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UPDATE
September 17, 2019

FCC Franchise Order to Take Effect September 26, 2019

Order Confirms Most In-Kind Contributions as Franchise Fees, Limits Regulation of Broadband Internet Service

Last month, the FCC adopted a Report and Order amending its rules governing how local franchising authorities ("LFAs") may regulate cable operators and cable television services. As detailed in a recent Public Notice, the amended rules **will take effect on September 26, 2019**.

Most importantly for MVPDs, the FCC concluded that most cable-related, "in-kind" contributions required by a cable franchise are franchise fees subject to the statutory five percent cap on franchise fees. Moreover, the FCC also concluded that LFAs may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system by an incumbent cable operator.

Background. Every cable operator that offers cable service in the public rights-of-way must comply with the cable franchising provisions of the Communications Act. Specifically, Section 621 of the Act prohibits a cable operator from providing cable service without first obtaining a cable franchise, while section 622 allows LFAs to charge franchise fees and sets the upper boundaries of those fees at five percent of a "cable operator's gross revenues derived . . . from the operation of the cable system to provide cable service."

The FCC has an extensive history of rulemakings and litigation interpreting sections 621 and 622. In 2007, the FCC released a Report and Order to provide guidance about terms and conditions in local franchise agreements that it found to be unreasonable under section 621 of the Act with respect to new entrants. Two major conclusions that the FCC adopted were that (i) non-cash, "in-kind" contributions from cable operators to franchise authorities are franchise fees that count toward the statutory five percent cap, and (ii) LFAs may not use their cable franchising authority to regulate non-cable services (like broadband services) that the new entrants deliver over their mixed-use networks (*i.e.*, networks that carry broadband services, voice services, and other non-cable services, in addition to video programming services).

The FCC later extended these conclusions to incumbent operators, which prompted a challenge by LFAs, and led to the Sixth Circuit of Appeals finding that the FCC had not justified its conclusions with respect to in-kind contributions and the mixed-use rule. This Report and Order directly responds to the decision by the Sixth Circuit Court.

Order Summary. There are four main conclusions in the FCC's Order. In particular, the FCC concluded that:

(i) Cable-related, "in-kind" contributions required by a cable franchise are franchise fees subject to the statutory five percent cap on franchise fees, with limited exceptions;

(ii) LFAs may not regulate the provision of most non-cable services, including broadband Internet access service, offered over a cable system by an incumbent cable operator;
(iii) The Communications Act preempts any state or local regulation of a cable operator's noncable services that would impose obligations on franchised cable operators beyond what Title VI of the Act allows; and
(iv) FCC requirements that concern LFA regulation of cable operators should apply to state-level franchising actions and state regulations that impose requirements on local franchising.

In-Kind Contributions as Franchise Fees. The FCC concluded that in-kind contributions required under a franchise are franchise fees subject to the statutory five percent cap, with limited exceptions including for certain capital costs related to public, educational, and governmental access ("PEG") channels. The FCC expressly defined "franchise fee" to include "any non-monetary contributions related to the provision of cable services provided by cable operators as a condition or requirement of a local franchise, including but not limited to free or discounted cable service to public buildings, costs in support of PEG access other than capital costs, and costs attributable to the construction of I-Nets."

Costs Not Defined as Franchise Fees. Despite the broad definition of franchise fees, the FCC concluded that there are a "limited" and "narrow" number of exceptions. These are:

- Any tax, fee or assessment of general applicability;
- PEG channel costs required by franchises in effect on October 30, 1984;
- PEG channel capital costs required by franchises granted after October 30, 1984;
- Build-out costs;
- Compliance with customer service requirements; and
- Requirements or charges incidental to the awarding or enforcing of the franchise (*e.g.,* bonds, insurance, letters of credit, etc.)

The FCC also clarified that PEG capital costs definition are not limited to construction-related costs. Vans, cameras and other equipment, even if not purchased in conjunction with the construction of such facilities, fall into the definition of capital costs, and are thus excluded from the cap on franchise fees. Further, to the extent a franchise agreement contains provisions that conflict with the FCC's Order, the FCC "encourage[s] the parties to negotiate franchise modifications within a reasonable time." Nonetheless, if a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with the Order, that provision is preempted.

Mixed-Use Networks. The FCC concluded in the Order that Section 624 of the Communications Act prohibits LFAs from regulating non-cable services, including broadband Internet access and telecommunications services, under the LFA's franchising authority. The Order specifically overruled the Oregon Supreme Court's decision in *City of Eugene v. Comcast*, stating that "[A]ny state or local regulation that imposes on a cable operator fees for the provision of non-cable services over a cable system franchised under Title VI conflicts with section 622(b) of the Act and is preempted under section 636(c)."

If you have any questions regarding franchises, franchise fees or the FCC's Order, please contact Bruce Beard at (314) 394-1535 or bbeard@cinnamonmueller.com.

FCC Regulatory Fee Payments Due by 11:59 PM EDT on September 24, 2109

On August 27, 2019, the FCC released an Order establishing its Fiscal Year 2019 regulatory fees, and announced that regulatory fee payments must be made no later than 11:59 p.m. EDT on September 24, 2019.

All licensees must use the Fee Filer System, and review, create, update, or change the fees owed. Then, each licensee must choose a payment method – online payment with a credit or debit card, online payment from a bank account, or sending a wire transfer.

Fee amounts. The FCC has set the following regulatory fees:

- **2019 Cable/IPTV regulatory fee:** Cable systems (including IPTV systems) that had subscribers as of December 31, 2018 must pay $0.86 per subscriber, a $0.09 increase from 2018.
- **CARS licenses and permits:** CARS facilities operating on October 1, 2018 must pay $1,225, a $150 increase from 2018, even if the facility's license expired after October 1, 2018.
- **Interconnected VoIP regulatory fee:** $0.00317 for each dollar of interstate and international telecommunications revenue that a provider reports on its Form 499-A.

***De minimis* exemption.** Entities whose total regulatory fee liability, including all categories of fees for which payment is due, is $1,000 or less are exempt from payment. Municipal providers and providers that qualify as non-profit entities are also exempt from regulatory fees.

If you have any questions about the payment of FY 2019 regulatory fees, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.

EAS Form Three Due September 23, 2019

Last month, on Wednesday, August 7, 2019, FEMA conducted a nationwide test of the Emergency Alert System ("EAS"). All EAS Participants, including multichannel video programming distributors ("MVPDs") were required to receive and broadcast the test message in an accessible format.

In conjunction with the National Test, **EAS Participants must file ETRS Form Three on or before September 23, 2019**.

If you have questions about EAS or about preparing for the upcoming nationwide EAS test, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com or Bruce Beard at (314) 394-1535 or bbeard@cinnamonmueller.com.

EEO Form 396-C Due September 30, 2019

On August 5, 2019, the FCC's Enforcement Bureau released a Public Notice announcing that multichannel video programming distributors ("MVPDs"), including cable operators, must submit Form 396-C, the FCC's MVPD Equal Employment Opportunity ("EEO") Program Annual Report, electronically by midnight on **September 30, 2019**. To file Form 396-C, login to the Media Bureau's CDBS Electronic Filing System.

MVPDs that have been randomly selected to file a Supplemental Investigation Sheet ("SIS") along with their Form 396-C must complete the following:

- Include one job description for employees in the "Service Workers" category in Part I of the form.
- Answer questions 4, 5 and 8 in Part II of the form:
    - Explain the employment unit's efforts to promote in a nondiscriminatory manner to positions of greater responsibility.
    - Describe the employment unit's efforts to encourage entrepreneurs to conduct business in a nondiscriminatory manner with all parts of its operation and provide an analysis of the results of those efforts.
    - Describe the manner in which the employment unit conducts its continuing review of job structure and employment practices.
- Attach, as Part III, a copy of the unit's EEO public file report created in 2019 covering the previous 12 months.

If you have any questions about EEO compliance, please contact Scott Friedman at (314) 462-9000 or sfriedman@cinnamonmueller.com.