FEDERAL COMMUNICATIONS COMMISSION
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE

Reply to: Ken Fellman
3773 Cherry Creek N. Drive, Suite 900
Denver, Colorado 80209
303-320-6100 Telephone; 303-320-6613 Facsimile

Ken Fellman, Chair
Mayor
Arvada, Colorado

Marilyn Praisner, Vice-Chair
Montgomery County Council
Rockville, Maryland

Pamela J. Beery, Attorney
Local Government Practice
Portland, Oregon

Jim Dailey, Mayor
Little Rock, Arkansas

Michael Guido, Mayor
Dearborn, Michigan

Randy Johnson, Commissioner
Hennepin County
Minneapolis, Minnesota

Thomas Menino, Mayor
Boston, Massachusetts

Nancy Nathanson, City Councilor
Eugene, Oregon

Patrick Spears, President
Intertribal Council on Utility Policy
Fort Pierre, South Dakota

Steve Stovall, Dep. Mayor Pro Tem
Plano, Texas

David A. Svanda, Commissioner
Public Service Commissioner
Lansing, Michigan

February 10, 2003

VIA ELECTRONIC FILING

Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW, TW-B204
Washington, D.C. 20554

Re: LSGAC Ex Parte Filing / Advisory Recommendation No. 31
In the Matter of Appropriate Regulatory Treatment for
Broadband Access to the Internet, CC Docket No. 02-52

Dear Ms. Dortch:

On behalf of the Commission's Local and State Government Advisory Committee, I am hereby submitting the LSGAC's Ex Parte Filing of Advisory Recommendation Number 31 with respect to CC Docket No. 02-52; In the Matter of Review of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities.

Very truly yours,

Kenneth S. Fellman
Chairman, LSGAC

KSF/eaj
Enclosure
cc: Hon. Michael K. Powell, Chairman (w/encl.; via email)
Hon. Kathleen Q. Abernathy, Commissioner (w/encl.; via email)
Hon. Michael J. Copps, Commissioner (w/encl.; via email)
Hon. Kevin J. Martin, Commissioner (w/encl.; via email)
Hon. Jonathan S. Adelstein, Commissioner (w/encl.; via email)
LSGAC Members and Staff (w/encl.; via email)
Kris Monteith (w/encl.; via email)

FCC Local and State Government Advisory Committee
Advisory Recommendation Number 31:

In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, CS Docket 02-52

1. **Introduction.** The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's Notice of Proposed Rulemaking ("NPRM") CS Docket No. 02-52.

2. **Background.** As stated in Advisory Recommendation Number 26, State, local and tribal governments seek the rapid deployment of advanced networks. The deployment of competitive broadband facilities providing cable and telecommunications services can create meaningful competition to incumbent service providers and will enhance the welfare of all citizens and the economic development of local communities.

3. The LSGAC believes the Commission has taken a mistaken direction by classifying cable modem service as a non-Title VI service. As we stated in Advisory Recommendation 26, classifying cable modem service as an "information service" does not preclude the service from also being a "cable service". The two definitions are not mutually exclusive. The Commission's insistence in March 2002 that cable modem service was not a cable service has caused extensive confusion among consumers, cable operators, and state and local governments.

4. **Discussion.** Cable modem service providers must be obligated to address local community needs and interests as a condition for deploying cable modem service facilities. The March 2002 decision declaring that cable modem service is no longer subject to traditional Title VI requirements has frustrated state and local efforts to accelerate cable broadband deployment by allowing cable operators to question state and local authority to require appropriate pre-conditions to the deployment of these facilities. State, local and tribal governments retain the inherent police power authority to protect consumers from unfair and unreasonable business practices. The for-profit use of the public rights-of-way by private entities must be efficiently and effectively managed and compensated, consistent with the dedication of this public property to serve the public interest. The Commission should take action in the pending NPRM to acknowledge these state and local powers over the deployment and marketing of cable modem facilities.

5. State and local regulation of cable modem service is essential to ensure that cable modem service is rolled out fairly to *all* Americans. The continued growth of this service depends in part on consumers believing that the service will perform as promised and without risk to personal privacy or computer hackers. Services promised must be services delivered, and consumers must have an effective remedy when an operator falls

short of promises and community obligations. For example, local authorities must be able to address any redlining in the rollout and availability of the service.

6. A cable system providing cable modem service imposes more intrusive structures and right-of-way impacts on a community than a traditional cable system. Local authorities must manage these impacts to assure the entire community receives the highest and best use of the rights-of-way at the lowest overall cost to the taxpayer. The Commission should ignore industry pleas for a "free-pass" in the use and consumption of public real estate for the delivery of cable modem service. Cable modem service is a business dependent on permanent, intrusive occupancy of the public rights-of-way, and local governments have authority to charge appropriate rent to avoid taxpayer subsidies to a private, commercial business.

7. The Commission should use this docket to explicitly recognize this local authority does exist and is consistent with the Commission's March 2002 classification decision. The Commission treads on uncertain legal ground if it relies solely on Title I authority to control the deployment and behavior of cable modem service providers. The Commission should recognize the importance of local property rights and independent local authority to regulate the activities of cable operators when they abuse or injure their consumers. State law doctrines of property law and consumer protection can resolve any issues that may arise with respect to cable modem service, including past unpaid cable modem franchise fees.

8. The LSGAC also recommends the Commission explicitly recognize in this proceeding that provisions of Title VI still apply to the cable modem service activities of cable operators. Congress declared that "other service(s)", presumably including cable modem service, provided by a cable operator over a cable system remain subject to "any requirements contained in a franchise", pursuant to Section 624(b)(2) of the Federal Cable Act. There are other examples throughout Title VI that explicitly cover "cable operators", including all of the non-telecommunications services on the cable system. For example, cable modem service is subject to the privacy provisions of Title VI, section 631, which explicitly authorize local authorities to establish privacy requirements.

9. Finally, in light of recent marketplace mergers and the Commission's recent decisions permitting unprecedented concentration of the ownership of the cable industry, including the provision of cable modem service, individual state and local governments must be prepared to address anti-competitive and discriminatory actions by a cable operator trying to control access to and the content of the internet.

RECOMMENDATION: The Local and State Government Advisory Committee recommends:

a. That the Commission acknowledge that state and local governments have inherent police power authority over cable modem service, separate and apart from Title VI.

b. That the Commission clarify that its March 2002 decision did not interfere with state and local authority to require franchises, compensation and universal deployment for cable modem service in return for occupation and use of public rights-of-way.

c. That the Commission clarify that its March 2002 decision did not interfere with the authority of state and local governments to impose customer service requirements to address anti-competitive actions by cable modem service providers.

Dated this 10th day of February, 2003.

Kenneth S. Fellman
Chairman