



Local Government Groups File with Supreme Court Requests High Court Review of United States Court of Appeals' Opinion Concerning Cable Modem Service

Washington, DC, October 4, 2004 ----- Five national organizations have asked the Supreme Court to review the decision of the United States Court of Appeals for the Ninth Circuit, and to also review the underlying decision of the Federal Communications Commission (FCC), concerning the regulatory classification of cable modem service. The **National League of Cities**, the **United States Conference of Mayors**, the **National Association of Counties**, the **International Municipal Lawyers Association**, and the **National Association of Telecommunications Officers and Advisors**, formed the **Alliance of Local Organizations Against Preemption** to pursue legal and regulatory actions as a result of the FCC's ruling that cable modem service is not a cable service.

The Alliance has filed comments before the FCC throughout its proceedings on the appropriate classification of cable modem service, and pursued challenges to the agency's determination through the courts. The FCC ruled that cable modem service offered over a cable system is an interstate information service, not a telecommunications service or a cable service, and thus no longer subject to local cable franchise requirements. In October 2003, the Ninth Circuit ruled that cable modem service is not a cable service but has separate telecommunications service and information service components, affirming in part, vacating in part, and remanding the case to the FCC. Various parties, including the Alliance, filed petitions for rehearing, and in March 2004, the Ninth Circuit denied those requests. The Solicitor General and the FCC, as well as the National Cable and Telecommunications Association and others, are also seeking review of the Ninth Circuit's decision by the high court.

The Alliance is specifically concerned that the Supreme Court provide a full review of both the Ninth Circuit and FCC decisions because absent such review, the classification of cable modem service would be determined without any meaningful judicial review of the underlying arguments of classifying cable modem service. While the high court generally will not address questions that have not been addressed by the court below, it has done so in the past, and the Alliance argues this is one of those rare instances where it should do so again.

The Alliance's filing, a Conditional Cross Petition for Certiorari, seeks the high court's review for the following reasons:

- It was a quirk of judicial process that placed the underlying case in the hands of the Ninth Circuit, which had previously ruled in the *AT&T v. Portland* case.
- The Ninth Circuit never adequately addressed the merits of the arguments pertaining to the classification of cable modem service because in the *Portland* case the issue was not briefed and in the appeal of the FCC's decision the court decided it was bound by its earlier decision in the *Portland* case.
- The FCC's decision that cable modem service is not a cable service does not pass the *Chevron* analysis that the Supreme Court has held applies to review of agency decisions.

- The underlying decision of the Ninth Circuit, which affirmed the FCC on the cable service issue, does not comport with the requirements of the Supreme Court's *Chenery* case for affirming an agency's decision.

The Alliance has continued, throughout the course of the court proceedings, to express its concerns regarding the underlying FCC decision. Some of the concerns expressed by the Alliance are:

- Local governments stand to lose as much as \$470 million dollars per year in cable modem franchise fee revenue, which should have been paid as a result of the cable operator's use of the public's property.
- These are funds that could be used by local governments to make their communities safer and more livable, from homeland security and general police and fire protection, to high quality education services to allow citizens to make full use of the rapid changes in technology.
- The Ninth Circuit and FCC rulings attempt to deprive local government of their right to require cable operators to pay adequately for their use of public property for private gain.

Libby Beaty, Executive Director of NATOA and a member of the Alliance, stated that, "Local governments have been upfront about their willingness to fight these decisions. We are prepared to make our case, and are hopeful that we will finally have a court hear our arguments and make a decision based on the merits of those arguments, not on the luck of the draw or the well-meaning but misguided interpretation of the Communications Act by a federal agency. As is pointed out in our brief, 'in construing the definition of "cable service," the Commission's task is to determine not what cable service ought to mean, but what it does mean' under the statute."

Tom Cochran, Executive Director of the United States Conference of Mayors said, "I am hopeful that the Supreme Court will take into consideration the direct economic impact of cities losing the 5% franchise fee. Many cities used this fee for maintaining and repairing the local rights of way where cable companies have their infrastructure. Now we are forced to subsidize this cable operation with resources that we don't have."

Don Borut, Executive Director of the National League of Cities, concurred saying, "This is a case of paramount importance to local government. Hundreds of millions of dollars in local cable franchise fees that local governments use to meet public safety, housing, infrastructure, and educational needs of citizens throughout the country are at stake. The Court must engage in a full judicial review of the regulatory framework for cable modem service that is consistent with the Communications Act."

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