

**FEDERAL COMMUNICATIONS COMMISSION
LOCAL AND STATE GOVERNMENT ADVISORY COMMITTEE**

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February 5, 2002

00-185

**VIA FACSIMILE (202-418-0520)
AND U.S. MAIL**

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Dr. Emily Hoffnar
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: LSGAC Advisory Recommendation No. 25

Dear Dr. Hoffnar:

Enclosed please find the original filing for LSGAC Advisory Recommendation No. 26. It is my understanding that you will file this document with the Secretary of the FCC and that you will also arrange for delivery of the referenced copies. I have enclosed the required copies for your convenience.

Thank you.

Very truly yours,

Elizabeth Jackson
For Kenneth S. Fellman

/ej
Enclosure

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Ms. Magalie Roman Salas, Secretary
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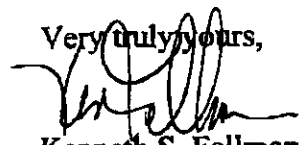
Re: LSGAC Advisory Recommendation No. 26

Dear Ms. Salas:

On behalf of the Commission's Local and State Government Advisory Committee, I am hereby submitting an original and two copies of the LSGAC's Advisory Recommendation No. 26 with respect to "In the Matter of Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185."

Following the Commission's review of this Advisory Recommendation, if there are additional questions or concerns, I may be contacted at the telephone number listed above, or via email at ken@kandf.com.

Very truly yours,


Kenneth S. Fellman
Chairman, LSGAC

KSF/eaj

Enclosure

cc: The Honorable Michael K. Powell, Chairman (w/ encl.)
The Honorable Kathleen Q. Abernathy, Commissioner (w/ encl.)
The Honorable Michael J. Copps, Commissioner (w/ encl.)
The Honorable Kevin J. Martin, Commissioner (w/ encl.)
LSGAC Members and Staff (w/encl; via email)

**FCC Local and State Government Advisory Committee
Advisory Recommendation Number 26**

**In the Matter of Inquiry Concerning High
Speed Access to the Internet Over Cable
and Other Facilities, GN Docket No. 00-185**

1. **Introduction.** The Local and State Government Advisory Committee ("LSGAC") submits this Recommendation in regard to the Federal Communication Commission's Notice of Inquiry ("NOI") GN Docket No. 00-185.
2. **Background.** State, local and tribal governments seek the rapid deployment of advanced networks. The deployment of competitive facilities providing cable and telecommunications services can create meaningful competition to incumbent service providers, enhancing the welfare of all citizens and the economic development of local communities.
3. State, local and tribal governments also have immediate concerns raised by the expansion of advanced communications systems throughout the United States. All service providers should be required to address local community needs and interests as they are permitted to deploy competitive facilities. State, local and tribal governments must retain authority to protect consumers from unfair and unreasonable business practices. And the for-profit use of public property by private entities must be efficiently and effectively managed, fully compensated, and consistent with the dedication of public property to serve the public interest.
4. Cable modem service promises to provide high-speed access to the Internet. Cable modem service should be encouraged and expanded as a viable competitor to other high-speed Internet access technologies.
5. Cable modem service raises unique regulatory questions. The technology is expected to deliver the full range of new telecommunications and cable television services, such as high-speed data file transfers, two-way video imaging, full motion one-way, enhanced entertainment television, and "voice over the Internet." This potential makes the regulatory classification of cable modem service urgent.
6. To date, the federal courts faced with the regulatory classification of cable modem service have reached different and opposing results. This legal uncertainty creates additional business and community risks, which discourage investment in cable modem services. The Commission, as the expert federal communications regulatory agency, has an obligation to define the rules to allow investors, service providers, state, local and tribal governments, and consumers certainty about the legal status of cable modem service.
7. **Classification of Cable Modem Service.** Cable modem service is a cable service. Classifying cable modem service as an "information service" may be useful for purposes of Title II of the Communications Act. However 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. "Information service" is only relevant in the Title II

context--where an information service cannot be both an "information service" and a "telecommunications service". The definition of "telecommunications service" is quite narrow (only services offered in the manner of a common carrier service). And "information services" have a series of rights that telecommunications service providers must respect.

8. Unlike Title II's definition of "telecommunications service", Title VI adopts a very broad definition of "cable service" and there is nothing inconsistent about a service being simultaneously a "cable service" and an "information service". Nothing in the definition of "information service" indicates a service is an "information service" to the exclusion of other relevant classifications within the Act. In fact--all cable services offered by a cable operator appear to be "information services" because cable services offer "the capability for . . . making available information via telecommunications, and includes electronic publishing. . . ." 47 USC §153(20).

9. Information services offered by cable operators on cable systems are subject to Title VI jurisdiction and regulation as prescribed in 47 U.S.C. § 544: "(LFA's) may enforce any requirements contained within the franchise--(A) for facilities and equipment; and (B) for broad categories of video programming or other services." (emphasis added).

10. Moreover, Congress's 1996 amendment to the statutory definition of "cable service" intended to expand the concept of "cable service" to include interactive information services. Congress abandoned the distinction it had made in the 1984 Cable Act between the selection and transmission of information and the capacity to use the information selected. Congress, in 1996, revised the definition of "cable service" to include information services which permitted "subscriber interaction . . . for the selection or use of such . . . service". Congress explicitly contemplated "the evolution of cable to include . . . information services made available to subscribers by the cable operator." *In the Matter of Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, Notice of Inquiry, 16 FCC Rcd. 1321, ¶ 45 (2001).

11. Local communities and the capital markets need the predictability and certainty of established legal precedent to understand the various rights and responsibilities of a cable modem service provider. The existing legal and policy framework for cable services is clearly understood and working well, and provides explicit rights and remedies to cable operators, subscribers and information service providers. Applying this existing body of law will provide a favorable investment environment that encourages accelerated deployment. This well-known set of rules will reduce the regulatory and business uncertainty currently faced by investors and by local governments. It will allow the capital markets to accurately evaluate the rules that will be applied to cable modem service providers. This in turn will reduce the regulatory uncertainty and business uncertainty faced by investors. By contrast, classifying cable modem service in a manner that does not address the various rights and responsibilities of cable operators offering cable modem service and the rights of information service providers and consumers seeking access to cable modem service will generate litigation, delay and further investment uncertainty. This uncertainty is certain to discourage cable modem service expansion as capital markets insist on higher returns on invested capital to accommodate the increased legal and business risks.

12. Title VI provides the FCC and local franchise authorities with sufficient authority to insure that cable operators do not restrain competition between affiliated and unaffiliated content providers.

13. Title VI further recognizes and encourages a meaningful role for local governments in overseeing the deployment of advanced cable services. Franchise authorities are best positioned to ensure that providers of advanced services address local and specific "community needs and interests".

14. A division of regulatory responsibility over cable operator video services and cable modem services between Title VI and Title II, or more problematically between Title VI and no regulation at all, would frustrate public oversight of the deployment of advanced services. The dichotomy would inhibit efforts by state, local and tribal governments to reduce the "digital divide."

RECOMMENDATION: The Local and State Government Advisory Committee recommends:

- a. That the Commission unambiguously declares that under federal law, cable modem service is a cable service.
- b. That the Commission takes this action through an interpretative ruling now and does not delay the regulatory classification of cable modem service pending any further proceeding.

Adopted by the LSGAC on February 5, 2002.



Kenneth S. Fellman
Chairman