

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.



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.



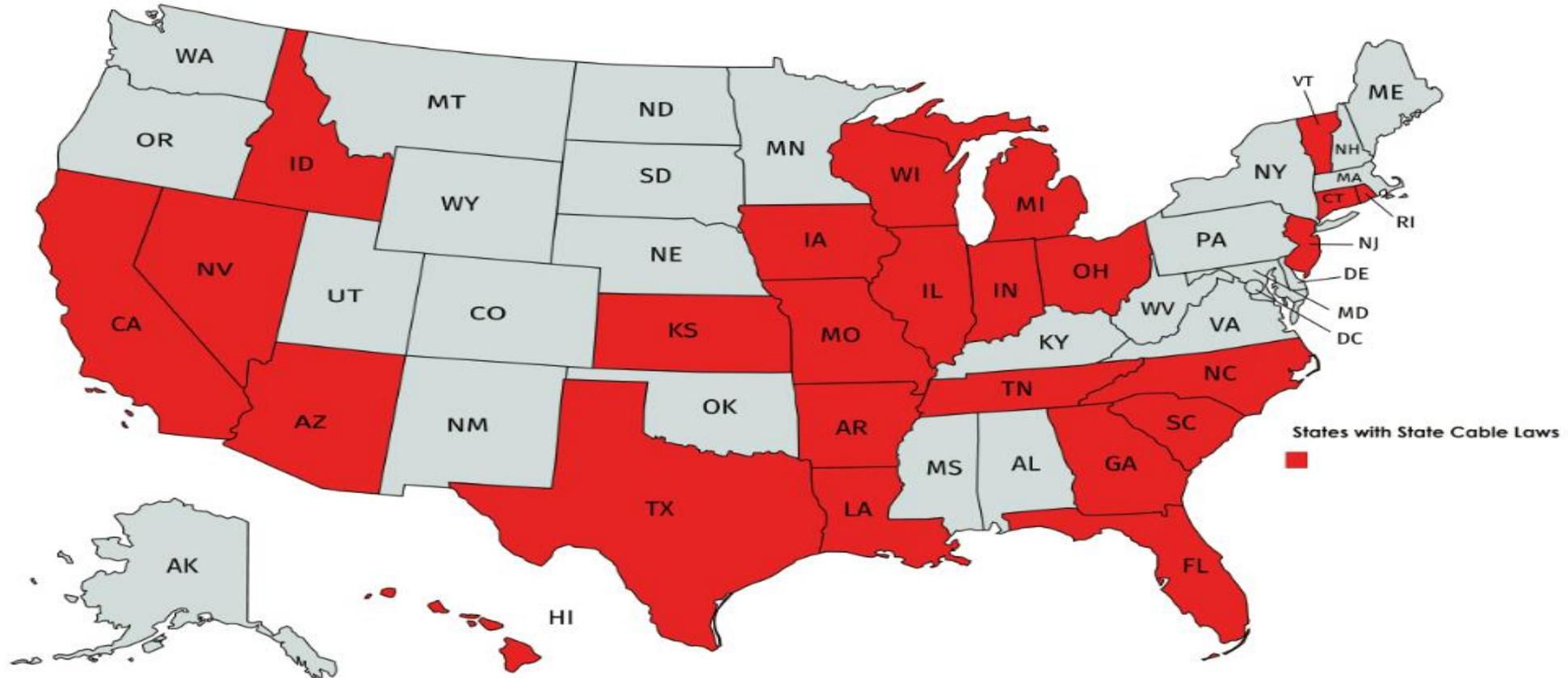
MIXED-USE RULE & IMPACT

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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