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INTEROFFICE MEMORANDUM

TO: David C. Olson, Director
Office of Cable Communications and Franchise Management

FROM: Ben Walters BW
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SUBJECT: Qwest Broadband Services – Proposed Cable Franchise
Anti-"redlining" Provision

After staff concluded negotiations with Qwest Broadband Services on a franchise to provide cable services within the City of Portland, on July 30, 2007, the Mt. Hood Cable Regulatory Commission held a hearing seeking public comments on the proposed franchise.[1] At the hearing, Comcast's vice-president for government affairs offered testimony broadly reflecting statements made in a letter sent by Comcast to the Commission on July 27, 2007. Comcast's letter asserted that "the proposed franchise provides no mechanism for the Commission and the City to ensure non-discriminatory deployment of services throughout the City or to residences within the City limits which truly reflects the socio-economic diversity of the City's neighborhoods." Letter from Sanford Inouye to Norm Thomas, page 3 (July 27, 2007).[2]

Section 4.3 of the draft franchise addresses potential "redlining" by prohibiting the franchisee from "bas[ing] decisions about construction or maintenance of its Cable System or Facilities based upon the income level of residents of the local area in which such group resides." Section 4.3 also forbids the franchisee from denying cable services "to any group of subscribers

[1] Qwest's service territory may eventually extend into portions of Gresham and other east Multnomah County cities. For the present time, however, Qwest has represented that its construction efforts and service marketing will be limited to within Portland.

[2] The cable industry, including Comcast, has argued for years that the telecommunication companies will engage in redlining unless subjected to rigorous anti-redlining guidelines. *See,* for example, Federal Communications Commission, *Application for the Consent to Assignment of Licenses of Adelphia Communications Corp. and Time Warner Cable Inc.*, MB Docket No. 05-192, Petition to Deny of National Hispanic Media Coalition, p. 4, fn.6 (July 21, 2005) www.mediaaccess.org/NHMCFinal.pdf (site accessed August 6, 2007).

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or potential residential subscribers based upon the income level of residents of the local area in which such group resides." Section 19.4 requires the franchisee to "establish similar rates and charges for all Subscribers receiving similar services" and prohibits discrimination based upon income or geographic location, as well as other factors.

The language contained in Sec. 4.3 of the draft franchise tracks the terms of 47 USC § 541(a)(3). This federal statute requires local governments to assure that cable franchisees will not deny access to cable service "to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides."

The nature of Congress' intent relating to this provision has been the subject of some debate. Initially, the Federal Communications Commission ("FCC") interpreted this section as meaning that "the franchising authority shall require that all areas of the franchised area be wired." Notice of Proposed Rulemaking, 49 Fed Reg at 48,769 (emphasis added). It later backed away from this position:

> [T]he intent of [section 541(a)(3)] was to prevent the exclusion of cable service based on income and that this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area.

Report and Order, 50 Fed Reg at 18,647. The District of Columbia Circuit upheld this interpretation on the grounds that:

> [t]he statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal service.

ACLU v. FCC, 823 F.2d 1554, 1580 (D.C. Cir. 1987)).

The FCC recently adhered to this conclusion, ruling that it would be "unlawful for [local franchising authorities] to refuse to grant a competitive franchise on the basis of unreasonable build-out mandates." Federal Communications Commission, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, ¶¶ 88-90, 72 FR 13189-01, 13204, 2007 WL 835168 (Wednesday, March 21, 2007). On the other hand, the FCC Order expressly disclaimed any intention to displace a "LFAs' authority to appropriately enforce [Section 541 (a)(3)] and to ensure that their constituents are protected against discrimination." *Id.* at ¶ 91.[3]

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[3] The FCC's ruling has been challenged in federal court. However, according to lawyers for some of the challengers, the 6th Circuit has declined to stay the effectiveness of the

The language of 47 USC § 541(a)(3) has been incorporated into numerous cable franchises by jurisdictions throughout the country. For example, the City of Davis, California has incorporated this construct into its city code, which states:

> A cable Operator shall not deny access or charge different rates to any group of Subscribers or potential Subscribers because of the income of the residents of the local area in which such group resides.[4]

The City of SeaTac, Washington, similarly requires that "[a]ccess to cable service shall not be denied to any group of potential subscribers solely because of the income level of the area in which they reside."[5] Similar language is found in Comcast's franchise for cable services in Spokane, Washington.[6]

A recent review of state legislation determined that at least eight states (including New Jersey, Florida and California) have enacted legislation restricting cable redlining "in language virtually identical to that of federal law."[7] California law provides that:

> A cable operator or video service provider that has been granted a state franchise . . . may not discriminate against or deny access to service to any group of potential residential subscribers because of the income of the residents in the local area in which the group resides.

California Public Utility Code §5890(a).[8] California statutes further provided that when issuing franchises, cities must "assure that access to cable service is not denied to any group of potential

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Commission's order.
http://www.millervaneaton.com/content.agent?page_name=HT:%20%20FCC%20Franchising%20Order%202006-12-20 (site accessed August 6, 2007).

[4] www.city.davis.ca.us/pcs/telecomm/pdfs/telecomm-finalord.pdf (site accessed July 30, 2007).

[5] www.ci.seatac.wa.us/mcode/ordinances/90-1028.htm (site accessed July 30, 2007).

[6] *Cable Communications Franchise Agreement between Spokane, Washington and Comcast Cable Communications, Inc.*, §15.B, p. 6 (December 8, 2004).
www.watoa.org/cable_franchise_spokane.doc (site accessed August 6, 2007).

[7] Minnesota House of Representatives Research Department, New State Cable TV Franchising Laws, p. 6 (November 2006) www.house.leg.state.mn.us/hrd/pubs/cablelaw.pdf (site accessed August 6, 2007).

[8] This language was enacted as part of The Digital Infrastructure and Video Competition Act in late 2006. www.cpuc.ca.gov/PUBLISHED/Graphics/65227.PDF (site accessed August 6, 2007).

residential cable subscribers because of the income of the residents of the local area in which the group resides." California Government Code §53066.2(a).

In conclusion, the language incorporated into the proposed cable franchise with Qwest is consistent with the approach taken throughout the country to address potential "redlining" of cable services. While Comcast has pointed to California's approach as being significantly different, the draft franchise language is essentially consistent with California's statutory terms. At this juncture, to push for a more rigorous approach such as Comcast is advocating could create potential legal conflict with the FCC's recently adopted administrative restrictions upon local government authority to address universal service. I recommend rejecting Comcast's arguments on this issue.

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c. Julie Omelchuck, Cable Office

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