Local Government
Telecomm Interests

Setting the Stage for 2020

ITCC – March 8, 2020
Overview

Issues/FCC

• Wireless
  • Small Cell/OTARD
  • VZW/Clark County Petition
  • WIA/CTIA Petitions
• Cable
  • FNPRM and Stay
    • Denial of Stay
    • Order on Reconsideration

The Hill

• Wireless (S. 2012, H.R. 530)
• Cable (H.R. 5659, S. 3218)

The Courts

• Small Cell (9th Cir)
  • Argued Feb. 10, 2020
• Cable Order
  • Appeal taken to 9th Cir
  • FCC Successfully moved to 6th
• Stay
  • Oral Argument 3/11
  • Case in Chief
  • Schedule not yet set.
Wireless Infrastructure Dockets FCC

• August 2018 Moratorium Ruling
  • Preempts express and *de facto* state and local moratoria on acceptance, processing or approval of telecom facility or service permits.

• September 2018 Small Cell Order
  • Relates to SWFs; applies to muni property
  • Fees - Must be limited to costs; presumptive caps
  • Aesthetic Requirements - Must be objective, reasonable, nondiscriminatory and published in advance
  • Shot Clocks – 60 days (collocation) or 90 days (new)

• On Appeal in the 9th Circuit.
Wireless Infrastructure Dockets

• WIA/CTIA Petitions
  • Petitions for Declaratory Ruling and Petition for Rulemaking to clarify or change FCC rules related to modifications of wireless structures subject to Section 6409(a) of the 2012 Spectrum Act.
  • Section 6409(a): “a State or local government may not deny, and shall approve, any eligible facilities request for a modification of an existing wireless tower or base station that does not substantially change the physical dimensions of such tower or base station.”
Wireless Infrastructure Dockets

• **WIA/CTIA Petitions Ask the FCC to Find:**
  • Section 6409(a) applies to all state and local required authorizations
  • Applicant can build after notice of missing the shot clock even if building and other permits have not issued
  • Shot clock begins to run when an applicant makes a good faith attempt to request local approval
  • “Substantial change” is narrowly defined, including limits on what is a “concealment element”
  • The entire structure is the “base station” being modified so new wireless facilities can be placed anywhere on the structure
  • Prohibit conditions on §6409(a) grants
Wireless Infrastructure Dockets

• CTIA Petition:
  • Wants FCC to find that light poles are subject to pole attachment rules as if they were utility poles
  • And clarification that utilities may not impose blanket prohibitions on access to any portions of their poles

• WIA Rulemaking Petition:
  • Asks FCC to change “site” to include 30 feet outside the site boundary
  • Requests cost-based permit fees
Wireless Infrastructure
Dockets

• **VZW/Clark County Petition**
  • Asks FCC to rule that Clark County’s fees violate FCC’s Small Cell Order

• **OTARD NPRM**
  • Current OTARD rules prohibit laws, regulations, or restrictions imposed by state or local governments or private entities that impair the ability of antenna users to install, maintain, or use over-the-air reception devices measuring one meter or less in diameter that provide services to the user’s premises
  
  • NPRM proposes to extend the rules to cover “hub and relay” antennas used to transmit signals to and/or receive signals from multiple customer locations
Cable Franchising
Third Report and Order

• **Effective** – Thursday, September 26th
• **Reinterprets** - 35 year old Cable Act
  • Definition of “franchise fee”
  • Scope of LFA authority over cable operators’ non-cable services
• **Prospective application**
  • Not retroactive
  • Applies to local and state issued franchises
Cable Franchising
Third Report and Order

• **Franchise Fees** - Redefined to include most non-monetary cable franchise obligations
• **“In-kind” franchise obligations**
  • Valued at “fair market value”
  • **Includes, but not limited to:**
    • Free or discounted service **and** institutional networks
    • “Maintenance cost” for PEG transport (not FMV)
    • Excludes customer service and buildout
Cable Franchising
Third Report and Order

- **PEG channel capacity** – FCC decision in 12 months
  - LFAs “may only require ‘adequate’ PEG access channel capacity, facilities, or financial support”
  - Adequate = satisfactory or sufficient
  - Impact on franchise renewal?

- **Franchise modification process**
  - “Encourage” parties to negotiate franchise modifications
  - Reasonable time = 120 days
Cable Franchising
Third Report and Order

• **Mixed Use**
  • LFAs can’t regulate non-cable (services, facilities, equipment)
  • LFAs can’t impose fees on non-cable (including telecom, broadband, Wi-Fi and small cell antennas)

• **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.”

• **On Appeal in the 6th Circuit.**
The Courts
The Courts: Wireless

• *United Keetoowah Band v. FCC* (D.C. Circuit)
  
  • Vacated FCC rules from March 2018 exempting small wireless facilities from NEPA/NHPA review, finding the exemption arbitrary and capricious.
    
    • Many thanks to the cites of Boston and Portland for filing in the proceeding as the Court cited to those filings in overturning the FCC's order.

• *Sprint v. FCC* (9th Circuit)
  
  • Appeal of 2018 Small Cell Orders
  
  • Fully briefed; oral argument with be 2/10/2020 in Pasadena, CA
The Courts

• Appeal of the Cable In-Kind Order
  • City of Eugene v. FCC
  • Window to appeal closed 10/28
    • Approximately 100 municipalities and organizations
    • NATOA and New York have joined as Intervenors
  • FCC successful in having case transferred to 6th Circuit.
  • Stay Motions are pending from Anne Arundel/Portland/NLC coalition
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)
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 CAN WE DO?

Cable –

Small Cell

• 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
Questions
Contacts

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