



Public Right-of-Way Access: A Changing Regulatory Field

By Nancy L. Werner, NATOA General Counsel

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OVERVIEW

FCC Cable Franchising Proceeding (FNPRM)

- In-Kind Contributions As Franchise Fees
- Mixed-Use Networks

What's Next?

What Can We Do?

BACKGROUND

Montgomery County v. FCC, 863 F.3d 485 (6th Cir. 2017)

- Challenge to a 2007 FCC Order extending to incumbent cable operators rules established to apply to competitive entrants
- In-kind Payments: Vacated FCC's finding that cable-related exactions are "franchise fees"
- "Mixed Use Rule": Non-Cable Services on the Cable System
 - Vacated FCC's finding that LFAs cannot use Title VI authority to regulate non-telecommunications (i.e., internet) services provided by incumbent cable operators
- FNPRM is the FCC's do-over after the 6th Circuit loss



IN-KIND CONTRIBUTIONS

Proposal:

- Would allow a cable operator to credit against franchise fees all “in-kind” contributions required under cable franchises
- “In-kind” includes include “any nonmonetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise agreement, including but not limited to free or discounted cable services and the use of cable facilities or equipment”
- “In-kind” does not include the cost of build-out requirements or PEG capital costs



IN-KIND CONTRIBUTIONS

Proposal:

- Suggests “in-kind” contributions to be valued at “fair market value”
- Proposing to apply the rules to state-level franchising actions and regulations (unlike prior order)



IN-KIND CONTRIBUTIONS

Examples of potential “in-kind” contributions:

- Free service to schools, libraries, and other government buildings
- Value of channel capacity dedicated to public, educational, and government (PEG) programming
- Electronic Programming Guide
- Discounts on Internet service as part of the cable franchise



IN-KIND CONTRIBUTIONS

Impacts:

- Reduce or eliminate franchise fees
- Reduce cable franchise provisions and consumer protections
- Additional costs to support PEG and other franchise provisions subject to the offset
- Uncertainty and litigation over calculation of offset

MIXED-USE RULE

Proposal (is ambiguous):

- “..prohibit [local franchising authorities] from using their video franchising authority to regulate non-cable services offered over cable systems by incumbent cable operators”
- “...prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers”
- Under either statement, excludes I-Nets from this restriction

MIXED-USE RULE

Impacts:

- Would preempt regulation of any facilities and equipment used in the provision of any services other than cable services
- Would effectively adopt cable operators' argument that a cable franchise authorizes installation of any equipment in RoW, regardless of use for cable service
- Impedes local authority to ensure consistent regulations apply to providers of similar services
 - As MMA said: It's a "race to the bottom"



WHAT'S NEXT?

No Date Certain for FCC Action

Other Potential Avenues to Watch

- OTT Classification
- FCC's Wireless/Wireline Infrastructure Dockets (17-79; 17-84)
- Courts



WHAT CAN WE DO?

Advocate at the FCC

- Large number of Massachusetts filers; still time for *ex partes*

Educate Elected Officials and the Public

- Federal, state and local officials, general public, must understand the impacts of the proposed rules



CONTACT

Nancy L. Werner
NATOa General Counsel
(703) 519-8035
nwerner@natoa.org