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6TH CIRCUIT COURT OF APPEALS UPHOLDS FCC CABLE FRANCHISING RULES

After nearly 15 years of regulatory proceedings and litigation, the FCC's rules governing cable franchising have largely been upheld by the 6th Circuit Court of Appeals. The so-called "621 Rules" govern the extent of authority that municipalities, acting as local franchising authorities (LFAs), can exercise over local cable operators. The 6th Circuit's decision in *City of Eugene v. FCC* ruled on challenges brought by local governments to the FCC's Third Report and Order. In that Order, the FCC provided a statutory basis for its "mixed-use" rule precluding LFAs from regulating non-cable service offering of cable operators, such as voice and broadband services. In the Third Report and Order, the FCC also provided its rationale for its ruling that most in-kind exactions imposed by LFAs on cable operators are considered "franchise fees" and count toward the 5% federal cap on franchise fees.

In addressing the FCC's ruling on franchise fees, the 6th Circuit distinguished between franchise obligations imposed by the text of the Cable Act and franchise obligations imposed "as a matter of negotiating discretion." The 6th Circuit held that the former category of obligations generally do not count toward the 5% cap on franchise fees. The latter do. Thus, items such as institutional network obligations, PEG operating support, and complimentary cable services to public buildings, which are not obligations mandated by the Cable Act, count toward the 5% cap. Build-out requirements and PEG capital support are obligations imposed by the Act and do not count toward the 5% cap.

The FCC did, however, rule that in determining the value of in-kind obligations for the purpose of determining whether the sum of the obligations imposed on a cable operator

exceed the 5% cap, the cable operator must value the in-kind obligation at its "marginal cost" rather than its "fair market value" as the FCC's Third Report and Order had ruled.

With respect to the "mixed-use" rule, the 6th Circuit struck down a 7% franchise fee imposed by the City of Eugene, Oregon on its local cable operator, Comcast. The Court held that the 7% fee on broadband services in addition to the 5% franchise fee imposed on Comcast's cable service revenue was preempted by the Cable Act. Having already granted Comcast a franchise allowing Comcast to occupy public rights-of-way under the Cable Act, the 6th Circuit ruled that the City of Eugene's attempt to impose an additional fee on broadband service was "merely an exercise of its franchise power by another name." The City of Eugene's broadband fee circumvented the limitations on local franchising power in the Cable Act by "attempting to accomplish indirectly what franchising authorities are prohibited from doing directly." The 6th Circuit ruled such a result is inconsistent with the Cable Act and therefore preempted.

Overall, the 6th Circuit's *City of Eugene* decision and the FCC's 621 franchising rules bring additional welcome clarity and regulatory certainty to cable franchise renewal proceedings. Moreover, the Court's decision upholding the FCC's rules will limit the amount of government-imposed fees that appear on the monthly bills of cable and broadband subscribers.