II. CONTRARY TO INDUSTRY CLAIMS, THE COMMISSION DOES NOT HAVE BROAD AUTHORITY TO PREEMPT LOCAL GOVERNMENT FRANCHISING OR REGULATION OF CABLE MODEM SERVICE, NOR DOES THE COMMISSION HAVE BROAD AUTHORITY TO PREEMPT RENTS FOR USE OF PUBLIC PROPERTY.

Industry commenters argue that local governments should be preempted from regulating cable modem service. AOL Time Warner, NCTA, Comcast and Cablevision argue that local governments have no authority over information services,[40] while Cox and AOL Time Warner assert that local governments have no authority over interstate services.[41] Cox, Comcast and Charter argue that Title VI authority does not extend to cable modem services,[42] and Cox, Charter and AT&T take the position that the Commission has the power to preempt under Title I.[43] AT&T argues that Title VI preempts local governments from imposing any requirements on cable modem franchising.[44] Finally, Cablevision asserts that local governments have no source of authority to regulate cable modem service, as the federal government occupies the field.[45] None of these arguments has any merit.

A. The Industry Fundamentally Misstates the Nature, Scope and Source of Local Authority Under Title VI.

Across the board, the industry urges that Title VI does not permit local regulation of cable modem service because cable modem service is not a cable service. Furthermore, these

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[40] AOL Time Warner at 28-29; Comments of NCTA at 46; Comments of Comcnsl Corporation at 27-28; Comments of Cablevision at 17-18; Comments of AT&T at 38, 40.

[41] Comments of Cox Communications at 38-39; Comments of AOL Time Warner at 27-28.

[42] Comments of Cox Communications at 41. Comments of Comcast Corporation at 29-10; Comments of Charter at 26-27

[43] Comments of Cox Communications at 53-55; Comments of Charter at 23-24; Comments of AT&T at 43-46.

[44] Comments of AT&T at 35-41

[45] Comments of Cablevision at 17

commenters ask the Commission to preempt any authority local governments may have These arguments are misguided and incorrect

1. The Courts Have Determined that Local Franchising Authority Does Not Stem from Title VI.

The industry argues that local authority is derived from Title VI and consists only of the authority granted by Title VI, with perhaps some limited authority to regulate rights-of-way.[46]

This claim is reminiscent of a similar argument made by the Commission in *City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999). In that case, the City challenged the Commission's decision to preempt the ability of local franchising authorities to require OVS providers to obtain a franchise. The court found that preemption of local franchising requirements was in conflict with the Act's preservation of state and local authority in § 601(c)(1) and with the principle that any Congressional directive to preempt must be found in a "clear statement."[47] The court did not agree with the Commission's assertion that local franchising authority stems from Title VI. Citing case law and the legislative history of the 1984 Cable Act, the court found that "[t]hese sources suggest that franchising authority does not depend on or grow out of § 621. While § 621 may have expressly *recognized* the power of localities to impose franchise requirements, it did not *create* that power, and elimination of § 621 for OVS operators docs not eliminate local franchising authority."[48] The court also rejected the Commission's argument, similar to claims made in this NPRM, that the 1906 Act's deregulatory mandate allowed for such preemption:

> The Commission maintains that if § 653(c)(1)(C) does not preempt local franchising authority altogether, but instead simply directs that local

[46] Comments of Cox Communications at 48; Comments of Cablevision at 17; Comments of AT&T at 35-41.

[47] *Dallas*, 165 F.3d at 347

[48] *Id.* at 348.

> authorities will no longer be constrained to regulate OVS operators as provided in Title VI, localities will be able to impose more onerous regulations on OVS operators than on cable operators. This result would conflict with Congress's express desire to reduce the regulatory burdens OVS operators face relative to their cable operator counterparts.
>
> While the agency's argument is plausible, it does not affect our holding. The statutory text, read in the light of *Gregory*'s and § 601(c)(1)'s warnings against implied preemption, does not support the Commission's interpretation, and apparent congressional intent as revealed in a conference report does not trump a pellucid statutory directive.[49]

The D.C. Circuit has also recognized the pre-existing role of franchising, on at least two occasions. In *Time Warner Entertainment Co. L.P. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996), the court noted that "prior to the passage of the 1984 Cable Act, and thus, in the absence of federal permission, many franchise agreements provided for PEG channels . . . . Congress thus merely recognized and endorsed the preexisting practice . . . ." And, the court added, "a statute that simply permits franchise authorities to regulate where they had previously done so raises no First Amendment problems . . . ." *Id.* at 972-73. While not the holding of the case, these passages both acknowledge the prior existence of franchising, and indicate that the Cable Act merely continued past practice.

In *National Cable Television Ass'n v. FCC*, 33 F.3d 66, 69 (D.C. Cir. 1994), the court stated that the 1984 Cable Act "preserves the local franchising system," an even stronger indication that the 1984 Cable Act effected no change in underlying local authority.

But perhaps the most important point is the fundamental observation that Congress cannot give powers to the states or to their creatures. Local governments derive their power from the states, not the federal government: The state has the power to grant franchises because the franchise power inheres in the sovereign. Thus, a "municipal corporation in granting [a

[49] *Id.* at 349 (emphasis in original).

franchise] acts as the agent of the state. In this relation it represents the state's sovereign power." *City of Greeley v. Poudre Valley Rural Elec. Ass'n, Inc.*, 744 P.2d 739, 744 (Colo. 1987), *quoting* 12 E. McQuillin, Municipal Corporations § 34.03, at 11 (3d ed. 1986). The U.S. Supreme Court has defined franchises as "special privileges conferred by government upon individuals, and which do not belong to the citizens of the country, generally, of common right. It is essential to the character of a franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from a law of the state." *Bank of Augusta v. Earle*, 38 U.S. 519, 595 (1839).

No less an authority than the Supreme Court has stated that "the cable medium may depend for its very existence upon express permission from local government authorities," *Turner Broadcasting System v. FCC*, 5 12 U.S. 622, 628 (1 094) and "[t]he Cable Act left franchising to slate or local authorities . . . ." *City of New York v FCC*, 486 U.S 57, 61 (1988).

Franchising authority docs not stem from Title VI, as the courts have recognized. Furthermore, absent a clear Congressional directive, the Commission has no authority to preempt the ability **of** local governments to require franchises **for** cable modem service any more than it did for OVS Accordingly, the industry's fundamental premise has no foundation in the law.

2 *The Legislative History of the Cable Act Recognizes the Extent of Local Authority.*

As we discussed in our opening comments, the legislative history makes it very clear that the ('able Act is designed to give local governments broad authority over cable systems.[50] One of the purposes of the 1984 Cable Act was to establish standards "which clarify the authority of Federal. state and local governments to regulate cable through the franchise process." H.R. Rep.

[50] ALOAP Comments at 29-32.

No. 98-934, at 23 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4660. Note the use of the word "clarify" – not "preempt," "alter," "revise," or "restructure," but merely "clarify." Congress expressly recognized the then-existing structure and ratified it:

> Primarily, cable television has been regulated at the local government level through the franchise process.... H.R. 4103 establishes a national policy that clarifies the current system of local, state, and Federal regulation of cable television. This policy continues reliance on the local franchising process as the primary means of cable television regulation . . .

H.R. Rep. No. 98-934, at 19 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4656. Note again the use of the word "clarifies," and especially the phrase "continues reliance on the local franchising process." The Commission has no authority to alter the balance that Congress struck by preempting rights that the Cable Act preserves, regardless of the industry's assertions

Furthermore, the legislative history repeatedly states that the status quo regarding non-cable services is unaffected by the Cable Act. H.R. Rep. No. 98-934, at 29 (1984), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4666 ("H.R. 4103 preserves the regulatory and jurisdictional status quo with respect to non-cable communications services"), at 60 ("The Committee intends that state and federal authority over non-cable communications services under the status quo shall be unaffected by the provisions of Title VI"); at 63 ("It is the intent of subsection (d) [now 47 U.S.C. § 541(d)] that, with respect to non-cable communications services, both the power of any state public utility commission and the power of the Commission be unaffected by the provisions of Title VI. Thus, Title VI is neutral with respect to such authority"). In other words, nothing in Title VI alters state or local authority regarding services provided by a cable operator that are not cable services. Not only is there no express preemption, but the legislative history demonstrates that Congress anticipated that Title VI would only affect local authority over ***cable*** services.

As we have discussed above and in our initial filing, where Congress meant to preempt, it said so specifically, and nowhere did Congress create the limits on local authority the industry now urges.

3. *Despite Industry's Efforts to Twist Its Meaning, the Local Government Coalition's Filing in the Original Cable Modem NOI Does Not State That Local Authority Over Cable Modem Service is Derived from Title VI*

Cox Communications asserts that in earlier comments local governments have "admitted" that classifying cable modem service as "anything but a Title VI cable service eliminates their authority under Title VI over this service."[51] This statement is incorrect. The reply comments of the National Association of Telecommunications Officers and Advisors ("NATOA") cited by Cox made no such statement.

The quotation from NATOA's reply comments on which Cox relies is taken out of context. The sentence is part of an argument asserting that cable modem service should be regarded as a cable service in order to maintain both the dual regulatory structure devised by Congress, and an effective structure overall.[52] It is a statement about how Congress intended cable services and cable modem services to be regulated, not a statement about the scope or source of local authority. Indeed, the heading of that section of the comments reads: "Cable modem service must be classified as a cable service to preserve the regulatory scheme devised by Congress."

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[51] Comments of Cox Communications at 41

[52] The relevant text is reproduced here:

> The classification of cable modem service as a cable service is not only necessary to preserve the Commission's own Title VI authority over the cable industry, but also the authority of local governments.

ALOAP is even more perplexed by Cox's citation to NATOA's initial comments in response to the Cable Modem NOI at 20-22. The cited discussion deals with the consequences of classifying cable modem service as a cable service or a telecommunications service and describes the benefits of treating cable modem service as falling within the scope of Title VI. It says nothing about Title VI being the source of local authority

If Cox believes that the decisions in this docket should be based on previous filings, then we urge the Commission to heed Cox's own prior statements in response to the Cable Modem NOI. The first page of Cox's initial filing in that proceeding stated that "[h]igh speed Internet access services provided by cable systems meet the statutory definition of both 'cable *service*' and 'information service' set forth in the Communications Act."[53]

B. Other Provisions Cited by the Industry Actually Preserve Local Authority.

1 *Section 601 of the 1996 Act Prohibits Implied Preemption*

As noted above in the discussion of the *City of Dallas* case, the 1996 Act prohibits preemption by implication. Section 601 states that the statute "shall not be construed to modify, supersede or impair any federal, state or local law unless expressly so provided." Implied preemption is, in other words, prohibited. Consequently, any arguments for preemption based on changes made by the 1996 Act must point to express language. Further, as the Supreme Court found in *Gregory v Ashcroft*, 501 U.S. 452, 464 (1991), intrusions on traditional state authority

[53] Comments of Cox Communications in the Cable Modem NOI. In addition, Cox states at 50 of its initial filing in this proceeding that "LFAs admitted, in their NOI comments, that a determination that cable modem service is not a cable service would mean that they cannot assess franchise fees on cable modem gross revenues." Again, Cox's use of this statement is misleading The Comments of NLC in the cable modem NOI discuss the implications of the *Portland* decision's telecommunications classification if applied nationwide. The section discusses the potential loss that local governments could face, and does not purport to be a discussion of local authority over an information services classification. *See* Comments of National League of Cities *et al* , in the Cable Modem NOI

will only be given effect when a statute's language makes the Court "absolutely certain that Congress intended" such a result. Without any clear intention on the part of Congress, the policy arguments and other assertions made in favor of local preemption are simply insufficient to permit preemption. The Commission and the cable industry must point to express statutory language. They have not done so, because no such language exists.

2. *Sections 706 and 230 Do Not Mandate Preemption.*

For example, cable industry commenters argue that the policy mandates in Section 706 of the 1996 Act and Section 230 of the Communications Act require that local government regulation be preempted.[54] But neither of these sections, nor any other federal statute for that matter, expressly preempt local regulation of cable modem services. Section 706 allows preemption only in certain specified circumstances, namely, the Commission must first determine that advanced telecommunications capability is <u>not</u> being deployed to all Americans in a reasonable and timely fashion.[55] The industry does not contend that the necessary elements

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[54] *See, e.g.*, Comments of Charter at 15-16, 25; Comments of Cablevision at 19-20; Comments of Arizona Cable and Telecomm. Ass'n. *et al* at 8-9.

[55] Section 706 states, in full:

> SEC. 706. ADVANCED TELECOMMUNICATIONS INCENTIVES.
>
> (a) IN GENERAL- The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.
>
> (b) INQUIRY- The Commission shall, within 30 months after the date of enactment of this Act, and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.
>
> (c) DEFINITIONS- For purposes of this subsection:

have been satisfied here, and actually provides arguments to the contrary. *See, e.g.* Comments of Charter at 7 ("the broadband market has experienced explosive growth in the last few years."); Comments of Comcast at 7 ("cable Internet service is growing robustly. Deployment, . . . is widespread, and continues to increase.); Comments of Cablevision at 4 ("The Commission's policy of 'vigilant restraint' has permitted the dynamic market for broadband services to flourish."). The Commission itself has made the same finding: "we conclude that advanced telecommunications capability is being made available to residential and small business customers in a reasonable and timely manner." *In re Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion*, Third Report, 17 FCC Rcd. 2884 at ¶ 99 (2002). *See also* ALOAP's initial comments at 10-13.[56]

Nor does Section 230, regarding the blocking and screening of offensive Internet content, have any bearing on this proceeding.[57] Furthermore, the implication is not that the Commission

(1) ADVANCED TELECOMMUNICATIONS CAPABILITY- The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology

(2) ELEMENTARY AND SECONDARY SCHOOLS- The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801)

[56] Consistent with the Commission's findings in the 706 reports discussed in our initial filing, the Commission has failed to find that local governments constitute market entry barriers under Section 257. In the Commission's first report, *In the Matter of Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses*, Report, 12 FCC Rcd. 16802 (1997), the Commission does not mention advanced services. In the second report, *In the Matter of Section 257 Report to Congress Identifying Market Entry Barriers for Enterpreneurs and Other Small Businesses*, Report, 15 FCC Rcd. 15376, 15442-43 at ¶ 173-76 (2000), the Commission references the 706 Report and states that "aggregate data suggested that broadband was being deployed in a reasonable and timely fashion." Again, the Commission fails to find tha local governments are barriers to market entry

[57] Section 230, 47 U.S.C. § 230, states, in full:

SEC. 230. [47 U.S.C. 230] PROTECTION FOR PRIVATE BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.

(a) FINDINGS -- The Congress finds the following

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) POLICY.--It is the policy of the United States--

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) PROTECTION FOR "GOOD SAMARITAN" BLOCKING AND SCREENING OF OFFENSIVE MATERIAL.-

(1) TREATMENT OF PUBLISHER OR SPEAKER.--No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) CIVIL LIABILITY.--No provider or user of an interactive computer service shall be held liable on account of--

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).

(d) EFFECT ON OTHER LAWS.--

(1) NO EFFECT ON CRIMINAL LAW.--Nothing in this section shall be construed to impair the enforcement of section 223 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

(2) NO EFFECT ON INTELLECTUAL PROPERTY LAW.--Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) STATE LAW.--Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) NO EFFECT ON COMMUNICATIONS PRIVACY LAW.--Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(e) DEFINITIONS.--As used in this section:

(1) INTERNET.--The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) INTERACTIVE COMPUTER SERVICE.--The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) INFORMATION CONTENT PROVIDER.--The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.

may rely on Section 230 to preempt local governments, but the opposite: Congress intended to preserve local and state authority, as it specified in Section 601. The policy guidance provided in Section 230 does not provide the clear language necessary to preempt.

3. *References to Preservation of Local Authority Under § 253 Are Irrelevant to This Proceeding.*

Several commenters discuss the authority of local governments under § 253, as if the preservation of local authority over use of rights-of-way by telecommunications providers somehow implies preemption in the area of cable modem service.[58] Not only do those parties generally misstate the law in their interpretations of Section 253,[59] but the specific claim that local regulation of companies engaged in interstate commerce is limited by 47 U.S.C. § 253 to regulation of the rights-of-way is plainly foreclosed by the language of that Section. Section 253 only allows preemption of local (and state) rules that prohibit an entity from providing "telecommunications services." Because this proceeding deals only with issues related to "information services" and "cable services," § 253 is wholly irrelevant. Furthermore, Section 601 by its terms prohibits expansion of Section 253 preemption to benefit entities to the extent that they are engaged in the provision of non-telecommunications services.

(4) ACCESS SOFTWARE PROVIDER.--The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

[58] *See, e.g.*, Comments of NCTA at 48-49; Comments of Cox Communications at 41.

[59] It is not necessary to discuss the authority of local governments under § 253 here, nor is it appropriate for the Commission to address that authority in this proceeding; nonetheless, we note in passing that the cable industry's arguments as to the scope of local authority under Section 253 have been rejected by various federal appellate courts. *See generally TCG Detroit v. City of Dearborn*, 206 F.3d 618 (6th Cir. 2000); *Bellsouth v. City of Coral Springs*, 42 F. Supp. 2d 1304 (S.D. Fla. 1999), *aff'd in part, rev'd in part sub nom. BellSouth v. Town of Palm Beach*, 252 F.3d

4. *Reliance on Title I Cannot Justify Preemption.*

As discussed in our opening comments at 32-37, and also noted by NCTA in Section I of its comments, the Commission's authority under Title I is limited. Title I was not enacted to "centralize interstate authority" over information services.[60] This argument is entirely belied by the history, substance, and structure of the Communications Act. The Act originated as the means of regulating the technologies that existed at the time it was passed: communications by wire (telephone and telegraph) and radio communications. Title II addressed the former and Title III the latter. Title I does not confer broad powers, because Congress adopted a specific, detailed regulatory scheme for each technology in the respective title.

Section 1, 47 U.S.C. § 151, describes the purpose of the Act; it is not a plenary grant of power. Otherwise, most of the rest of the Act would be unnecessary. Similarly, Section 2, 47 U.S.C. § 152, describes the matter and persons over which the Commission has jurisdiction – but again it does not grant plenary power or even specific power to do anything. What the Commission can and cannot do is laid out elsewhere in the Act, primarily in Titles II, III, and VI. When Congress enacted Title VI, it amended Section 2 to refer to cable service and cable operations. Yet Congress has never adopted a separate title to deal with information services, nor has it amended Section 2 to refer to information services and information service providers. Logic would dictate either that Congress believed that information services and their providers fall within an existing category – such as cable service – or that it did not intend for the Commission to comprehensively regulate such services.

1169 (11th Cir. 2001); *Cablevision of Boston, Inc. v. Public Improvement Comm'n of Boston*, 184 F.3d 88 (1st Cir. 1999).

[60] Comments of Cox Communications at 39.

Of course, Congress has been aware for many years that the Commission might seek to regulate information services, at least since the time of *Computer I*.[61] Yet even in the 1996 Act, Congress did nothing to alter the existing structure. Presumably Congress is satisfied with the status quo and intends for the Commission to regulate information services only within the bounds established as a result of *Computer II*.[62] The mere fact that Congress has defined "information services" is not sufficient to support the claim that the Commission now has exclusive jurisdiction. If Congress had intended to grant exclusive jurisdiction, it could and would have said so. But Section 2, which contains the Commission's grant of jurisdiction, does not even refer to information services.

In any case, the definition of "information services" in Section 3(20) was necessary to give meaning to those provisions - nearly all of them newly adopted in 1996 – that addressed information services. Not one of those provisions gives the Commission authority over information services in general. They only direct the Commission how to exercise its pre-existing authority over entities that already regulate with respect to aspects of the regulated businesses which touch on or involve information services. These sections include 228 (**Regulations** of carriers offering pay-per-call services); 230 (**Protection** for private blocking and screening of offensive material); 251 (Interconnections); 254 (**Universal** service); 256 (Coordination for interconnectivity); 257 (**Market** entry barriers proceeding); 259 (**Infrastructure**

[61] *In the Matter of Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, Tentative Decision of the Commission, 28 FCC 2d 291 (1970) ("Computer I").

[62] Under *GTE Service Corp. v. FCC*, 474 F.3d 724 (2d Cir. 1973), the Commission has no authority to regulate information services that are not provided by entities not otherwise subject to the Commission's jurisdiction. The Commission has never directly challenged that holding, and its decision to "forebear" in *Computer II* is not inconsistent with the Second Circuit's decision. In any case, the current regime says nothing about exclusive jurisdiction or about preemption of local authority over cable modem service.

sharing); 272 (Separate affiliates; Safeguards); 274 (Electronic publishing by Bell operating copies); 309 (Application for license); 534 (Carriage of local commercial television signals); and 544 (Regulation of services, facilities and equipment). When one examines these provisions carefully. Not one provision in this list grants the Commission extensive authority over information services. The provisions illustrate both the ancillary nature of information services in the overall scheme of the Communications Act, and the ancillary nature of the Commission's authority. They are not grants of exclusive authority.

The industry might have a point if Congress had said that the Commission has-a role in regulating information services outside of the exercise of its existing authority over cable and telecommunications providers - but Congress did not. The 1996 Congress did not alter the basic jurisdictional roles assigned federal, state and local governments in any way that is relevant here.[63] Furthermore, because Congress did not intend for the Commission to exercise jurisdiction over information services outside of the existing three-part regulatory structure (Title II, Title III and Title VI), there was no need to alter that structure.

So the question becomes whether Title I grants the Commission the power to preempt local authority over any service – not just an information service, but any service - because there is no basis for saying that information services have special status in, by, or with respect to Title I. The courts have answered this question. The Commission only has ancillary jurisdiction under Title I. and that authority is severely limited, as we discussed in our opening comments. *See* ALOAP Comments at 32-37.

In summary, the entire Act is an attempt to balance the different federal, state and local interests. Congress expressly preserved state and local authority in parts of the communications

field, and the Commission can preempt this authority only where Congress has defined it explicitly.[64] By looking at the entire structure of the Act it is clear that the Commission has limited authority, with powers explicitly laid out in each title. The Commission's powers over information services are therefore even more limited -- there is certainly no grant to the Commission of plenary authority over information services in the Act. The Commission may not construe relative silence with respect to information services as granting broad authority when the Act establishes such a detailed and defined scheme with respect to other classes of service. There is at most a limited grant for limited purposes, to the extent needed to address the specific issues identified by Congress in the provisions listed above. To reach beyond those explicit powers, the Commission must demonstrate that the use of its ancillary powers wider Title I is warranted, and that authority is limited to that which is "reasonably ancillary to the effective performance of the Commission's various responsibilities."[65] Without a strong showing that local franchising impedes the Commission's responsibilities under an explicit provision of the Act outside of Title I, the Commission cannot exercise ancillary jurisdiction to preempt local authority.

5. *Classification of Cable Modem Service As an Interstate Service Does Not Resolve the Issue of Local Authority.*

Merely classifying cable modem service as an interstate service does not dispose of all the issues that arise regarding the relationship between providers of the service and local governments. The Commission must remember that there are at least three distinct functions at

[63] The obvious exception being the federal-state jurisdictional limits for purposes of Section 25. *AT&T v. Iowa Util. Bd.*, 119 S. Ct. 721 (1999).

[64] *Dallas v. FCC*, 165 F.3d at 347-48 (5th Cir. 1999).

[65] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

issue here: the right of state and local governments to control their own property; the right of state and local governments to charge for the use of that property; and the regulation of the interstate service. Traditional interstate commerce preemption principles are generally only relevant with respect to the last, not the first two. A person engaged in interstate commerce does not have the right to use or occupy the property of others, much less do so without paying a fee. *See* ALOAP's initial comments at 50-51. As noted by some industry parties in their discussion of franchise fees, local governments have authority over their local rights-of-way.[66] Merely classifying cable modem service in the course of exercising the Commission's jurisdiction over interstate commerce is not sufficient to preempt local property rights. Consequently, even if the industry's interpretation of the scope of Title I authority were correct, it would be irrelevant, at least with respect to local authority to collect franchise fees. The authority to preempt regulation *is* not the authority to take property.

And even as to interstate commerce, the scope of Commission preemption *is* limited. The industry's reading of *Computer II* is not applicable here. First of all, as discussed above, under *GTE Service Corp. v. FCC*, 479 F.3d 724, the Commission does not have plenary authority over information services. Furthermore, in *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), the court found that preemption was permissible because "when state regulation of intrastate equipment or facilities would interfere with achievement of a federal regulatory goal, the Commission's jurisdiction is paramount and conflicting state regulations must necessarily yield to the federal regulatory scheme."[67] In the current proceeding, as discussed above, there is no indication that a local franchising requirement conflicts with the

[66] Comments of AOL Time Warner at 13-14; Comments of NCTA at 47

[67] *CCIA*, 693 F.2d at 214.

federal regulatory scheme. Further, in *CCIA v. FCC*, the D.C. Circuit found that the Commission properly exercised its ancillary jurisdiction in *Computer II*, because if it did not preempt, it would be impaired in carrying out its responsibilities under Title II related to transmission tariffs.[68] It was this necessity that made the preemption proper. In this case, however, preemption is inappropriate - indeed, impermissible – for two reasons. First, there is no underlying necessity. As discussed above, local authority has not and is not interfering with broadband deployment. And second, the Commission has no duties under the Act with respect to information services that rise anywhere to the level of its duties to assure reasonable charges for carriage under Title II. Without those two elements, the Commission has no justification or authority to preempt

C. Other Industry Claims Do Not Justify Preemption.

Sonic commenters claim that local regulation should be preempted under the dormant Commerce Clause, the First Amendment, and other potential sources of authority.[69] First, the dormant Commerce Clause does not apply where Congress has clearly spoken on the issue Congress's exercise of its Commerce Clause powers in the fields of telecommunications and cable television is not "dormant." For example, Title VI is a detailed exercise of the commerce power, and in Section 601 of the Cable Act Congress expressly allocated authority over cable services among federal, state and local authorities. In doing so, Congress eliminated any possibility of appeal to the dormant Commerce Clause:

> When Congress has struck the balance it deems appropriate, the courts are no longer needed to prevent States from burdening commerce, and it matters not that the courts would invalidate the state tax or regulation

[68] *Id.* at 215.

[69] Comments of AOL Time Warner at 29-39; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 20-22; Comments of AT&T at 39

> under the Commerce Clause in the absence of congressional action. Courts are final arbiters under the Commerce Clause only when Congress has not acted.

Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154-55 (1982) (citation omitted). Franchisee requirements are adopted to delineate the relationship between the operator and the local government, and they are necessary because the operator has requested the special privilege of occupying public property in the course of operating its business. Even in those areas in which State law would ordinarily be preempted under the dormant Commerce Clause, it is clear that Congress may exercise its Commerce Clause powers, as it has here, to carve out a role for state and local government. "When Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause. . . ." *Northeast Bancorp v. Board of Governors of Fed. Reserve Sys.*, 472 U.S. 159, 174 (1985).[70]

With respect to the First Amendment, the some industry commentors argue that the First Amendment prevents local governments from prohibiting operators from providing any service.[71] That misstates the current law. In the first place, a government prohibition must at least involve the operator's speech, and a franchise or fee requirement does not prohibit speech. Franchise requirements which delineate the relationship between the operator and the local government, are necessary because the operator has requested the special privilege of occupying public property in the course of operating its business. *Id.*

Furthermore, the predicate for any First Amendment claim is a restriction on protected speech - "the inquiry for First Amendment purposes is not concerned with economic impact."

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[70] It may be that industry commenters meant to argue that the Commerce Clause is dormant because Congress has not regulated information services at all. If that is the case, however, the arguments for Commission authority of any kind would seem to be even weaker than they are.

[71] *See, e.g.*, Comments of AOL Time Warner at 30; Comments of Verizon at 20-21; Comments of AT&T at 39.

Warner Cable Communications, Inc. v. City of Niceville, 911 F.2d 634, 638 (11th Cir. 1990), *reh'g denied*, 920 F.2d 13 (11th Cir. 1990), *cert. denied*, 501 U.S. 1222 (1991); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 78 (1976) (Powell, J., concurring)); *see also P.A.M. News Corp. v. Butz*, 514 F.2d 272 (D.C. Cir. 1975). Franchise requirements or fees do not require cable providers to carry or to associate themselves with any particular speech. And a cable modem service franchise requirement does not block speech: the operator can still set up a web site and provides all the content it desires

Nor does franchising present a content-based restriction. A content-based requirement is based upon the ideas or views expressed, and requires the state to examine "the content of the message to be conveyed." *Forsyth Cong., Ga. v. Nationalist Movement*, 505 U.S. 123, 134 (1992) (citations omitted). A regulation is not content-based merely because it has "an incidental effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). Accordingly, the courts have uniformly treated regulations geared towards video programming and carriage of broadcasting as content-neutral. *Time Warner Entertainment, L.P. v. F.C.C.*, 93 F.3d 957, 972 (D.C. Cir. 1996) (requirements for third party leased access are content neutral); *Turner Broadcasting System v. FCC*, 520 U.S. 180, 195 (1997) ("Turner II") (treating requirement for carriage of broadcast stations as content neutral).

The *Turner* cases merely require that a community be able to provide some "empirical support or at least sound reasoning" to support a claim that a regulation incidentally affecting speech is justified by a substantial government interest.[72] The empirical data need not rise to the

[72] *Turner Broadcasting System v. FCC*, 520 U.S. at 195 ("*Turner II*"): "substantiality is to be measured in this context by a standard more deferential than we accord to judgments of an administrative agency." The substantial evidence test for administrative agencies – more stringent than the test required by *Turner II* – requires only that a decision be supported by

level that might be required for a court or administrative agency to resolve an issue. It is enough that the evidence permit the legislative body to draw "reasonable inferences" that a problem is more than "fanciful." *Century Communications Corporation v. Federal Communications Commission*, 835 F.2d 292, 305 (D.C. Cir. 1987).

The cable operators want to use and occupy specific real estate to place facilities used to access content. That is not a government prohibition on providing the service. The First Amendment does not (a) give anyone the right to take another's property; (b) does not mean that property can be used without paying fair market value; and (c) is not a general bar to regulation, particularly the sort of regulations at issue here.

I). Claims of Municipal Abuses Are Either Unsupported or Are Based on Plain Error.

Several of the industry commenters cite one or more instances of what they consider to be outrageous actions or burdensome requirements adopted by local governments as evidence of the need for preemption.[73] The examples provided are all quite reasonable exercise of local authority. The industry would like the Commission to forget that local governments do not adopt legislation or franchise requirements frivolously. Local elected officials and their staffs respond to the demands of the public; they are also aware and respectful of the scope of their responsibilities under our federal system. Consequently, when they do adopt requirements they do so in response to the expressed needs of the public. Furthermore, the industry would have the Commission forget that the establishment of franchise requirements is ultimately a political process. As in any other such process, cable operators and other companies are entitled to and

[73] "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951) (citation omitted).

receive due process. Not only are they permitted to speak at public hearings on legislation, but they are entitled to meet with the responsible officials. As the Commission can attest, the industry takes full advantage of its right to be heard and the representatives of the various companies are eloquent and effective.

Accordingly, before the Commission makes any assumptions about the purpose, scope or effect of any alleged abusive actions by local officials, we urge the Commission to consider the sketchy and anecdotal nature of the allegations.[74]

- Charter identifies basically two "burdensome" requirements. First, Charter objects to the Seattle ordinance discussed earlier.[75] What is most interesting about this complaint is that Charter does not serve the City of Seattle -- and therefore is not subject to the requirement of which it complains. If Charter must go to a community where it does not have a franchise to find an alleged problem, one can only presume that it could not find a comparable example within its own service area. And if this is the case, one must further conclude that the claims of abuses are enormously exaggerated. The second action to which Charter objects concerns letters sent by certain local governments advising Charter that if Charter fails to pay franchise fees on cable modem service, its franchise in the respective community may be subject to

[73] *See, e.g.*, Comments of Charter at 18-21; Comments of AT&T at 42-43; Comments of AOL Time Warner at 23-26.

[74] We also urge the Commission to consider the applicability of Sections 1.1206 and 1.1204 of its rules in this instance. Those rules include notes requiring that in the event of any petition for rulemaking or declaratory ruling seeking preemption of state or local regulatory authority, the petitioner must serve the original petition on the state or local government whose provision is being challenged. To the extent that any of the commenters in this proceeding have effectively sought such preemption, therefore, by identifying a specific local requirement as an example of the type of provision that should be preempted, we believe that the commenter should be required to comply with these provisions.

revocation[76] This is hardly abusive, especially since the letters responded to notices from Charter saying it would no longer pay. In addition, for the reasons set forth in our opening comments -- and indeed in the letters themselves – local government have strong arguments that have yet to be rejected by any court to the effect that the Declaratory Ruling does not affect the obligation to pay franchise fees on cable modem service The letters Charter complains of are the necessary first step in any action a franchising authority might choose to take to enforce its rights: surely Charter does not mean to say that it should not be given notice of the claims a local government might have against it. Furthermore, termination of rights under an agreement is hardly an extreme or unusual measure for failure to pay agreed-upon compensation: every day tenants are evicted for failing to pay their rent.[77]

- AT&T also cites the Seattle ordinance,[78] but at least AT&T serves the city. Incidentally, as discussed further at Point VII.B, *infra,* AT&T objects to the ordinance only with respect to certain of its provisions dealing with privacy.
- **AOL** TimeWarner cites letters it has received from two communities, the City of Laredo, Texas, and the Village of Kimberly, Wisconsin, which argue that the

[75] Comments of Charter at 20-21

[76] Comments of Charter at IX-20

[77] Charter also objects to certain liquidated damages or fine provisions, without identifying the cities involved. The Commission cannot possibly evaluate the validity of this complaint without knowing the full background behind those requirements. Since the communities are not identified, this is impossible, and the allegations must be ignored. In any event, this is another instance of only a handful of examples being used to create the impression of an enormous problem.

[78] Comments of AT&T at 42-43

company must pay franchise fees despite the Declaratory ruling.[79] As noted above, there are legitimate arguments for this position. Indeed, the Laredo letter lays those arguments out clearly and forcefully

III. CABLE MODEM FRANCHISE FEES ARE A RIAITEH FOR LOCAL DISCRETION.

Not surprisingly, the industry commenters agree with the NPRM's tentative conclusion that Title VI does not allow the imposition of cable modem franchise fees.[80] The industry commenters advance various arguments, including that cable modem service does not impose any additional burden on the rights-of-way; that Section 622 either limits lees to cable service or bars fees on non-cable services;[81] that fees produce revenues in excess of costs;[82] and that fees on cable modem service are barred by the Internet Tax Freedom Act.[83] None of these arguments has any merit. As several commenters admit, fees are compensation for the use of the rights-of-way.[84] Economic principles require that to avoid distortions in the marketplace a person who uses property should pay fair market value. Consequently, absent an express legal bar, there is no sound argument against cable modem franchise fees – and no such express bar exists. In fact,

[79] Comments of AOL Time Warner at 25-26

[80] Comments of Arizona Cable Telecomm. Ass'n. *et al* at 16; Comments of Charter at 31; Comments of NCTA at 50; Comments of Comcast at 29; Comments of AOL Time Warner at 32-33; Comments of AT&T at 35-39.

[81] Comments of NC'i-A at 50, Comments of AOL Time Warner at 31-12; Comments of Comcast at 33; Comments of Cox Communications at 48-49; Comments of Charter at 30; Comments of Cable Telecomm. Ass'n. *et al* at 16-17.

[82] Comments of Charter at 31; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 18

[83] Comments of Comcast at 30; Comments of AOL Time Warner at 34; Comments of Cox Communications at 52; Comments of Arizona Cable Telecomm. Ass'n. *et al* at 19; Comments of NCTA at 52.

[84] Comments of Cox Communications at 45; Comments of Cablevision at 16; Comments of AOL Time Warner at 13-14; Comments of AT&T at 38.

as discussed in our initial comments at 44-47, Section 622 clearly permits franchise fees on non-cable services.

A. Economic Principles Demand that Cable Modem Service Providers Pay Fair Market Value for the Use of the Rights-of-Way.

Attached as Exhibit C is the Declaration and Curriculum Vitae of Ed Whitelaw (the "Whitelaw Report"). Dr Whitelaw holds a Ph D in Economics from MIT and is President of ECONorthwest, an economics consulting firm. The Whitelaw Report explains that even if a cable modem service provider is already paying a fee based on its revenues from providing cable service, economic principles require that the provider pay an additional amount, to reflect the additional value to the provider of the additional use it is making of the rights-of-way. Not charging a fee would distort economic incentives and, from the point of view of society, lead to overconsumption or other wasteful and inefficient uses of the right-of-way.

With regard to the latter point it is important to bear in mind that sound economics concludes the societal point of view should control. A cable operator niay be using the right-of-way very efficiently from its own perspective – *i e* , at low direct cost to the cable operator – but that use may at the same lime be wasteful from the point of view of other potential users, or the sum total of all users. For example, as the Whitelaw Report notes, any use by a service provider imposes costs on others, including not only the costs of repairing the roadbed, but less tangible costs such as traffic delays Inefficient use by one provider miry also impose additional costs on other right-of-way users, through unnecessary make-ready, design, modification, and repair costs. The cable operator inay he providing many services rind using the right-of-way very