

Cable Television Advisory Board Meeting Agenda
R E G U L A R M E E T I N G
November 12, 2003 Wednesday, 7:00 P.M.
Stanley E. Remelmeyer Telecommunications Center Meeting Room
3350 Civic Center Drive Torrance

Board Information

The Board advises and makes recommendations to the Cable TV Foundation and City Council in the area of policies and procedures in public access interests, scheduling public access programming, facilities and equipment for the community and public access channels, and disbursement of Foundation funds.

Agenda Review

Complete Board agendas are available for review at the Office of Cable Communications. The agenda cover and minutes are available on the City of Torrance home page – www.tornet.com

Meetings

All Board meetings are open to the public. Those who wish to speak on any matter on the agenda are asked to provide their name and address for the record.

Direct other questions or concerns to the City Council (310-618-2880), City Manager (310-618-5880), and Cable Television Administrator (310-618-5762). In Compliance with the Americans with Disabilities Act, if you need special assistance to participate in this meeting, please contact the Office of Cable Communications (310-618-5762). Notification 48 hours prior to the meeting will enable the City to make reasonable arrangements to ensure accessibility to this meeting. [28CFR35. 102-35. 104 ADA Title II].

A G E N D A

- 1. CALL MEETING TO ORDER**
- 2. ROLL CALL**
- 3. FLAG SALUTE**
- 4. MOTION TO ACCEPT AND FILE REPORT ON POSTING OF AGENDA**
- 5. APPROVAL OF MINUTES**
 - A. October 8, 2003
- 6. SCHEDULED BUSINESS**
 - A. Community Matters – NONE
 - B. Committee Reports
 - 1) Producer Incentive
 - 2) 12th Annual TCTV Video Programming Awards
 - 3) Open Mic Night
 - C. Report of Community Television Center – October, 2003
 - D. Report of Legislative and Cable Related Activities – October, 2003
 - E. Old Business - NONE
 - F. New Business - NONE
 - G. Addendum Matters
- 7. ORAL COMMUNICATIONS**
- 8. ADJOURNMENT**

Prepared by:

Michael D. Smith
Cable Television Administrator

Roll Call: Carlson Craft Haussmann Korman Mikulicich, Jr. Tsao Perkins

MEETINGS

The Cable Television Advisory Board meets the second Wednesday of each month at 7:00 p.m.

AGENDA REVIEW

Complete agendas are available for review at the Office of Cable Communications. The Agenda covers are available on the Boards Homepage. www.tornet.com

City of Torrance
OFFICE OF CABLE COMMUNICATIONS
3350 Civic Center Drive
Torrance, California 90503

AFFIDAVIT OF AGENDA POSTING

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES) as
CITY OF TORRANCE)

I, _____, in compliance with government Code 54954. 2(a), DO HEREBY AFFIRM that a copy of the **CABLE TELEVISION ADVISORY BOARD AGENDA** for the meeting of Wednesday, November 12, 2003, at 7:00 p.m., was conspicuously posted on the City Clerk's bulletin board, 3031 Torrance Boulevard, Torrance, California at the time and date indicated below.

POSTED:

Time:_____ Date:_____

By:_____

(Signature)

October 8, 2003

MINUTES OF A REGULAR MEETING OF THE TORRANCE CABLE TELEVISION ADVISORY BOARD.

1. CALL MEETING TO ORDER:

The Torrance Cable Television Advisory Board convened in a regular meeting on Wednesday, October 8, 2003, at 7:10 p.m. in the Torrance Community Television Conference Room located in the Stanley E. Remelmeyer Telecommunications Center.

2. ROLL CALL:

Present: Commissioners: Craft, Haussmann, Korman, Mikulicich Jr. (arrived 8:34 p.m.), Tsao, and Chair Perkins

Also Present: Cindy Hibbard, Clerk Typist
Mark J. Doddy, TCTV Coordinator
Michael D. Smith, Cable Television Administrator

Excused: Commissioner Carlson

3. FLAG SALUTE:

Commissioner Haussmann led the salute to the flag.

4. MOTION TO ACCEPT AND FILE REPORT ON POSTING OF AGENDA:

MOTION: *Commissioner Korman moved to accept and file the report of the City Clerk on posting of the agenda for this meeting. This motion, seconded by Commissioner Tsao, carried with an aye vote.*

5. APPROVAL OF MINUTES:

A) October 8, 2003

MOTION: *Commissioner Craft moved to approve the minutes for the October 8, 2003, meeting. This motion seconded by Commissioner Korman, carried with an aye vote.*

6. SCHEDULED BUSINESS:

A) Community Matters – NONE

B) Committee Reports

(1) Producer Incentive

The Committee conducted the October 3rd, P.C. Editing Techniques 201 Get-together. This session was lead by professional photographer and editor, Brian Anderson along with TCTV Staff. Ten guests attended and were very pleased with the program.

The next meeting is November 7th and will feature Holiday P.S.A. production conducted by staff and volunteers. This is the second year we're offering this open studio call to the community.

MOTION: *Commissioner Craft moved to accept the Producer Incentive Committee Report for October 2003. This motion, seconded by Commissioner Korman, motion carried with aye vote.*

(2) Video Programming Awards

The Committee members have made calls to Torrance businesses as a follow-up the letters mailed soliciting donations. So far, Exxon Mobil has mailed a check for \$1,000 making them a Platinum Sponsor. Commissioner Tsao committed to submitting a donation of \$200 through his company, New Century Properties & Investments, Inc.

Judging have been identified and letters will go out first week of November requesting them to participate.

Kendra Kostelecky and Chris Berg have confirmed as hosts. Eligible producers will be contacted personally by Coordinator Doddy to encourage their participation.

MOTION: *Commissioner Haussmann moved to accept the Video Programming Awards Committee Report for October 2003. This motion, seconded by Commissioner Tsao, motion carried with aye vote.*

(3) Open Mic Night

The Open Mic Night participants have all been contacted personally. All candidates agreed to participate with the exception of one.

Commissioners have confirmed their hosting duties and all of the production requirements have been settled.

The Open Mic Night program will be cablecast October 22 through November 3rd at 7:00 p.m. on TCTV channel 28.

MOTION: *Commissioner Craft moved to accept the Open Mic Night Committee Report for October 2003. This motion, seconded by Commissioner Tsao, motion carried with aye vote.*

C) Report of Community Television Center - October, 2003

Coordinator Doddy discussed statistics for the month. He highlighted 12 new programs were completed compared to 14 in 2002 and 4 in 2001.

He also noted studio usage was up over last month to 72%. He mentioned Field Equipment Reservations were higher than last month at 23%.

Two people attended the monthly New Users Orientation Session. Two were certified through the Its Your TV Brochure. Seven Users graduated from the Pre Production Planning workshop; Five new Producers graduated Field and Post-Production workshop; and eight producers enrolled in the Studio workshop.

Brief discussion followed.

MOTION: *Commissioner Craft moved to accept the Torrance Community Television Center Report for October 2003. This motion, seconded by Commissioner Korman, motion carried with aye vote.*

D) Report of Legislative and Cable Related Activities – October, 2003

Administrator Smith gave a brief summary of the report. A three-judge panel of the Court of Appeals for the Ninth Circuit, found that the F.C.C. erred in an earlier ruling that effectively absolved cable companies of any obligation to make their lines accessible to competitors. The decision may force cable companies to share their high-speed Internet, or broadband, networks with competing Internet service providers. Federal Communications Commission chairman Michael Powell plans to appeal the Appeals Court ruling.

The NBA announced Monday that Time Warner, Cox Communications and Cablevision had signed multiyear agreements to carry the league's cable channel, NBA TV. Commissioner David Stern said in a conference call that negotiations with other cable companies were continuing.

Time Warner Cable announced Monday that it is increasing download speeds for its Road Runner customers from 2 megabits per second to 3 mbps starting Oct. 1.

Brief discussion followed.

MOTION: *Commissioner Tsao moved to accept the Legislative and Cable Related Activities Report for October 2003. This motion, seconded by Commissioner Craft, carried with an aye vote.*

E) Old Business – NONE

F) New Business - NONE

7. ADDENDUM MATTERS – NONE

8. ORAL COMMUNICATIONS:

- a) Secretary Hibbard reminded everyone that Sunday is Day Light Savings Time and that all should turn their clocks back one-hour.
- b) Secretary Hibbard wished everyone a happy and safe Halloween.
- c) Coordinator Doddy said he looked forward to the 12th Annual TCTV Video Awards Ceremony. There have been a lot of programs completed by a variety of new and old producers.
- d) Administrator Smith informed the Board that the City Manager has assigned certain functions of Community Relations to this division. DeAnn Baxter a recent graduate of Pennsylvania State has been hired as the new Community Relations Associate. Her role is to assist in speech writing, creating and editing press releases, coordinating citywide Internet content, and many other duties.
- e) Commissioner Korman invited everyone to attend the Torrance Symphony Season Opening Concert, October 18th at the Armstrong Theatre.
- f) Commissioner Korman reported that she was impressed and pleased with the recent Field and Post-production Workshop she just completed. She felt staff was very well prepared and provided clear training.
- g) Commissioner Korman mentioned she liked the intimacy of meeting in the Conference Room instead of the Studio.
- h) Commissioner Tsao wished everyone a happy and safe Halloween.
- i) Commissioner Tsao also invited everyone to attend the Torrance Symphony Season Opening Concert, October 18th at the Armstrong Theatre.

8. ADJOURNMENT:

Chair Perkins adjourned the meeting to reconvene on Wednesday, December 10, 2003 at 7:00 p.m.

Respectfully submitted,

Michael D. Smith
Cable Television Administrator

Members of the Cable Television
Advisory Board
3350 Civic Center Drive
Torrance, California

Members of the Advisory Board:

COMMITTEE MEMBERS: *Craft, Tsao, and Chair Mikulicich Jr.*

SUBJECT: Producer Incentive Committee Report – October 2003

The November 7, 2003, meeting featured videotaping of Holiday P.S.A.'s. Staff and Volunteers made themselves available to provide production assistance for members of the community to tape greetings to share during December and January.

The December 5, 2003 meeting will feature Advanced Sound Techniques II taught by professional audio producer and engineer, Don Fefie. This meeting is an encore performance from last year with additional customization based on the needs expressed at the previous meeting.

Respectfully Submitted,

Nikola Mikulicich Jr.
Chairperson
Producer Incentive Committee

NOTED:

Michael D. Smith
Cable Television Administrator

6B1

Roll Call: Carlson Craft Haussmann Korman Mikulicich, Jr. Tsao Perkins

CABLE TELEVISION ADVISORY BOARD
 PRODUCER INCENTIVE COMMITTEE
M O N T H L Y P R O D U C E R G E T - T O G E T H E R S
 2 0 0 3 - 0 4

The Cable Television Advisory Board Producer Incentive Committee invites you to attend and participate in the **"MONTHLY PRODUCER GET-TOGETHERS."** The GET-TOGETHERS are held the first Friday of every month with the exception of January and July.

Here's your chance to meet, greet, and exchange ideas and skills with your fellow Producers.

Call TCTV and reserve your spot today.

DATE	TOPIC	SPEAKER/FACILITATOR	LOCATION	COORDINATOR
August 01	B.B.Q. Potluck	TCTV Coordinator and Staff	TCTV Studio	Commissioners Nick Mikulicich, Jr.
September 05	P.C. Editing Techniques 101	Brian Anderson	TCTV Studio	Commissioner Chet Craft
October 03	P.C. Editing Techniques 201	Brian Anderson	TCTV Studio	Commissioner Nick Mikulicich, Jr.
November 07	Holiday P.S.A.'s	TCTV Coordinator and Staff	TCTV Studio	Commissioner Nick Mikulicich, Jr.
December 05	Advanced Sound Techniques II	Don Fefie	TCTV Studio	Commissioner Nick Mikulicich, Jr.
January 30	12 th Annual TCTV Video Programming Awards Ceremony		Cultural Arts Center Meeting Room	Staff
February 06	12 th Annual Video Awards Winners Review	TCTV Coordinator and Staff	TCTV Classroom	Commissioner Richard Tsao
March 05	Copyright Law	Irving Keschner, Esq.	TCTV Studio	Commissioner Richard Tsao
April 02	P.S.A. in a Day	TCTV Coordinator and Staff	TCTV Studio	Commissioner Chet Craft
May 07	Lighting Techniques	Mic Ocoboc and Milan Janicin	TCTV Classroom	Commissioner Chet Craft
June 04	Post Production Techniques	TCTV Coordinator and Staff	TCTV Edit Suites	Commissioner Richard Tsao
July 02	Storytelling Tips and Strategies Or Music Licensing Rights	TBA	TCTV Classroom	Commissioner Chet Craft

Members of the Cable Television
Advisory Board
3350 Civic Center Drive
Torrance, California

Members of the Advisory Board:

COMMITTEE MEMBERS: *Korman, Tsao, and Chair Craft.*

SUBJECT: 12th Annual TCTV Video Programming Awards Committee Report – October 2003

The Committee and staff have been addressing the following items:

- Judging letters were mailed November 7th
- Judging will be held December 9th and 10th
- Follow-up telephone calls to all potential sponsors continued
- Staff has contacted all eligible producers to invite them to participate in this years competition
- Production has been scheduled to interview certain producers
- Post-production has been started for the packages that will be included in the program
- Invitations are being drafted
- Call For Entry deadline is November 29th

Respectfully Submitted,



CHET CRAFT
Chairperson
Producer Incentive Committee

NOTED:

Michael D. Smith
Cable Television Administrator

6B2

Members of the Cable Television
Advisory Board
3350 Civic Center Drive
Torrance, California

Members of the Advisory Board:

COMMITTEE MEMBERS: *Craft, Haussmann, and Chair Mikulicich Jr.*

SUBJECT: Open Mic Night Committee Report – October 2003

Staff has contacted all participants personally to make certain they are fully briefed on the production and playback process. The Committee will serve as host during the entire taping. Staff will make certain the statements are cablecast as planned.

The Committee and staff coordinated the following items:

TAPING SCHEDULE

FRIDAY, OCTOBER 17, 2003

TIME	SCRIPT	CANDIDATE	HOST	COMMISSIONER
9:00 a.m.	10/09	GREG JOHNSON	Chet Craft	
10:00 a.m.			Chet Craft	
11:00 a.m.	10/12		Nikola Mikulicich Jr.	Georgia Perkins
12 Noon		CLAUDE TODOROFF	Nikola Mikulicich Jr.	Georgia Perkins

SATURDAY, OCTOBER 18, 2003

TIME	SCRIPT	CANDIDATE	HOST	COMMISSIONER
9:00 a.m.		G. RICK MARSHALL	Dale Korman	
10:00 a.m.		TERRY L. RAGINS	Dale Korman	
11:00 a.m.	10/12		Richard Tsao	
12 Noon	Email	DAVID W. CORNWELL	Richard Tsao	

PLAYBACK SCHEDULE

CABLECAST OCTOBER 22nd THROUGH NOVEMBER 3RD at 7:00 PM

T O R R A N C E U N I F I E D S C H O O L D I S T R I C T

CANDIDATE
CLAUDE TODOROFF
TERRY L. RAGINS
HEIDI ANN ASHCRAFT
G. RICK MARSHALL
DAVID W. CORNWELL

EL CAMINO COLLEGE DISTRICT

CANDIDATE
GREG JOHNSON
MARY E. COMBS

Respectfully Submitted,

NIKOLA MIKULICICH JR.
Chairperson
Open Mic Night Committee

NOTED:

Michael D. Smith
Cable Television Administrator

Roll Call: Carlson Craft Hausmann Korman Mikulicich, Jr. Tsao Perkins

Honorable Chairperson and Members
of the Cable Television Advisory Board
3350 Civic Center Drive
Torrance, California

Members of the Board:

SUBJECT: Recommendation to accept and file report of the Community Television Activities and Facility Usage Report for October 2003.

Expenditure: \$0.00

RECOMMENDATION

The Cable Television Administrator recommends that the Board accept and file the Community Television Activities and Facility Usage Report for October 2003.

BACKGROUND/ANALYSIS

The report is separated into three groups: Facilities, Programming, and Miscellaneous Activities.

Facility Usage

Field Equipment Reservations for October 2003 had a usage rate of 58%, compared to 45% in 2002 compared to 62% in 2001.

Edit Room Reservations for October 2003 had a usage rate of 45%, compared to 30% in 2002, compared to 37% in 2001.

Studio Reservations for October 2003 had a usage rate of 34%, compared to 71% in 2002, compared to 48% in 2001.

Electronic Field Productions for October 2003 had 3 scheduled shoot, compared to 4 in 2002, and compared to 3 in 2001.

Programming

- A total of 9 original TCTV programs were completed during October 2003, compared to 16 in 2002, compared to 6 in 2001.
- Torrance residents bicycled a total of 21 programs in October 2003, compared to 14 in 2002, compared to 14 in 2001.

Miscellaneous Activities

- Dub Room "B" had 29 hours of usage during October 2003, compared to 60 in 2002, compared to 23 in 2001.
- 4 "It's Your TV" brochures were mailed, 3 new Users were certified through the brochure.
- 4 potential Users attended, 3 were certified through the New Users Orientation Session.
- 8 Users enrolled in the Studio production workshop.
- Gave tour to Cub Scout Pack 1064, Den 4. 10 children and 6 adults attended.

Respectfully Submitted,

Mark J. Doddy
TCTV Coordinator

NOTED:

Michael D. Smith
Cable Television Administrator

Roll Call: Carlson Craft Haussmann Korman Mikulicich, Jr. Tsao Perkins

Honorable Chairperson and Members
of the Cable Television Advisory Board
3350 Civic Center Drive
Torrance, California

Members of the Board:

**SUBJECT: Recommendation to accept and file report of the Legislative and Cable
Related Activities Report – August**

Expenditure: \$0.00

Time Warner Name Change Set for Oct. 16

AOL Time Warner Inc. set a date for its planned name change, saying in a prepared statement that it will officially become Time Warner Inc. Oct. 16.

At the same time, the media giant will change its New York Stock Exchange ticker symbol to TWX.

AOL Time Warner announced that it would make the change last month, but it gave no exact date.

In the statement, the company said its corporate Web site would also change Oct. 16 to timewarner.com. *Multichannel News, 10/13/2003*

L.A. Suburb to Sue Time Warner

The city of Santa Clarita, Calif., a Los Angeles suburb, plans to sue one of its two local cable operators, Time Warner Cable, to resolve a dispute over franchise-fee payments.

The community claimed that Time Warner owes \$220,000 in back franchise fees, plus interest and penalties. The parties have been discussing the issue, but regulators apparently ran out of patience. The City Council unanimously directed city staff Oct. 16 to pursue legal action.

The community is home to approximately 26,000 Comcast Corp. subscribers and 18,000 Time Warner homes. As part of the city's preparation for refranchising negotiations, Santa Clarita officials audited franchise-fee payments of the two operators dating back to 1997.

That date is significant: In 1997, the U.S. Court of Appeals for the Fifth Circuit ruled in favor of cities in the so-called fee-on-fee dispute between cities and cable companies. In *City of Dallas vs. the Federal Communications Commission*, the court said fees that operators pass through to consumers to pay their cable-franchise fees must be counted as part of systems' gross revenue. That has the effect of raising the franchise-fee payments to cities.

Cities outside of the jurisdiction of Fifth Circuit states needed to cite the decision and make it clear that franchisees were to pay fees that are computed including the pass-through.

The Santa Clarita audit indicated that Comcast had no deficiencies in its franchise-fee payments, deputy city attorney Brad Wohlenberg said. But Time Warner has not paid fee-on-fee increases to the city, per the Dallas decision, he added.

Time Warner spokesman Deane Leavenworth said the company and city officials continue to meet regularly. "We expect to come to a resolution," he added.

Wohlenberg said attorneys have not yet decided whether the lawsuit will be filed in state or federal court. "We will file. We just want a proper complaint in the right venue," he added.

The city has extended the franchise agreement with both companies to allow more time to complete refranchise negotiations. Instead of expiring Nov. 7, it will run until April 4. *Multichannel News*, 10/24/2003

TIME WARNER CABLE SHIFTS GEARS

Time Warner Cable's digital penetration is closing in on 40%, or about 4.2 million subscribers, so it's no wonder the pace of digital additions slowed dramatically in the third quarter. The company appears to be shifting its strategic focus to selling premium products such as DVR-enhanced set-top boxes and SVOD subscriptions.

TWC added a total of 131,000 digital subscribers in the third quarter, a number that was below analysts' forecasts and down from 229,000 in the same period last year. Meanwhile, the pace of DVR additions has quickened — TWC deployed 100,000 DVR set-tops in the third quarter, bringing its total DVR base to a 250,000.

Basic subscriber and high-speed data numbers were somewhat weaker than expected. TWC added 190,000 cable modem subs; the company does not expect much of a pickup from that number in the fourth quarter. The MSO added 10,000 basic customers in the quarter, below the 30,000 additions some analysts expected.

Time Warner, which dropped the AOL from its name earlier this month, posted a 9% increase in overall operating income, to \$2.3 billion, on \$10.3 billion in revenue.

The slowdown in digital growth at Time Warner Cable hurt shares of Scientific-Atlanta, which last week reported lower-than-expected shipments of Explorer 8000 DVR set-tops. *Cable World*, Oct 27, 2003

Calif. Ops Deal with Wildfires

Losses are mounting for California operators and their customers, who are being hit hard by Southern California's wildfires.

By Tuesday, Time Warner Cable San Diego had lost between 1,000-1,500 customer homes in the Scripps Ranch/Tierrasanta neighborhoods.

Earlier this week, the company's Miramar office was evacuated and, as the fire continued to burn, the company warned customers that nonemergency calls and installs would be rescheduled due to short staffing. Time Warner employees there and in Los Angeles County were urged by the company to take care of their own evacuated families, said Deane Leavenworth in the Chatsworth office.

In L.A. County on Tuesday, a fire raged two miles from the Time Warner Cable regional headquarters and two miles from the headend for the division, he added.

Charter Communications Inc. lost its Rimforest office, burned to the ground in the San Bernardino mountains, but employees were reported safe Tuesday, although one worker may have lost her home.

Comcast Corp. was already repairing a 70-home node burned by another fire in Claremont in L.A. County. Comcast has designated a point person for homeless residents to phone so that they close cable accounts and set up forwarding addresses, a spokeswoman said. *Multichannel News*, 10/28/2003

FCC to Seek Cable-Modem Rehearing

The Federal Communications Commission plans to seek rehearing from the U.S. Court of Appeals for the Ninth Circuit regarding an October ruling that tossed out the agency's classification of cable-modem service.

The FCC had the option of filing an appeal with the U.S. Supreme Court. But commissioner Kathleen Abernathy told reporters Wednesday that the agency would seek rehearing, also called en banc review. "We are going to go en banc," she said.

A three-judge panel of the Ninth Circuit held that it was bound by a decision in 2000 that cable-modem service was both an information service and a telecommunication service. As a result, the panel, without analyzing the substance of the FCC's order, vacated the FCC's March 2002 ruling that cable-modem service was exclusively an information service.

If the Ninth Circuit's ruling were to stand, cable-modem service could become subject to common-carrier regulation -- something the industry wants to avoid. The FCC, however, has forbearance authority to exempt cable-modem service from traditional telecommunications regulation.

Abernathy explained that the Ninth Circuit's decision cast a cloud over the FCC's larger broadband agenda. The agency tentatively decided that a phone company that offered retail digital-subscriber-line service was not offering a telecommunications service.

"I think it puts things on hold," she added. "What this means is that we are going to, I think, have to be at a standstill for a little bit while we see what happens in the court, because I think it would be not wise to move forward while we've got this litigation strategy."

If the Ninth Circuit grants en banc review of the cable-modem case, the FCC could renew the DSL-classification proceeding, Abernathy said.

"That's an option. If they decide to grant rehearing en banc, we could go forward," she added.

Abernathy, chairman Michael Powell and commissioner Kevin Martin comprise the FCC's Republican majority.

On other issues, Abernathy said she was still debating whether mandating cable carriage of multiple digital-broadcast signals violates cable's First Amendment rights. She said the issue could be voted on at the agency's Dec. 17 meeting.

And she said she supported Powell's decision to involve the agency in the Internet-protocol-telephony issue. A public forum is tentatively scheduled for early December. *Multichannel News*, 11/5/2003

Ergen: DBS Could Hit 70M Subs

New York -- Direct-broadcast satellite could potentially grow to an industry of 60 million-70 million subscribers with the rollout of digital-video recorders, HDTV programming and broadband Internet access, EchoStar Communications Corp. CEO Charlie Ergen predicted Thursday.

"I think as we move forward, our industry has a tremendous opportunity to grow well beyond where people think we're going to be," Ergen said during the Satellite Broadcasting & Communications Association's Sky FORUM conference here, which also featured sessions with Cablevision Systems Corp. chairman Chuck Dolan and DirecTV Inc. chief Eddie Hartenstein.

Although the EchoStar-DirecTV merger attempt failed, Ergen said, the companies could still work together on projects such as fighting piracy. He suggested that DirecTV and EchoStar combined could add an additional 1 million subscribers next year with a coordinated crackdown on piracy.

EchoStar, which planned to roll out its "Super Dish" HDTV service over the summer, is now shooting for a rollout in mid-November, Ergen said. "The [66-centimeter] dishes are coming in now, but we don't have enough to do an effective rollout," he added.

Dolan, who pitched his new Voom DBS service, wouldn't say how much the company would spend on it.

When asked what he thought of negative investor reaction to the Voom spinoff, Dolan said, "I think the consternation is understandable." But he added that the spinoff will divide the risk, as Cablevision shareholders will get "two pieces of paper -- one with moderate risk and the other with greater risk, and he can choose between the two."

Hartenstein said sales of TiVo Inc. DVR-equipped DirecTV boxes has boosted average revenue in those homes by \$15, while churn in TiVo homes has dropped by 0.5% monthly. He added that DirecTV could reconfigure its Spaceway satellites to offer more HDTV programming. *Multichannel News*, 10/30/2003

D.C. Court Upholds FCC Tuner Mandate

Washington -- In a victory for broadcasters, a federal court here ruled Tuesday that the Federal Communications Commission is allowed to require TV-set manufacturers to include off-air digital tuners in nearly all new TV sets.

In a unanimous decision, a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit held that the FCC's tuner mandate was consistent with the agency's authority under the All Channel Receiver Act.

"The court's decision today upholding the FCC's DTV-tuner requirement is a milestone toward completing the DTV transition. Consumers buying TV sets will know that the receivers they buy will continue to receive all broadcast signals, even as broadcasting changes to digital," National Association of Broadcasters president Edward Fritts said in a prepared statement.

The FCC adopted the tuner mandate in August 2002 over the cost-concern objections raised by the Consumer Electronics Association. The CEA appealed the ruling to the D.C. Circuit.

The FCC adopted a phased-in approach. By July 2004, one-half of all sets with screens 36 inches or larger must have digital-TV tuners. Tuners must be included in all sets 13 inches and larger by July 1, 2007.

The tuner mandate also extends to VCRs and DVD recorders and players, also by July 1, 2007.
Multichannel News, 10/28/2003

With Cable TV at M.I.T., Who Needs Napster?

Two students at the Massachusetts Institute of Technology have developed a system for sharing music within their campus community that they say can avoid the copyright battles that have pitted the music industry against many customers.

The students, Keith Winstein and Josh Mandel, drew the idea for their campus-wide network from a blend of libraries and from radio. Their effort, the Libraries Access to Music Project, which is backed by M.I.T. and financed by research money from the Microsoft Corporation, will provide music from some 3,500 CD's through a novel source: the university's cable television network.

The students say the system, which they plan to officially announce today, falls within the time-honored licensing and royalty system under which the music industry allows broadcasters and others to play recordings for a public audience. Major music industry groups are reserving comment, while some legal experts say the M.I.T. system mainly demonstrates how unwieldy copyright laws have become. A novel approach to serving up music on demand from one of the nation's leading technical institutions is only fitting, admirers of the project say. The music industry's woes started on college campuses, where fast Internet connections and a population of music lovers with time on their hands sparked a file-sharing revolution.

"It's kind of brilliant," said Mike Godwin, the senior technology counsel at Public Knowledge, a policy group in Washington that focuses on intellectual property issues. If the legal theories hold up, he said, "they've sidestepped the stonewall that the music companies have tried to put up between campus users and music sharing."

Hal Abelson, a professor of computer science and engineering at M.I.T., called the system an imaginative approach that reflected the problem-solving sensibility of engineering at the university. "Everybody has gotten so wedged into entrenched positions that listening to music has to have something to do with file sharing," he said. The students' project shows "it doesn't have to be that way at all."

Mr. Winstein, a graduate student in electrical engineering and computer science, described the result as "a new kind of library." He said he hoped it would be a legal alternative to file trading that infringes copyrights. "We certainly hope," he said, "that by having access to all this music immediately, on demand, any time you want, students would be less likely to break the law."

While listening to music through a television might seem odd, it is crucial to the M.I.T. plan. The quirk in the law that makes the system legal, Mr. Winstein said, has much to do with the difference between digital and analog technology. The advent of the digital age, with the possibility of perfect copies spread around the world with the click of a mouse, has spurred the entertainment industry to push for stronger restrictions on the distribution of digital works, and to be reluctant to license their recording catalogues to permit the distribution of music over the Internet.

So the M.I.T. system, using the analog campus cable system, simply bypasses the Internet and digital distribution, and takes advantage of the relatively less-restrictive licensing that the industry makes available to radio stations and others for the analog transmission.

The university, like many educational institutions, already has blanket licenses for the seemingly old-fashioned analog transmission of music from the organizations that represent the performance rights, including the American Society of Composers, Authors and Publishers or Ascap, the Broadcast Music Inc. or B.M.I., and Sesac, formerly the Society of European Stage Authors and Composers.

If that back-to-the-future solution seems overly complicated, blame copyright law and not M.I.T., said Jonathan Zittrain, who teaches Internet law at Harvard and is a director of the university's Berkman Center for Internet and Society. The most significant thing about the M.I.T. plan, he said, is just how complicated it has to be to fit within the odd boundaries of copyright law.

"It's almost an act of performance art," Mr. Zittrain said. Mr. Winstein, he said, has "arrayed the gerbils under the hood so it appears to meet the statutory requirement" - and has shown how badly the system of copyright needs sensible revamping.

Representatives of the recording industry, including the Recording Industry Association of America, Ascap and B.M.I., either declined to comment or did not return calls seeking comment.

Although the M.I.T. music could still be recorded by students and shared on the Internet, Professor Abelson said that the situation would be no different from recording songs from conventional FM broadcasts. The system provides music quality that listeners say is not quite as good as a CD on a home stereo but is better than FM radio.

M.I.T. students, faculty and staff can choose from 16 channels of music and can schedule 80-minute blocks of time to control a channel. The high-tech D.J. can select, rewind or fast-forward the songs via an Internet-based control panel. Mr. Winstein and Mr. Mandel created the collection of CD's after polling students.

Mr. Winstein said that the equipment cost about \$10,000, and the music, which was bought through a company that provides music on hard drives for the radio industry, for about \$25,000. Mr. Winstein said they were making the software available to other colleges.

Students have been using a test version for months, and Mr. Winstein said the system was still evolving. The prototype, for example, shows the name of the person who is programming whatever 80-minute block of music is playing. Mr. Winstein said he once received an e-mail message from a fellow student complimenting him on his choice of music (Antonin Dvorak's Symphony No. 8) and telling him "I'd like to get to know you better." She signed the note, "Sex depraved freshman."

Mr. Winstein, who has a girlfriend, politely declined the offer, and said he realized that he might need to add a feature that would let users control the system anonymously. *New York Times October 27, 2003*

Cable firm or telecom? Law's language could cost towns millions

Local municipalities and several watchdog organizations nationwide are lobbying to patch what they claim is a billion-dollar loophole in the proposed Internet Tax Nondiscrimination Act of 2003.

The act is an amendment to the Internet Tax Freedom Act, which bans taxes on Internet services.

Municipalities and watchdog groups fear the language of the new act would free cable and telecommunication companies from paying franchise fees for the use of the public rights-of-way to install cable or fiber optic systems.

AT&T, Sprint, SBC, MCI, EarthLink and Comcast are some of the major companies in the area that provide phone, cable and Internet services.

They are subject to regulation because they run wires through public property to offer their services. Wireless Internet service providers, not as prevalent in the area, are not subject to such regulation.

If companies were free of regulation, a cable provider would no longer have to pay 5 percent of its gross revenue to municipalities.

Even as recently as this month, the courts are battling out how they define telecommunications and Internet or information services - and thereby determining what the full impact of the act may be.

If a company is classified as a telecommunications service, it is subject to regulation and, therefore, fees. If considered an Internet or information service, it is pardoned of such regulation under the Internet Tax Freedom Act.

Cities receive thousands of dollars in fees from cable companies each year. The city of Batavia, for example, received \$207,000 in franchise fees from Comcast this year. That amount is representative of other cities of its population with similar numbers of cable subscribers.

Wheaton and Elmhurst, which have populations in the 40,000s and 50,000s, and have about 10,000 cable subscribers, receive about \$330,000 in franchise fees annually from cable companies. And larger communities, such as Aurora and Naperville, receive approximately \$1 million in franchise fees in a given year.

While municipal officials fear this loss of revenue, others say the intention of the legislation is clear - to simply ban taxes on Internet services.

Representatives from the Washington, D.C.-based National Cable and Telecommunications Association, the lobbying arm for the cable industry, say the concerns are unfounded.

"The Internet Tax Nondiscrimination Act would not have an effect on the cable television franchise fees that are paid by cable operators," association spokesman Brian Dietz said.

But with the big day approaching, questions linger. The U.S. House of Representatives already has passed the bill, and senators are poised to review their version before Nov. 1, when the first act will expire.

"There's a deep concern that the way (the bill) is worded, any revenue related to the Internet in any way shape or form, won't be available to local governments," said Stu Chapman, a Hoffman Estates telecommunications consultant for cities and counties across the country.

Plugged into profits

Worries have escalated since the Washington, D.C.-based Multi-State Tax Commission released a report Sept. 24 stating that if the current language of the proposed legislation had been in effect for 2002, state and local governments would have lost \$22 billion in revenue, a large part of which would be franchise fees.

Those fees are used in a variety of ways. In Batavia, money from Comcast helps fund entities like the city's public access channels. The funds also act as a general revenue source for the city, Batavia Access Television Director Dan Shanahan said.

"To me, Senate Bill 150 reflects the lobbying strength of big telecommunication businesses and how it wants to squelch the functions of municipalities and community television," he said. In Batavia's case, 3 percent of that goes to Batavia Access Television, which receives about \$125,000 a year.

BATV belongs to the Alliance for Community Media, a group against the proposed legislation. It represents the interests of community, religious and charitable groups and individuals who use public, educational and government access cable television channels.

Hoffman Estates cable television coordinator Bruce Anderson also sees the bill as jeopardizing the rights of cities.

"What municipalities are worried about is the broadness of scope of (the bill)," he said. "It would not only extend the moratorium on Internet taxes permanently, but it's also so broad as to threaten the rights of municipalities to collect fees for use of rights-of-way."

Gary White, media manager for the city of Wheaton, thinks the language on the bill may not be intentional, which is what U.S. House Speaker Dennis Hastert's press secretary, Brad Hahn, confirms.

The result, however, might be devastating.

"It's not just local; this is across the nation," said White, also a member of the National Association of Telecommunications Officers and Advisors, a group also warning of the legislation's outcome. "We just don't want to get the short end of the stick."

Watchdog organizations like White's group want to see congressmen add a couple of paragraphs to the legislation to clarify the definition of Internet services, to assure local municipalities they will get franchise fees, Shanahan said. But no action has been taken.

What's in a word?

"There's a lot of misinformation about what this legislation does," Hahn said.

One reason for the confusion is cable and telecommunication conglomerates now offer Internet services.

Is a company that offers both phone service and 300 digital channels a telecom or a cable company?

Questions like these predate the legislation in question and go back to a twisted legal battle attempting to define a telecommunications company, cable service and an information service.

The debate began a few years ago with two court cases in Oregon and Virginia.

At issue was whether a city or county had the authority to require cable companies to allow other unaffiliated Internet service providers access to the cable network.

In both cases, the court defined the companies as telecommunications services but differed on who had the authority to control the network.

Because the court rulings were unclear, the Federal Communications Commission issued its own ruling in March 2002.

"They attempted to settle the issue," Chapman said. "They came out with a declaratory ruling saying both of your courts are wrong. It's not a telecommunications service and it's not a cable service - it's an information service, not subject to anyone's regulation."

Therefore, any wired Internet provider that offers voice, cable or Internet services would not be subject to regulation.

The commission saw Internet service as being more content-oriented, regardless of how the service was delivered, he said.

But even then, the debate wasn't over.

The 9th District U.S. Circuit Court of Appeals undermined the FCC by making a decision earlier this month.

With regard to content, Internet service providers are an information service. With regard to delivery, wired providers should be classified as telecommunications companies - and subject to regulation.

"The matter will probably be appealed to the Supreme Court," Chapman said.

Despite all this murkiness, Hahn said the mission of the proposed legislation is clear.

"The purpose here is to make sure the moratoria on Internet-specific services is extended," he said. "The last thing that we want is for people to wake up and find they can be taxed on their e-mail."

Hastert supports banning Internet taxes, Hahn said. The congressman, though, did not sponsor the bill. A total of 25 Democrats and 110 Republicans co-sponsored the House bill. So far, 11 senators have signed on to sponsor the bill.

If organizations continue to rally against the legislation and congressmen also find a problem with the language, they could talk about altering the bill in committee, Hahn said.

"If this is a widespread enough concern, this will be discussed," he said.

Language: FCC, court rulings added to confusion. *Chicago Daily Herald* 10/26/03

TV service being delivered via telephone lines

Some people mute the television when the phone rings, but Robert Kruger just keeps his eyes on the screen. More specifically, he looks at the blue-green window that appears in the upper-right corner and displays the caller's name and phone number.

"I don't even have to get up from my chair," said Kruger, a retiree who lives in Phoenix. "I can see who's calling, and if it's not someone I want to talk to, I'll ignore the phone."

While caller ID is a common feature on phones, Kruger is one of an estimated 125,000 people in the United States who can see the same information on the tube because he receives his television service over the phone line, using a high-speed digital subscriber line, or DSL.

Cable companies have long been encroaching on the phone carriers' turf, and more than 2 million American consumers now receive voice service through cable providers. Now phone companies have started to turn the tables by offering video content.

Fighting back

"Any telephone company that doesn't consider the cable providers a real threat is missing the boat," said Brent Groome, the chief executive for customer operations at Horry Telephone Cooperative in Conway, S.C. Television is a way to counter that threat. Horry began offering video service in 2001 and now has almost 1,000 customers.

While the wires are identical to the copper lines found in any home, the signals traveling on them are not. Horry is using VDSL, or very high bit-rate DSL, to deliver video content in digital form. VDSL is a first cousin to the more common asymmetric DSL, or ADSL, which is what most carriers use for consumer broadband Internet service.

Both types of lines are capable of carrying TV signals, but VDSL has a larger data capacity: as much as 50 megabits per second. Most American households receiving video over the phone lines have VDSL connections.

Customers receiving video over the phone line can sign up for broadband Internet access as well. Qwest Communications, which has offered television over VDSL in Phoenix and Denver since 1997, is offering all three services starting at \$99.97 a month.

Transmitting TV programming over VDSL is similar to using digital cable. Both technologies feed a stream of digital data through a fiber-optic line to a centralized neighborhood system, where it branches off to individual houses over coaxial cable or standard phone wires.

The difference, according to Bruce Swail, president of Next Level Communications, a Motorola subsidiary that makes VDSL gear, is that cable networks are constantly broadcasting every channel to every home, while VDSL creates a dedicated connection, carrying only the channels individual users have selected.

Since the entire spectrum of programming arrives at their TV, cable subscribers switch channels within their set-top box. VDSL users, however, change channels by sending a request upstream through the network until it reaches the central switching system, which then begins to transmit only the selected TV station.

Specialized ads

Michelle Abraham, senior analyst with the market research firm In-Stat/MDR, said this difference could allow VDSL carriers to insert advertising selectively, something that cable operators will not be able to match.

"A restaurant might want to advertise only to homes within a five-mile radius, which is possible with this," she said, although none of the phone carriers using the technology have exploited this capability yet.

With voice and video streams arriving together, it's an easy feat to merge the information and provide caller ID functions on the screen.

Next Level says that more than 120 companies are using its systems, primarily smaller carriers like Horry, often in rural areas. Abraham estimated that some 125,000 homes in the nation receive TV service over DSL today, a figure that she said could grow to more than 600,000 connections by 2005.
New York Times Oct. 23, 2003

GAO: A La Carte Not a Panacea

A long-awaited General Accounting Office report on the cable industry concluded that retail cable rates have risen due to a number of factors and that the sale of programming on an a la carte basis would not be a uniformly positive development.

The most damaging news in the 94-page study, released Friday, was the finding that cable rates are 15% lower in markets where two wireline cable companies compete. However, other government reports and consumer advocates have documented that trend before.

The GAO said cable rates have gone up in other markets due to rising programming costs and capital investments to provide consumers with digital services, including high-speed data.

On the key a la carte issue, the GAO said requiring cable operators to break up programming tiers would have mixed results, causing some cable networks to lose ad revenue and some subscribers to see their bills rise.

"An a la carte approach would facilitate more subscriber choice but require additional technology and customer service. Additionally, cable networks could lose advertising revenue. As a result, some subscribers' bills might decline but others might increase," the GAO said.

The GAO took about one year to prepare the report, which was based on interviews with most of the top cable companies and other industry participants.

The report's mixed outlook on the a la carte issue could help cable to combat a la carte mandates brewing on Capitol Hill. Sen. John McCain (R-Ariz.), an a la carte supporter, had ordered the GAO to investigate the feasibility of breaking up cable-programming tiers to expand consumer choice and lower bills.

"[The] GAO's analysis confirms that cable-price increases reflect significant investments by cable operators in infrastructure and programming, which have improved the quality and consumer value of cable television," National Cable & Telecommunications Association president and CEO Robert Sachs said in a prepared statement.

"The report also shows -- significantly, we believe -- that proposals to reregulate cable-program services would not benefit consumers," he added. "Rather, forcing cable operators to package programming a la carte would produce a net loss for many cable customers, who would end up paying higher prices for fewer channels. *Multichannel News, 10/24/2003*

Statement of FCC Chairman Michael Powell On 9th Circuit Cable Modem Decision

I am disappointed that the Court felt that it was bound by its prior decision and did not address the merits of the Commission's classification.

Unfortunately, as noted by Judge O'Scannlain, the ruling "effectively stops a vitally important policy debate in its tracks," producing "a strange result" which will throw a monkey wrench into the FCC's efforts to develop a vitally important national broadband policy.

I will direct the FCC's General Counsel to appeal.

Letters PEG: It's More Than Menus

To the Editor:

I was disgusted to read the uninformed comments by Comcast general counsel Terry Bienstock to the National Association of Telecommunications Officers and Advisers regarding his crusade to take back PEG access channels (Multichannel News, 9/29/03).

Mr. Bienstock described PEG channels as "school menus running continuously." He also asserted that Comcast spends \$100 million each year to support 2,400 channels across the country. Finally, he claimed that it would be more cost-effective for Comcast to help communities stream some of that video over the Internet.

Mr. Bienstock is entitled to his opinions, but, as an attorney, he ought to at least get his facts straight.

PEG access stations across the U.S. and, increasingly, around the world, produce more original local programming than NBC, CBS, ABC and Fox networks combined. School lunch menus are not counted in this statistic, but it should be said that school lunch menus are very important to some communities!

The assertion that Comcast spends millions on PEG is not quite right. Comcast charges its customers for PEG support and uses that additional revenue to pay cities and towns. Municipalities are entitled to these fees because cable operators use the public rights-of-way to install their privately owned cable or fiber optic systems. Like a Starbucks in a library lobby or a magazine stand in a courthouse, a private business should expect to pay rent for public space. Only the cable-industry lobby has succeeded in getting Congress to let it pass this cost of doing business directly on to the public, its customers.

Mr. Bienstock's suggestion of streaming PEG channels over the Internet is a thinly-veiled position designed to take away all public benefits now derived from local cable-television franchise agreements, since the industry has, for the time being, succeed in convincing [Federal Communications Commission chairman Michael] Powell that cable-modem service is not a cable service. If PEG is streamed, yet another benefit will be taken from local cable TV customers.

Before Mr. Bienstock beats up on PEG channels, he needs to talk to the Lions, Kiwanis and Rotary Clubs; the League of Women Voters, the NAACP, AARP, the Urban League, public schools, local Chambers of Commerce, religious institutions, colleges and universities, community theaters, labor unions, veterans groups, second language communities, the disabled, politicians, and political organizations and local governments; NASA, the U.S. Department of Education, the Organization of American States, members of Congress, the National Guard, the U.S. Army, the U.S. Air Force, the Federal Emergency Management Administration, the U.S. Department of Housing and Urban Development and various arts organizations such as Annenberg/CPB and Classic Arts Showcase. These are some of the active users who rely on PEG channels to get their programming out in a media landscape of ever-increasing sameness under media consolidation.

Finally, Mr. Bienstock is apparently tone deaf to the fact that his very subscribers choose cable TV over a dish in part so they can keep an eye on their local tax dollars at work by watching local and

state government meetings. PEG channels give cable operators a significant competitive advantage over DBS for a very small price.

Paul D. Berg , Executive Director, Newton Communications Access Center Inc., NewTV and Member, National Board of Directors, Alliance for Community Media *Multichannel News*, 10/6/2003

Access Ruling Settles Little

Impact Unclear from FCC's Legal Setback on Cable Data Carriage

Washington — The cable bar has a new motto: Losing never felt so good.

For the second time in three years, a three-judge panel of the U.S. Court of Appeals for the 9th Circuit has said cable-modem service, the cable industry's cash cow, is legally in part a telecommunications service.

Theoretically, that means cable operators could be required to open their lines to competing Internet-service providers (ISPs) — a mandate cable has been trying to avoid since 1998, when America Online Inc. started an open-access crusade in response to AT&T Corp.'s acquisition of Tele-Communications Inc.

ISPS EXULT

The court ruling seemed like a cable defeat — and ISPs treated it that way.

"Cable-modem users deserve choice in high-speed Internet providers. Today's ruling is a big step towards finally affording them that choice," said David Baker, vice president of law and public policy for EarthLink Inc.

But the reality is that the legal process in court and at the Federal Communications Commission could drag on for so many years that ISPs like EarthLink have virtually no near-term hope of plugging into cable systems on a no-questions-asked basis.

That's why the cable legal establishment wasn't crying buckets over the 9th Circuit ruling. Cable lawyers knew that unless Congress were to intervene, litigation could include one or more trips to the U.S. Supreme Court covering a period of several years.

Even if the high court were to embrace the telecommunications-service classification, the FCC would have the power to drain that ruling of any meaning by using statutory forbearance authority to deny open access to cable Internet facilities.

ISPs can win every court case but still end up losers.

After the courts have issued the last word on classification, an appeal of the FCC's use of its forbearance authority could trigger yet another multiyear litigation cycle that leads all the way to the Supreme Court.

"Few things are as messed up as telecom and Internet classifications," said Scott Cleland, a telecom and media analyst with Precursor (formerly Precursor Group).

Immediately after last Monday's decision, segments of the major media propounded the idea that cable must now carry unaffiliated ISPs at just and reasonable rates, and that the ruling spelled unavoidable disaster for FCC chairman Michael Powell's minimalist approach to regulating cable-modem service.

Sachs: it's unresolved

But National Cable & Telecommunications Association president Robert Sachs asserted that no ISP could legally demand access.

He pledged the NCTA's support behind Powell's decision to appeal the ruling.

"Contrary to reports on the case which you may have already seen, we believe the issues raised in Monday's decision are far from resolved," Sachs told reporters last Wednesday at NCTA headquarters. "We think the regulatory status of cable-modem service will not be settled for some time."

Cox Communications Inc. spokeswoman Laura Oberhelman said the No. 4 cable company hadn't ordered technicians to retrofit its system to accommodate a wave of ISP access demands as a result of the 9th Circuit's ruling.

"It's business as usual for us," she said.

The FCC has 45 days to file an appeal for a full review from all of the San Francisco-based 9th Circuit's judges — a request which would automatically stay the panel's ruling.

Alternatively, it can appeal to the Supreme Court.

Blair Levin, a cable analyst with Legg Mason, called the ruling "not a positive for cable" but ruled out intrusive federal broadband regulation of cable.

"In short, even if the ruling stands, we expect the FCC to play the forbearance card to avoid putting significant obligations on cable," Levin said in a note to clients.

Although the FCC under Powell would likely use forbearance authority, an agency under Democratic FCC member Michael Copps clearly would not.

In a speech last Thursday, Copps noted that the FCC has tentatively concluded to use its forbearance authority to circumvent a court ruling that cable-modem service was partly a telecommunications service.

"How's that for chutzpah?" said Copps, who used the remainder of the speech to support FCC adoption of network neutrality safeguards on cable companies that offer high-speed data services.

Copps's outlook appeared to raise the stakes for cable on the outcome of next November's presidential election. A Democratic-controlled FCC could embrace the telecommunications service classification and refuse to forbear.

Cable and FCC sources both observed that the FCC's initial decision to adopt a hands-off policy toward cable-modem service came under Democratic FCC chairman William Kennard.

"You never can tell, but I believe that that past [deregulatory] policy would support a forbearance policy should it come to that, and we are a long way from that," said Daniel Brenner, NCTA's senior vice president of law and regulatory policy.

March '02 standard

The genesis of last Monday's ruling in *Brand X Internet Services vs. FCC* was the agency's March 2002 declaratory ruling that cable-modem service was neither a cable service nor a telecommunications service, but purely an interstate information service as those three terms are defined in federal communications law. The FCC barely regulates information services, including ISPs.

The FCC ruling snubbed a June 2000 decision by a 9th Circuit panel in an appeal AT&T brought against Portland, Ore., which had refused to transfer TCI's cable franchise unless AT&T Broadband agreed to accommodate multiple ISPs.

The panel held that cable-modem service was not a cable service, but both an information service and a telecommunications service. It voided Portland's open-access ordinance, saying the city did not have the authority to require a cable-service provider to offer a telecommunications service as a condition of a franchise transfer.

By lottery, the 9th Circuit was assigned to review the FCC's March 2002 decision in an appeal brought by seven parties, including Brand X, a small ISP based in Santa Monica, Calif.

Without devoting a single word to the FCC's analysis in classifying cable-modem service as exclusively an information service, the 9th Circuit panel vacated the agency's order because it clashed with the Portland decision. Under 9th Circuit rules, the Brand X panel was bound to honor the holding in Portland .

If the appeal had been heard by another court, the FCC's analysis would not have been ignored. Neither the 9th Circuit, sitting en banc, nor the Supreme Court would be bound by the Portland holding.

Circuit Judge Diarmuid F. O'Scannlain said although he felt compelled to affirm Portland , he was troubled that the tradition of obeying precedent gave such short shrift to an expert agency like the FCC. Quoting Justice Antonin Scalia, O'Scannlain called the outcome "positively bizarre."

"Regardless of one's view of the wisdom of the FCC's declaratory ruling, it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us or Congress decides to act," O'Scannlain said in his opinion.

NCTA outside counsel Howard Symons said the Brand X case was "quite vulnerable on appeal because really the merits of the FCC's decision have never been considered by any judges."

The most identifiable loser in the open-access debate continues to be local franchise authorities.

Both the FCC and the 9th Circuit agree that cable-modem service is not a cable service.

As result, the FCC has barred cities from collecting franchise fees on cable-modem revenue. Lawsuits filed by Portland other localities to impose open-access requirements have cost all local governments hundreds of millions of dollars in revenues they were collecting prior to the litigation.

"The net effect of this decision is that it deprives local governments of their constitutional right to charge cable monopolies, which should not be exempt from paying fair rent for the use of public property," Donald Borut, executive director of the National League of Cities, said in a statement.

ISPs on Cable

Where third-party Internet service providers operate on three cable operators' platforms.

MSO	ISP	MARKET
Comcast	America Online	Nationwide
	EarthLink	Seattle, Boston
	Net1Plus	Massachusetts
Cox	EarthLink	El Dorado, Ark.
	America Online	El Dorado, Ark.
Time Warner Cable	America Online	Nationwide
	EarthLink	Nationwide
	Athenet	Green Bay, Wisc.; Milwaukee
	Big Net	Akron and Dayton, Ohio
	Internet Junction	Tampa, Fla.
	Internet Nebraska	Lincoln, Neb.
	LocalNet	Upstate New York
	WebOne/PlanetKC	Kansas City
	Stic.Net	Austin, Houston, San Antonio, Texas
	West Central Ohio	Akron, Cincinnati, Columbus, Dayton

Source: MSOs

Multichannel News, 10/13/2003

Respectfully Submitted,

Michael D. Smith
Cable Television Administrator

Roll Call: Carlson Craft Haussmann Korman Mikulicich, Jr. Tsao Perkins