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Newest FCC Preemption: Cable Franchising Fees

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OVERVIEW

FCC Cable Franchising Proceeding Third Report and Order

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

What's Next?

What Can We Do?

BACKGROUND

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

Effective September 26, 2019

Reinterprets 35-year old Cable Act

- Definition of “franchise fee”
- Scope of LFA authority over cable operators’ non-cable services

Prospective Application

- Not retroactive, but will be applied to existing franchise agreements
- Applies to local and state issued franchises

IN-KIND CONTRIBUTIONS

Franchise Fees:

- Redefined to include most non-monetary cable franchise obligations (so-called “in-kind” contributions):

“[I]nclude any non-monetary contributions related to the provision of cable service by a cable operator as a condition or requirement of a local franchise, including but not limited to:

- (1) Costs attributable to the provision of free or discounted cable service to public buildings, including buildings leased by or under control of the franchising authority;
 - (2) Costs in support of public, educational, or governmental access facilities, with the exception of capital costs; and
 - (3) Costs attributable to the construction of institutional networks.”
- (47 CFR 76.42)

IN-KIND CONTRIBUTIONS

Franchise Fees:

- Excludes customer service and buildout
- PEG transport maintenance and use is a “franchise fee”; construction is an excluded “capital costs”
- “In-kind” contributions to be valued at “fair market value”
- Two Positives:
 - Broader definition of “capital costs” than prior orders; now includes all equipment in connection with PEG
 - Franchise fees spent on PEG capital costs are not included in franchise fee cap

IN-KIND CONTRIBUTIONS

PEG Channel Capacity:

- FCC found the record insufficient to determine whether PEG channel capacity is a franchise fee or a capital cost
- Decision expected by September 2020
- LFAs “may only require ‘adequate’ PEG access channel capacity, facilities, or financial support”
 - Adequate = satisfactory or sufficient

IN-KIND CONTRIBUTIONS

Franchise Modification Process:

- “Encourage” parties to negotiate franchise modifications
- Reasonable time = 120 days
- Disagreement between FCC and industry about what this means

MIXED-USE RULE AND PREEMPTION

Mixed Use Rule:

- LFAs cannot regulate cable operators' non-cable services, facilities or equipment
- LFAs cannot impose fees on cable operators' non-cable services (telecom, broadband, small cells, etc.)

Preemption:

- Broadly preempts “any state or local requirement, whether or not imposed by a franchising authority, that would impose obligations on franchised cable operators beyond what Title VI allows.”

WHAT'S NEXT?

Legal Action is Pending

- Case pending in 6th Circuit Court of Appeals
- Motion for Stay also pending – oral argument March 11, 2020

Potential Legislative Fix

- Markey/Eshoo bills to amend the definition of “franchise fee” in the Cable Act (S. 3218 and H.R. 5659)

WHAT'S NEXT?

Franchise Modifications

- Order is in effect; anticipate action from cable operators in early 2020
- “In-kind contributions” are not prohibited; LFAs get to decide whether to waive these contributions or accept a franchise fee reduction (if necessary)
- Check your franchise
 - Change of law/preemption clauses
 - Definition of “gross revenues”
 - Neither the Cable Act nor the Third Report and Order address deductions from gross revenues, so make sure you are at the 5% cap in the Act before offsetting

WHAT'S NEXT?

Franchise Modifications – Franchise Fee Impacts:

- (Franchise Fees + PEG Grants (cash) + Fair market value of in-kind contributions, including I-Nets)

MINUS

- (PEG Capital Costs [including franchise fees used to pay for PEG Capital Costs] + Costs of complying with build-out or customer service requirements, if included in above)

MUST BE LESS THAN

- (5% of Gross Revenues from Cable Service)

WHAT'S NEXT?

Franchise Modifications –Franchise Fee Impacts:

- Does the Third Report and Order allow for the deduction of the contribution?
 - Industry mentioned ROW-related issues like relocation, but FCC did not expressly address it
 - PEG Transport: maintenance and operation costs are “fees” but construction is not
 - Customer Service and Buildout are not “fees”
- How did the cable operator calculate FMV?
 - Is documentation or information required to verify the calculation?
 - Is there a more appropriate FMV (*e.g.*, which rate is applicable for free service to public buildings)?
 - How did they calculate the 5% cap?

WHAT'S NEXT?

Franchise Modifications – Other Considerations:

- Should modifications be limited to franchise fees and/or “in-kind” considerations?
 - The original franchise negotiation likely involved tradeoffs; If the LFA gave up something in exchange for an “in-kind” obligation, should that something be back on the table?
- Preserve rights should the Third Report and Order be vacated on appeal or other change of law
- Renewals
 - How do you address “in-kind” franchise provisions and offsets?
 - How do you preserve rights?

WHAT CAN WE DO?

Markey/Eshoo Bills

- Ask your delegation to support the bills

PEG Channel Capacity Issue

- This issue is up for resolution in 2020
- Prepare to file in the docket and litigate should the issue move forward



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