

MEMORANDUM

To: Kurt Wolf

From: Brian Grogan

Date: June 17, 2019

Re: FCC's Proposed Rulemaking on Cable Franchise Fees and Mixed-Use Networks

This fall the FCC is poised to adopt a new order that many anticipate will have an adverse impact on local government cable franchising. This memo will provide a summary of the FCC's Second Further Notice of Proposed Rulemaking,¹ and the anticipated new order the FCC is likely to release ("FCC Proposed Order"). The FCC Proposed Order has a strong potential to decrease the City's regulatory control over cable operators and potentially reduce the level of funding available to the City under the cable franchise.

Background

The Federal Communications Act of 1934, as amended by the Cable Communications Policy Act of 1984 ("Cable Act"), permits state and local government entities to award a franchise to a cable operator to authorize the construction and operation of a cable system in the public right-of-way. The Cable Act provides that a City may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise.

In awarding a cable franchise, a city may require assurance that the cable operator will provide adequate public, educational, and government access channel capacity ("PEG Channels"), facilities, including PEG financial support. A cable operator may also be required under a cable franchise to pay a "franchise fee" to a city of up to five percent (5%) of the cable operator's gross revenues derived from the operation of the cable system to provide cable services. This franchise fee does not apply to telephone services or broadband services even though the cable operator generally uses the same system to provide such non-cable services.

For 35 years cities and cable operators have negotiated cable franchises under the framework set forth in the Cable Act and there has been general agreement among all parties regarding the basic elements of a cable franchise – subject to unique local needs and interests.

The Proposed New FCC Rules

Specifically, the FCC Proposed Order contemplates new rules that may:

¹ Released on September 25, 2018 ([Second Further Notice of Proposed Rulemaking](#)).

1. Allow all cable-related, in-kind contributions, other than PEG capital costs and build out requirements, to be treated as “franchise fees” subject to the 5% franchise fee cap.
 - a. This could allow a cable operator to unilaterally deduct from its cable franchise fee payments made to the City, the value of franchise requirements such as PEG channel capacity, connections to programming origination points, and complimentary cable services to schools and other public buildings. These requirements are all currently in cable franchises and cable operators have provided these commitments without cost to cities for several decades.
 - b. This could further allow the value of such in-kind contributions to be set at the “fair market value” of the contributions, although has FCC requested comment on whether it instead should be the cable operators’ costs.
2. Prohibit cities from regulating the non-cable services offered over cable systems, other than I-Nets, and prohibit cities from regulating the facilities and equipment used in the provision of these non-cable services.
 - a. The proposed new rules may be interpreted to allow certain cable operators to construct and install facilities and equipment for broadband, cellular or other communications purposes in your City’s rights-of-way without any local regulation or compensation. This would raise a host of safety considerations and potential disparities in the application of regulations among competing right-of-way users.

Some experts have estimated that local franchise fees could be reduced by as much as 50% if the FCC moves forward with its Proposed Order as contemplated.

Recently, several national municipal groups such as the US Conference of Mayors, National League of Cities, NATOA and others met with various FCC bureaus and the newest FCC Commissioner, Geoffrey Starks. The meetings were an excellent opportunity to share with federal policymakers the local perspective and concerns on a variety of matters pending before the FCC, such as how the FCC's Proposed Order would significantly impact revenue for all U.S. cities.

The timing for FCC action is hard to predict, but many foresee action in the fall of 2019.

Impact on Renewal Proceeding with Charter

Many large cable operators in the United States have expressed confidence that the FCC will take action substantially consistent with the FCC’s tentative conclusions. This means that cable operators believe the FCC will permit the operators to offset many franchise obligations against the five percent (5%) franchise fee. This may be true for even existing cable franchises that have provisions that have been in place for 10 or more years. This also means that long overdue franchise renewals may well be even more difficult to complete as the entire cable industry assesses the impact of the anticipated new FCC Proposed Order.

What Happens When the FCC Issues its Proposed Order?

If the FCC issues the Proposed Order later this fall, it is quite likely that a number of cities will challenge the Order in federal court. Such a challenge is an uphill battle as courts generally defer to the regulatory expertise of the agency absent an overwhelming record to the contrary. However, such a challenge is likely to also allege that the FCC is exceeding its authority in issuing the Order. No matter what the legal challenge, such a court case is often time consuming and could result in a "cloud" hanging over the FCC Order until a federal court makes a final determination.

It is unlikely that a court would issue a "stay" for the Order, meaning that cable operators would have the opportunity to implement the FCC's findings, but they would do so at their risk pending the outcome of any legal challenge. If the Order is overturned in court, operators may have to undo whatever changes they implemented in their local franchises. As a result, it is likely that some cable operators may take a "wait and see" approach until all of judicial challenges have been completed. This procedural delay may well further cloud the renewal process as it places cities in the difficult position of either solidifying commitments in the franchise today, on the assumption that the FCC's Proposed Order will be upheld, or waiting for a final decision from the courts on the FCC's Order.

Finally, it is worth noting that at some point it is highly likely that Congress will be forced to reassess all of its communications laws and create new a new communications statute. There have been many advances in a number of communications industries and the laws that are now 35+ years old simply are no longer keeping pace with modern technology. In the past, when Congress has worked on new legislation it has often caused a standstill in completing contract negotiations as all parties are waiting to see what the new law may provide and are reluctant to enter into contracts based on the existing statute.

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