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SUMMARY OF FCC'S PROPOSED CABLE FRANCHISE FEE AND MIXED-USE RULES, SECOND FNPRM, DOCKET NO. 05-311

On September 25, 2018, the FCC released a Second Further Notice of Proposed Rulemaking (FNPRM) proposing to allow cable companies to deduct from their existing franchise fee payments the fair market value of a wide range of franchise obligations, including PEG channel capacity and other PEG-related franchise requirements. If the FCC's proposed new rules are adopted, most franchising authorities will see reductions—in many cases significant reductions—in franchise fee payments from cable operators. The FNPRM also proposes to preempt local governments from regulating or imposing fees related to the non-cable services provided by cable operators, creating a regulatory environment in which cable companies are exempt from regulations that apply to their competitors.

We strongly encourage local governments to file comments in this proceeding to document the impacts of the proposed rules. Comments must be filed with the FCC on or before midnight (Eastern) on November 14, 2018 and reply comments must be filed or before midnight (Eastern) on December 14, 2018. The following are specific details and potential consequences of the two elements of the FNPRM, which may be useful in drafting comments or reply comments:

Reduction of Cable Franchise Fees and PEG Impacts

- The FNPRM would allow all "cable-related, in-kind contributions," other than PEG capital costs and build out requirements, to be treated as "franchise fees."
  - Cable operators currently paying the maximum 5% franchise fee permitted by federal law will be able to ***reduce their current franchise fee payment*** by the fair market value of all in-kind contributions (defined below).
  - The only exceptions are (i) PEG capital costs required by the franchise that are incurred in or associated with the construction of PEG access facilities and (ii) build-out requirements. Cable operators could not deduct these amounts from franchise fees.
  - Though it cannot be quantified based on the FNPRM and will vary by jurisdiction, some are estimating a reduction in cable franchise fees of 30% and perhaps significantly more where a franchise has more "cable-related, in-kind contributions" and/or an LFA has more than one cable operator.
- "Cable-related in-kind contributions" would be defined 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 agreement, including but not limited free or discounted cable services and the use of cable facilities or equipment. It does not include the cost of build-out requirements." This broad definition may include:
  - PEG channel capacity
  - Transmission of PEG programming

- Complementary cable services to schools and other public buildings
    - Institutional networks
    - Electronic programming guide service
    - Video-On-Demand for PEG channels
    - Discounts for senior citizens or economically disadvantaged groups
    - Accommodations for hearing impaired subscribers
    - Customer service center located in the franchising area
    - Other technical and local customer service standards that exceed federal standards
- The FNPRM proposes that reductions in franchise fees would be calculated based on the fair market value of the in-kind contributions. The Commission invites comments on whether it should instead be calculated based on the cost to the cable operator.
    - A fair market value methodology will result in a greater reduction of franchise fees than a cost-based methodology.
    - The FCC recently ruled that local governments' charges for use of public property for small wireless facilities must be cost-based; by contrast, it proposes to allow cable companies to use fair market value—not costs—to calculate deductions from franchise fees.
- The FNPRM tentatively concludes that build-out requirements would not be considered franchise fees because these requirements are not specifically for the use or benefit of the local government or an entity designated by the local government. The FNPRM asks what other requirements besides build-out obligations are not specifically for the use or benefit of the local government or an entity designated by the local government and therefore should not be considered franchise fees.
    - It is helpful that build-out requirements cannot be deducted from franchise fees, but the Commission's reasoning for excluding build-out but not excluding other requirements designed to benefit the public and subscribers seems inconsistent with this reasoning.
    - Most of the items listed above as potential "cable-related, in-kind contributions" are NOT for the benefit of the local government or its designee; they are for the benefit of the community. The FNPRM does not address why requirements such as PEG channel capacity should be considered contributions for the benefit of local governments or PEG access providers rather than the community.
- The Commission is considering applying the proposed new rules to state-level franchising actions, not just local franchising. In other words, state video franchising laws may be impacted; you cannot assume state franchising laws will protect your franchise fees or PEG channels.
- The new rules effectively rewrite cable franchise agreements to reduce the franchise fee payments without any corresponding increase in the value of the services the cable operator provides to the community.
    - Some jurisdictions may be forced to consider reducing or eliminating "cable-related, in-kind contributions" in the franchise to retain existing franchise fee payments.

Preemption of Non-Cable Services

- The FNPRM proposes to prohibit local governments from regulating the facilities and equipment used by cable operators in the provision of non-cable services.
    - Because cable franchises generally do not address use of the rights of way for non-cable facilities, many franchises will not include appropriate provisions related to installation of non-cable facilities such as small wireless facilities. If preempted from regulating these installations outside the franchise, local governments would not have authority manage a cable company's deployment of non-cable facilities.
    - Public safety is at risk if cable companies can install non-cable facilities without any local review and approval requirements.
    - The proposed preemption would not apply to institutional networks, which federal law allows local governments to regulate.
- This preemption would extend to fees for use of the rights of way, even where the cable franchise authorizes use of the rights of way only for cable services and even though the cable franchise fee is limited to revenue from cable services.
    - This means the cable company can use local rights of way for any purpose, regardless of the terms of the franchise, and provide no additional compensation to the local government for the additional uses of the rights of way.
    - For example, cable companies could install small wireless facilities in the rights of way to enable wireless services without any additional compensation to the local government.
- The proposed rules would prevent local governments from maintaining a level playing field among providers of similar services because they could not require cable operators to comply with the same obligations non-cable companies must follow when providing competing services.
    - For example, the FCC's ruling on small wireless facilities (see link above) contemplates that wireless providers would pay fees for each small wireless facility deployed in the rights of way provided that the fees are non-discriminatory, yet local governments could not impose the same fees on cable operators' small wireless facilities under the terms of the proposed rules. The result would be that local governments could not charge fees for these deployments by any entity, including non-cable operators.
    - Similarly, the FCC's new rules for small wireless facilities do not allow local governments to impose aesthetic requirements on small wireless facilities that are more burdensome than those imposed on other infrastructure providers, yet the FNPRM may prohibit LFAs from imposing any aesthetic requirements on wireless deployments by cable operators.
- The new rules effectively rewrite cable franchise agreements to authorize use of the rights of way for any facility a cable operator wishes to install without any adjustment in the compensation or the protections commonly included in a franchise (*e.g.*, rights of way construction standards; indemnification and insurance; etc.).