 (Ga. June 4, 2001); *Smith v. Prime Cable of Chicago*, 658 N.E. 2d 1325 (Ill. App. Ct. 1995); *Time Warner Entertainment Co. v. Whiteman*, 741 N.E.2d 1265 (Ind. Ct. App. 2001); *Bielfield v. MediaOne of Metro Detroit, Inc.*, No. 98-007691CP (Michigan Circuit Ct. July 12, 1999); *Thomson v. MediaOne of St. Paul, Inc.*, No. C9-98-012453 (Minn. Dist. Ct. 2<sup>nd</sup> Dist. July 1, 1999); *Dillion v. U-A Columbia Cablevision of Westchester*, 740 N.Y.S.2d 396 (N.Y. App. Div. 2002); *Holt v. Century Communications Corp.*, No. 4:99cv102-P-B (N.D. Miss. Sept 20, 2001); *Horne v. Time Warner Operations*, 119 F. Supp. 2d 624 (S.D. Miss., 1999); *Waltermire v. TCI, Inc.*, No. C1198-0239 (Ohio Ct. of Common Pleas Jan. 13, 1999); *McWethy v. TCI, Inc.*, 988 P.2d 356 (Okla. Ct. Civ. App. 1999); *Jeffcoat v. Time Warner Entertainment*, No. 13:98-1119-23 (D.S.C. June 30, 1999); *Putnam v. Time Warner Cable of Southeastern Wisconsin*, 2002 Wisc. LEXIS 507 (Wisc. July 16, 2002).

<sup>105</sup> See *National Cable Television Ass'n v. Gulf Power Co.*, 534 U.S. 327, 2002 U.S. LEXIS 491 (2002)(specifically deferring to the Commission's authority to classify cable modem service); *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, MM Docket No. 84-1296, Memorandum Opinion and Order, 104 FCC 2d 386, 393 ¶¶ 18-19 (FCC 1986), *aff'd on this point sub nom. ACLU v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987)(finding that the Commission has authority to address franchise fee disputes where such disputes concern matters of national cable policy).

<sup>106</sup> Black's Law Dictionary, 6th ed., West Publishing Co. 1990.

<sup>107</sup> See *Section 214 Certificates*, Final Report & Order, 21 F.C.C.2d 307, 324-25 (¶ 47)(1970), *aff'd*, 449 F.2d 846 (5<sup>th</sup> Cir. 1971)(explaining that "CATV service represents the initial practical application of broadband cable technology" and that "there is a substantial expectation that broadband cables will make economically and technically possible a wide variety of new and different services involving the distribution of data, information storage and retrieval, and visual, facsimile and telemetry transmissions of all kinds"); *Cable Television Report & Order*, 36 F.C.C.2d 143, 144 n.10 (¶ 1) (1972)(finding that cable systems could provide computer to computer communications); *Heritage Cablevision Assocs. v. Texas Util. Elec. Co.*, 6 F.C.C.R. 7099, 7102 (¶ 17)(1991), *aff'd*, 997 F.2d 925 (D.C. Cir. 1993)(finding that cable's multichannel or broadband capacity could provide a broad array of service to its subscribers); *Third 706 Report* at n.97 (stating that as part of social contracts with cable operators in the mid-1990's, operators were required to upgrade the majority of their systems and to provide free cable modems and high speed Internet service to public and private schools and to public libraries passed by their systems).

On this national issue, the Commission's determination is necessary and appropriate.<sup>108</sup>

The Commission should confirm that cable operators acted in good faith in collecting franchise fees on cable modem service, and that operators may not be forced to issue refunds due to Section 623 preemption. Moreover, under no circumstances should operators be forced to refund to customers franchise fees paid over to LFAs unless LFAs disgorge them.

### **III. LOCAL REGULATION OF CUSTOMER SUPPORT WOULD DERAIL OPERATORS' INNOVATION, INVESTMENT AND ADVANCES.**

One particular area for which LFAs have proposed cable modem regulation would have a significant detrimental effect on innovation—the field of cable modem customer service.

#### **A. Charter Has Made Substantial Investment In Innovative, High-Quality Customer Support For Cable Modem Subscribers.**

As in all competitive industries, the very competitive broadband Internet access market has spurred cable operators to heavily invest in innovative, high-quality customer service support for cable modem service.

As detailed in the attached E. Doyle Minton declaration,<sup>109</sup> Charter's efforts to provide quality customer care for cable modem customers has gone far beyond anything envisioned when the Commission's video customer service guidelines were devised. Charter has centralized its telephone support in sophisticated call centers.<sup>110</sup> Over the last year, for example, Charter has thus far consolidated from 320 call centers to 200 call centers. Charter has invested \$60 million in capital infrastructure in these new call centers, and expects to invest an additional \$20-30 million this year. Charter has built new customer call centers, in addition to consolidating

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<sup>108</sup> See *Bova*, 2002 U.S. Dist. LEXIS 12481 at \* 3 (holding that the Commission's determination that cable modem service was an information service and not a cable or telecommunications service was determinative of whether Bova could bring an action under 47 U.S.C. § 207).

<sup>109</sup> See Minton Declaration attached as Exhibit 1.