by Angelina Panettieri

What Do Local Leaders Need To Know About The FCC Cable Order?

On Aug. 1, 2019, the Federal Communications Commission (FCC) voted 3-2 to approve a report and order that will make dramatic changes to cable franchises managed by state and local governments. The order, that went into effect 30 days after it is published in the Federal Register, has two major components that will impact local governments. The first addresses "in-kind" components of franchise agreements and their relationship to franchise fees, and the second addresses regulation of "mixed use" networks by state and local franchising authorities.

The National League of Cities (NLC) opposed the order, as did a large number of local governments; Public Education and Government (PEG) channel operators; and 49 members of Congress. Despite these protests, the FCC moved forward with the order. It is likely to reduce franchise revenues at the state and local level and wholly preempt state and local authority over the growing broadband and wireless services being provided by cable companies. The FCC claimed this order was done to expand broadband access but provided no requirement or assurance from cable companies that reduced franchise obligations would reduce costs for consumers or increase broadband deployment in underserved areas.

In-Kind Changes

Franchise fees, charged by state or local governments on cable providers, were set at a limit of up to five percent of cable revenues by the Cable Act of 1984. Many jurisdictions also negotiate additional non-cash provisions when creating franchise agreements with cable companies to operate in their state or locality. For example, many Americans have broadband access via cable because of build-out obligations negotiated in franchise agreements years ago that ensured cable infrastructure was built in their neighborhoods.

When the order goes into effect, cable providers will be able to deduct the "fair market value" of any in-kind franchise obligations from their cash franchise payments. This includes any obligation other than build-out requirements, customer service requirements, PEG capital costs or channel placement value. This also includes the value of service or infrastructure to government buildings or schools, discounted service for seniors or low-income households or institutional networks (I-Nets).

Mixed-Use Changes

The order contains a "mixed-use" provision that preempts state and local authority over non-cable service and infrastructure on cable networks. An increasing number of residents get broadband service from their community's incumbent cable provider. Federal data indicates that a rising number of residents are "cutting the cord," and dropping their cable television subscriptions in favor of broadband-only subscriptions and over-the-top streaming video. In addition, some cable providers are augmenting existing wired cable service with wireless service built from a base of their cable infrastructure.

The order ensures that state and local governments are unable to regulate these broadband services and infrastructure and may not create franchise agreements for those services in the future. This exempts a major and growing portion of the communications market from any state or local oversight and from being obligated to contribute to the community in the way that cable companies traditionally have.

What Is Next for Local Governments?

Fifteen U.S. Senators sent a letter opposing the FCC vote shortly before the meeting. Sixty-three members of Congress from both chambers have sent formal correspondence over the past year opposing FCC preemption of cable franchising. While the FCC has finalized its regulations, cities, towns and villages should contact their members of Congress to inform them about the impact this preemption will have on their constituents and urge them to use their congressional authority to overturn the FCC's actions.

Communities should gain a firm understanding of their current franchise agreements, whether state or local, and what in-kind provisions are currently included. Twenty-three states currently conduct cable franchises at the state, rather than local level, and any payments localities receive from those franchise agreements will be impacted. While cable companies are not obligated to alter their existing franchise payments, they may begin deducting the value of those in-kind franchise obligations as soon as 30 days after the FCC order is published in the federal register. Communities should work to understand what the budgetary loss will be if those franchise payments are reduced.

Cities, towns, and villages remain very concerned that the FCC will further preempt local governments in the name of providing concessions to industry. Commissioners Carr and O'Reilly clearly indicated during the August meeting that they would have liked to go further on the franchising order. It appears these preemption efforts will not slow down.

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