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Work Session XI: Telecom –
Shot Clocks, Municipal Broadband and How the FCC Controls Your World

Cable Television Law Update 2015 –
A Look at Federal Regulatory Developments

Brian T. Grogan, Esq., Moss & Barnett
150 South Fifth Street, Suite 1200
Minneapolis, MN 55402
612-877-5340 (phone) / 612-877-5031 (fax)
Brian.Grogan@lawmoss.com

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FCC 621 Order – Part III

- **Jan. 21, 2015**
- **State Level Franchising**
  - **621 Orders apply only to actions or inactions**
    - at the <u>local level</u> where a state has not specifically circumscribed the LFA's authority.
  - **Prior 621 rulings on**
    - Franchise fees
    - PEG and I-Net obligations
    - Non-cable related services and facilities
    - **<u>Do not apply</u> to state level franchising**

FCC 621 Order – Part III

- **In-kind payments**
  - noncash payments, such as goods and services
  - **FCC held**

"Non-incidental in-kind fees must count toward the 5 percent franchise fee cap, and does not limit the franchise fee exception to in-kind payments that are unrelated to cable service."

FCC 621 Order – Part III

- **Cable Act provides**:
  - Requirements or charges "incidental" to the award or enforcement of the franchise are <u>exempt</u> from franchise fees.
  - See Section 622(g)(2)(D)

FCC 621 Order – Part III

- **"Incidental" <u>includes</u>**
  - Payments for bonds
  - Security funds
  - Letters of credit
  - Insurance
  - Indemnification
  - Penalties
  - Liquidated damages
  - Other "minor" expenses

FCC 621 Order – Part III

- **FCC held that "Incidental" <u>does not include</u>**
  - Consultant fees
  - Application fees
    - that exceed reasonable costs
  - Acceptance fees
  - Free or discounted services
  - Leased LFA equipment above market rates

Impact on 2015 Cable Franchising

- **Offsets**
  - Citing FCC 621 order
  - Operators argue about In-kind obligations
    - Free service to schools and public buildings
    - Connections to City Hall or other locations
    - Transport fees
    - Operational v. capital use of PEG fees
  - If operator executes franchise
    - Issue solved?
  - Waiver language in franchise

FCC 621 Order – Part III

- **Mixed use Networks**
  - Under the Cable Act -
  - LFAs have jurisdiction only over the provision of "cable services" over "cable systems."
  - **FCC held**

  "LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant."

Impact on 2015 Cable Franchising

- **Operators often seek authority for ROW**
  - Not just for Cable
    - Title VI of the Cable Act
  - For broadband and telecommunications
- **Cable franchise should be limited to Cable**
  - Nothing in franchise should preclude
    - City's right to impose fees
    - For non-cable services
  - FCC 612 Order
    - don't allow it to be expanded

Impact on 2015 Cable Franchising

- **Right-of-way regulation**
  - Separate ROW rules in cable franchise?
  - ROW code v. franchise/ordinance
  - Code provisions often not updated
    - No longer just utilities using ROW
    - Different ROW rules for different users?
      - Gas, electric, water, telecom, cable, wireless
  - Underground
    - Above ground pedestals
    - Back-up power

Impact on 2015 Cable Franchising

- **Level playing field (LPF)**
  - No requirement under federal law
  - Few states have mandatory LPF
  - Three types of LPF pitched by industry
    - Right to terminate franchise
      - Due to changes in state or federal law
      - Due to grant of competitive franchise
    - Line item veto
      - Operator picks and chooses what to delete
    - If not identical operator will not comply

Effective Competition Order

- **June 3, 2015 (3-2 vote)**
- **FCC concludes that all cable operators are subject to**
  - "Competing Provider Effective Competition"
- **LFAs are prohibited from regulating basic cable rates - *unless***
  - LFA successfully demonstrates that the cable system is not subject to Competing Provider Effective Competition
- **Burden of proof shifted entirely to LFA**

Effective Competition Order

- **First update of Effective Competition rules, in over 20 years**
- **FCC states the below reasons for Order:**
  - Reflect the current MVPD marketplace;
  - Reduce the regulatory burdens on all cable operators, especially small operators, and
  - More efficiently allocate the FCC's resources.

Effective Competition Order

- **August 31, 2015 challenge filed in DC Circuit**
  - National Association of Broadcasters (NAB)
  - NATOA
  - Northern Dakota County Cable Communications Commission
- **NAB is concerned because the Order may result in no obligation for cable operators to carry broadcasters' channels**
  - Under negotiated retransmission consent agreements which typically require carriage on the basic service tier that must be offered to every subscriber.

Effective Competition Order

- **NATOA has stated that the Order is in conflict with a congressional directive to simply streamline the effective competition process for "small cable providers"**
  - NATOA argues that the Order will result in higher consumer prices
  - May result in the removal of PEG and local broadcast channels from the basic tier of service.

MVPD Proceeding

- *In re Franchising Innovation & Competition in the Provision of Multichannel Video Programming Distribution Services*
  - *Released December 2014*
- *2 key issues raised*

MVPD Proceeding

- **Managed Linear IP Video Service**
  - AKA – plain old cable service
  - FCC tentatively determines that
  - It is a "Cable Service" under the Cable Act
    - 47 U.S.C. § 522(6)
  - If an entity crosses a ROW with a closed transmission system
    - Or where affiliates have a significant interest in such system
  - Then = "Cable Operator" of a "Cable System"

MVPD Proceeding

- **Over The Top (OTT) Video Programming**
- **FCC tentatively concludes that:**
  - A Cable Operator's OTT video programming is not a "cable service.
  - If this tentative conclusion is maintained
  - Could have massive ramifications for cities nationwide
    - Franchise fees
    - PEG fees
    - PEG programming carriage

Questions

Brian T. Grogan, Esq.
Moss & Barnett, A Professional Association
150 South Fifth Street, Suite 1200
Minneapolis, MN 55402
(612) 877-5340 phone / (612) 877-5031 facsimile
E-mail: Brian.Grogan@lawmoss.com
Web site: www.lawmoss.com