

FCC CHANGES TO CABLE FRANCHISING: WHAT YOU NEED TO KNOW AND WHAT YOU CAN DO

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OVERVIEW -- 4 ELEMENTS OF ORDER

- Fair Market Value (FMV) of In-Kind Franchise Obligations is subject to 5% Cable franchise fee cap.
- Parties are to negotiate franchise modifications to account for FMV of In-Kind benefits within a reasonable period of time (120 days) and any franchise term that is inconsistent with the order is subject to preemption.
- LFAs may not regulate the provision of any non-cable services, including cable broadband, provided over the cable system of a cable operator, with the exception of channel capacity on institutional networks.
- “[T]he rules and decisions adopted in this Order apply to state-level franchising actions and regulations.” Order at ¶ 113



TIMELINE

Event	Date
FCC Released Order	August 2, 2019
Order Published in Federal Register	August 27, 2019 (TODAY)
Deadline to file for Circuit Lottery	September 6, 2019
Effective Date	September 26, 2019
Deadline to file Appeal	October 28 , 2019

We will also need to file a stay request with the FCC. Though it will be unlikely to succeed, it avoids the argument that a court should decline a stay request because we didn't ask the FCC first.



BACKGROUND – HOW WE GOT HERE

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

Local government challenged a 2007 FCC Order extending to incumbent cable operators rules established to apply to competitive entrants. 6th Circuit decided:

- In-kind Payments: Vacated FCC’s finding that all cable-related exactions are “franchise fees”
- “Mixed Use Rule”: Vacated FCC’s finding that LFAs cannot use Title VI authority to regulate non-telecommunications (i.e., Internet) services provided by incumbent cable operators because of I-nets.

3rd Report and Order is the FCC’s do-over after the 6th Circuit loss



IN-KIND RULE EXPRESSED AS A FORMULA

(Franchise Fees + PEG Grants (cash) + FMV of In-Kind contributions, including I-Net)

MINUS

(PEG Capital + Costs of complying with build out, incidentals, customer service (over and above FCC standards?))

MUST BE LESS THAN OR EQUAL TO

(5% of Gross Revenue from Cable Service)***

***Please Note: The 5% of Gross Revenue is the Cable Act's definition and may be higher than what your state provides for as a franchise fee. Some state laws only capture subscriber revenue. Federal captures subscriber and ancillary revenue.



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IN KIND ORDER

Allows a cable operator to credit against franchise fees the market value of all “in-kind” obligations required under a state or local cable franchise.

- “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” (§ 25)
- “In-kind” does not include the cost of build-out requirements or PEG capital costs
- “In-kind” does not currently include the fair market value of PEG channel capacity.



WHAT MIGHT BE AN IN-KIND CONTRIBUTION?

- Institutional Networks
- Complementary Cable Service to Government Buildings
- PEG Studio Operated by Cable Operator
- Video-On-Demand
- Customer Service Beyond FCC Rules
- Video Transmission Paths/PEG Transport
- Discounted Enterprise Services
- ROW Requirements
- Relocation, Restoration, Maintenance



POSSIBLE TIMELINE FOR RESOLVING FMV DISPUTES

September 27, 2019

Contact by Operator with FMV estimate

Discussions between the Parties – up to 120 days

Resolution or Self-help

Resolution/ Litigation

Congressional Assistance

- Review your documents. Make sure that benefits that arise out of a settlement are not claimed as a franchise benefit.

- Have you examined if you are spending any of your franchise fee for PEG Capital expenses? If so, those are not counted toward the 5% cap.
- Can you make claim that you are a franchise in effect on October 1984 and it is an ongoing term?

- Discussion of 47 USC 542 (e) **(e)Decreases passed through to subscribers** Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.

- It is very likely that a cable operator will engage in self-help. That is reducing the cable franchise fee and require you to litigate to obtain a refund.
- Do you have a performance bond to use as an offset

- There will be national litigation to determine if the FCC simply misreads the Act, 35 years of experience and their own precedent – still, you may need to litigate locally to recover fees.

- Need to build Congressional opposition to any effort to extend offset status to PEG Channel Capacity. This issue is deferred in the Order published today.

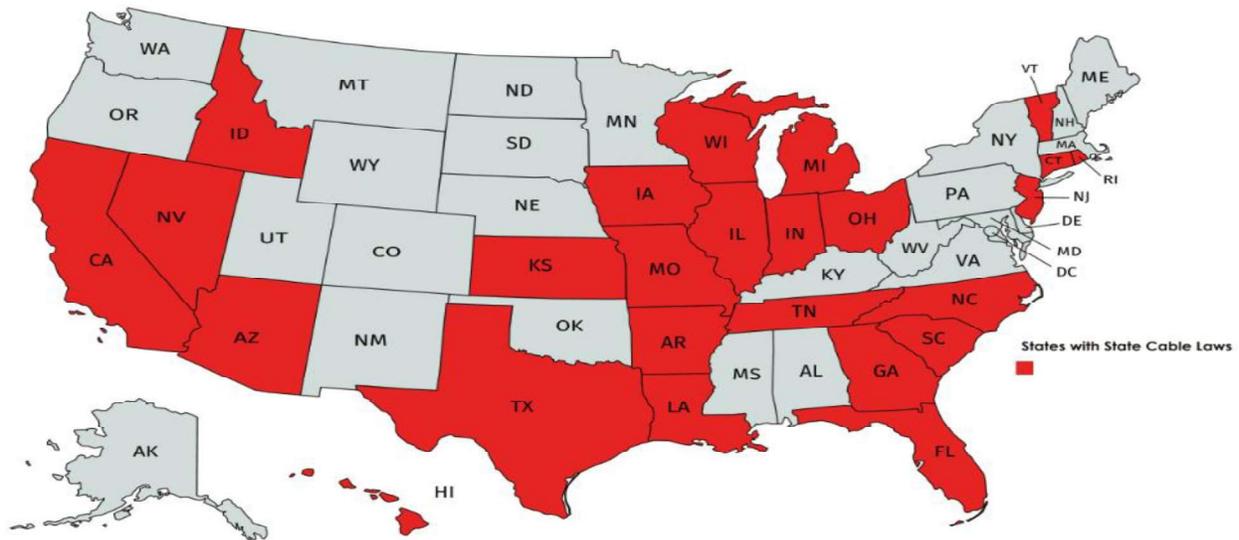
MIXED-USE RULE & IMPACT

A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks. (*New 47 CFR §76.43*)

- Preempts regulation of any facilities and equipment used in the provision of any services other than cable services;
- Adopts cable operators' argument that a cable franchise authorizes installation of any equipment in RoW, regardless of use for cable service, including Wi-Fi and small cells;
- Impedes local authority to ensure consistent regulations apply to providers of similar services.



Order Applies in 23 States with Cable Franchise Laws



FCC Cable Franchise Order

- From 2005 to 2009, 23 states in an effort to jump-start competition moved cable franchising from local to state government.
- Legislatures felt they cut a fair deal on franchise fees, **PEG, and connections to government buildings, schools and libraries.**
- FCC just overturned all of those deals.
- Cable companies can claim a fair market value of **in-kind benefits** against franchise fees. Will cost states and local governments hundreds of millions of dollars.



WHAT CAN NLC MEMBERS DO?

- Follow Mike Lynch's insights in program to follow.
- Identify potential loss of revenue and authority in your community
- Based on potential significant loss of revenue, consider joining a coalition that is appealing the Order
- Educate your congressional delegation about the losses and request they oppose any effort FCC or industry effort to extend order to FMV of PEG channels



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*The FCC and Cable Franchising: What Cities Need to Know
August 27, 2019*

Third Report and Order (FCC 19-80), Franchising & In-Kind

What happened?

Franchising as we know just got turned on its head!

For 35 years, LFA's and Operators pretty much saw Franchising the same way (1984 Cable Act)

FCC's order demands cable operators to take significant offsets against franchise fees

What's next?

The Order takes effect September 27.

Litigation is planned and expected.

A (Court) stay would be great, but not likely

Expect to hear soon from your Operator and work to resolve views within 120 days

What do I do?

Review all:

1. Franchises
2. Side Letters
3. Settlements
4. Operator offerings (marketing) v. (requirements)
5. Institutional Network and Service Agreements (I-Net's and SLA's)
6. State franchising statute, if applicable

Third Report and Order (FCC 19-80), Franchising & In-Kind

Research

Confirm PEG Access:

- *Funding -- in particular, differentiate capital from operating.*
- *In-Kind contributions (programming, resources, etc.)*
- *For both I-Net and PEG Video Return - estimate number of lines, mileage or linear footage, equipment & maintenance.*
- *Connections & drops -- how many & what level of service (Basic, Standard, etc.?)*

Inform

The Order is pushed today, effective in 30 days

- *Litigation is planned and expected.*
- *A (Court) stay would be great, but not likely*
- *Anticipate loss of revenue (or service) in January/February, 2020*
- *Urge/encourage/plead with Revenue & Law departments, as well as PEG Media Centers, to join planned appeal of the Order!*

Prepare for notice

Prepare to ask Operator Q's (RFI)!

Confirm/settle views on:

1. *Franchises*
2. *Side Letters*
3. *Settlements*
4. *Operator offers (marketing) v. (requirements)*
5. *Institutional Network and Service Agreements (I-Net's and SLA's)*
7. *State franchising statute, if applicable*

Third Report and Order (FCC 19-80), Franchising & In-Kind

Research

Funding

Review & organize your buckets of capital v. operating

- *Assign values to muni contributions (staff, office space, leases, etc.)*
- *Prepare an all-funds view of cable & PEG*
- *Identify any 'pass thru' to subscriber of existing costs*
- *Fair market value (FMV) - challenge Operator's calculations by researching comps!*

What You Receive for FF and PEG Fees & Other

1. Fees
2. PEG "capital grants"
3. PEG operating
4. Equipment, studios or facilities from Operator
5. PEG transport (Video Return)
6. Free or discounted muni-service
7. Institutional networks ("I-Nets")
8. Any other non-cash benefits to gov or PEG - not the public!

Do not include:

1. *Capital expense/contributions for PEG Access.*
2. *Build-out of cable plants for subscribers,*
3. *Customer service -- office,, CSR's, etc.*
4. *Channel capacity -- (though this might change in a year - thank you Cmmr. O'Rielly!*

Third Report and Order (FCC 19-80), Franchising & In-Kind

Inform

Educate

"First, we conclude that cable-related, "in-kind" contributions required by a cable franchise agreement are franchise fees subject to the statutory five percent cap on franchise fees set forth in section 622 of the Act, with limited exceptions, including an exemption for certain capital costs related to public, educational, and governmental access (PEG) channels."

3rd R & Order

Dust off your renewal cheat sheet of terms and review for impact through the lens of this Order.

Prepare a risk memo for Revenue Dept. outlining estimated financial and services impact of Order implementation.

Copy to your Law Department & Electeds..... loss of longtime revenue and services is a compelling argument for legal action.

Inform policy, digital equity & IT staff -- you'd be surprised how few will realize the impact of reduced services and revenue.

PEG & Franchising benefits have a 35-year history in cities, town & counties. Younger residents and public employees have no idea of the relationship between public right-of-way access and franchise support.

Third Report and Order (FCC 19-80), Franchising & In-Kind

Prepare for notice

Franchise Agreement(s)
Side Letters
Settlements
Operator offers (marketing) v.
(requirements)
Institutional Network and Service
Agreements (I-Net's and SLA's)
State franchising statute, if applicable

Offsets at "fair market value" (FMV)

No idea what that FMV means not cost-based, but what the operator thinks something is worth.

And, it needs to be a franchise in-kind benefit -- differentiate between what the Operator gives in "community benefits" v. what is "required" in the contract.

No clarification on who receives the write-off -- the operator or the consumer. Assuming subscribers are paying for these LFA requirement, subscribers should be re-imburses. If not, it's just a wealth transfer from local governments to Cable Operators!

LFA's have 120 days to negotiate with the operator (from when -- I don't know!)

Don't go looking for trouble, let the Operator knock first.

Third Report and Order (FCC 19-80), Other issues

What the heck is Mixed Use?

When cable isn't cable

Licensors can't demand/require non-cable services

Remember the cable modem ruling of 2002?

A "cable system" includes "installation of Wi-Fi and small cell antennas attached to the cable system."

Non-Cable Services

Offsets at "fair market value" (FMV)

No idea what that FMV means not cost-based, but what the operator thinks something is worth.

And, it needs to be a franchise in-kind benefit -- differentiate between what the Operator gives in "community benefits" v. what is "required" in the contract.

No clarification on who receives the write-off -- the operator or the consumer. Assuming subscribers are paying for these LFA requirement, subscribers should be reimbursed or credited on their next bill. If not, it's just a wealth transfer from local governments to Cable Operators!

State Franchising Laws

State franchising, as applicable in 23 states:

"..... Commission requirements that concern LFA regulation of cable operators should apply to state-level franchising actions and state regulations that impose requirements on local franchising."

(I noticed that NLC shared a great report on state preemption just this past week!)

Third Report and Order (FCC 19-80), Franchising & In-Kind



Assess the impact

Alert internal stakeholders

Advise the external stakeholders

Await the cable knock on the door

Ask for support to challenge

THANK YOU!



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How Cities Can Fight Back

The FCC and Cable Franchising: What Cities Need to Know— August 27, 2019



NLC NATIONAL
LEAGUE
OF CITIES
CITIES STRONG TOGETHER

National League of Cities

- Represents the more than 19,000 cities, towns and villages in the US
- 49 state municipal leagues
- Advocacy, research, technical assistance
- Policy positions & priorities set by member cities
- Major 2019 priority advocacy issues: infrastructure, housing, opioid epidemic, telecommunications preemption

Cable Preemption: Fighting Back

- 2 major procedural avenues: judicial and legislative
- Complementary approaches – why do they both matter?
- When and why do communities need to engage?

Remember: the order goes into effect September 26 and stays in effect until it is stayed or overturned.

Fighting Back in the Courts

- Order of operations:
 - Stay of order – doesn't overturn, only pauses implementation
 - Cities/PEG operators/others file in federal circuit court
 - If cases are filed in multiple circuits, a lottery is held to determine which court handles the case
 - Schedule is set by the court – could take a number of months, and the FCC can try to delay the process
 - Appeal is likely
- Avoiding the tragedy of the commons

Fighting Back in Congress: PEG Allies

US House of Representatives

1. Rep. Jim Costa (CA)
2. Rep. TJ Cox (CA)
3. Rep. Anna Eshoo (CA)
4. Rep. Jared Huffman (CA)
5. Rep. Jackie Speier (CA)
6. Rep. John Larson (CT)
7. Rep. Jahana Hayes (CT)
8. Rep. Tulsi Gabbard (HI)
9. Rep. Katherine Clark (MA)
10. Rep. William Keating (MA)
11. Rep. Joseph Kennedy III (MA)
12. Rep. Stephen Lynch (MA)
13. Rep. James McGovern (MA)
14. Rep. Ayanna Pressley (MA)
15. Rep. Seth Moulton (MA)
16. Rep. Richard Neal (MA)
17. Rep. Lori Trahan (MA)
18. Rep. Chellie Pingree (ME)
19. Rep. Angie Craig (MN)
20. Rep. Betty McCollum (MN)
21. Rep. Ann Kuster (NH)
22. Rep. Chris Pappas (NH)
23. Rep. Yvette Clarke (NY)
24. Rep. Elliot Engel (NY)
25. Rep. Adriano Espaillat (NY)
26. Rep. Brian Higgins (NY)
27. Rep. Hakeem Jeffries (NY)
28. Rep. Nita Lowey (NY)
29. Rep. Gregory Meeks (NY)
30. Rep. Grace Meng (NY)
31. Rep. Jerrold Nadler (NY)
32. Rep. Max Rose (NY)
33. Rep. Jose Serrano (NY)

34. Rep. Thomas Suozzi (NY)
35. Rep. Nydia Velazquez (NY)
36. Rep. Dwight Evans (PA)
37. Rep. Mary Gay Scanlon (PA)
38. Rep. Peter Welch (VT)
39. Rep. Denny Heck (WA)
40. Rep. Gwen Moore (WI)
41. Rep. Mark Pocan (WI)

US Senate

1. Sen. Richard Blumenthal (CT)
2. Sen. Chris Murphy (CT)
3. Sen. Mazie Hirono (HI)
4. Sen. Brian Schatz (HI)
5. Sen. Edward Markey (MA)
6. Sen. Elizabeth Warren (MA)
7. Sen. Ben Cardin (MD)
8. Sen. Chris Van Hollen (MD)
9. Sen. Angus King (ME)
10. Sen. Gary Peters (MI)
11. Sen. Amy Klobuchar (MN)
12. Sen. Tina Smith (MN)
13. Sen. Maggie Hassan (NH)
14. Sen. Jeanne Shaheen (NH)
15. Sen. Kirsten Gillibrand (NY)
16. Sen. Chuck Schumer (NY)
17. Sen. Jeff Merkley (OR)
18. Sen. Ron Wyden (OR)
19. Sen. Patrick Leahy (VT)
20. Sen. Bernie Sanders (VT)
21. Sen. Tammy Baldwin (WI)

Congressional Targets

- Senate Commerce Committee
- House Energy & Commerce Committee
- Senate Broadband Caucus & House Rural Broadband Caucus/congressional Internet Caucus

Know Your Delegation; Educate Your Delegation

- How do franchises work in your state?
- What is your franchise revenue? What is your anticipated loss?
- What cuts will you need to make to PEG or other programs to accommodate those losses?
- What impact does PEG have in your community?
- Cable companies are supposed to pass franchise savings on to consumers. Do they?



Next Steps for Communities

1. Mark the effective date – September 26
2. Assess & document your current franchise revenues and possible losses/community impacts
3. Educate your residents – they can be advocates
4. Talk to your city attorney, get up to speed on state law, and decide ASAP if you can file or participate in a legal coalition
5. Keep in touch with NLC, your state municipal league, and organizations like NATOA and ACM

QUESTIONS? GET IN TOUCH.

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