02-52

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Federal Communications Commission
Consumer & Governmental Affairs Bureau
Office of The Bureau Chief

CGB

31 October 2002

Mr. Kenneth S. Fellman, Esq.
Chairman
Local State Government Advisory Committee
Kissinger & Fellman, P.C.
3773 Cherry Creek N. Drive
Suite 900
Denver. Colorado 80209

Re: Cable Modem Service Fees

Dear Ken:

In your August 20,2002, letter to Chairman Powell and FCC Commissioners Abemathy, Copps and Martin regarding the Commission's March 14,2002, Declaratory Ruling and Notice of Proposed Rulemaking (NPRM) on cable broadband issues, and during the September 27,2002, Local and State Government Advisory Committee Meeting (LSGAC), you raised questions as to whether any fee can be charged by local governments for cable modem service. You have also suggested that a statement Ken Ferree made to the media might be inconsistent with the Declaratory Ruling and NPRM. This letter responds to those inquiries.

In the Declaratory Ruling and NF'RM, the Commission determined that cable modem service is **an** interstate information service subject to Commission jurisdiction. The NPRM solicits comment on the regulatory consequences of this classification.

In the Item, the Commission notes the language in section 622(b) of the Communications Act, which provides that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed **5** percent of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services." The Commission then states, "Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined." The Commission "tentatively conclude[s] that Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service" and seeks comment on that issue. The Commission also asks for comment about any other authority state and local governments might have for assessing fees or taxes on cable Internet service and about authority for franchising facilities-based providers of information services. ***(See*** paragraphs 96 through 105 of the Declaratory Ruling and NPRM). The Commission is currently reviewing the comments received on these issues.

Ken Ferree was asked about fees at two points during the press conference following the March 14,2002, Commission meeting. First, in response to a question regarding governments imposing fees on cable modem service as an interstate information service, Mr. Ferree stated:

> *"That is a question in the N P M. Now we tentatively conclude in the N P M that Title VI doesn't grant any authority to require an additional franchise or impose additional fees under Title VI. But that's not to say that under some other general provision of state law that grants local authorities rights or authority to regulate their rights-of-way that they may not have some other authority. And, that's why we ask that question in the N P M."*

Secondly, in response to another question, Mr. Ferree referred to the above-referenced ceiling on franchise fees, which is based on revenues from cable service. Because the Commission has classified cable modem service as an information service, he stated *"So, revenues from cable modem services no longer should be considered in determining the ceiling on cable franchise fees."* These statements reflect the Declaratory Ruling and NPRM. Notwithstanding, even if Mr. Ferree's statements could be construed as inconsistent with the Item, it is the Declaratory Ruling and NPRM, and not statements at a press conference, that have legal effect.

You also asked about the handling of customer service complaints while the rulemaking is pending. In the NPRM, the Commission seeks comment on how the information service classification may affect the application of state or local regulation of consumer protection and customer service standards to cable modem service. As you requested at the September 27,2002, LSGAC meeting, Commission staff will not send franchising authorities any customer service complaints about cable modem service while these issues are pending. This treatment does not in any way prejudge the issue.

Please be assured that, when addressing the issues raised in the rulemaking, the Commission will give the comments on issues of state and local authority careful consideration.

Sincerely,

K. Dane Snowden
Chief
Consumer & Governmental Affairs Bureau

cc: W. Kenneth Ferree, Chief, Media Bureau
CS Docket No. 02-52