August 26, 2019

To: Metropolitan Cable Television Commission

From: Anne Davies, Lane Council of Governments

Subject: MPC 7.a: Update on FCC Third Report and Order (In-Kind Franchise Fee Offset)

Action Recommended: None; Information Only

I. Cable Franchising

Many utilities and other businesses use municipally managed public rights of way (ROW) to locate necessary infrastructure that enables their businesses to function. There are management principles, ordinances, permitting and code requirements that govern the placement of infrastructure in the public right of way. In addition, municipalities are authorized to receive fair and reasonable compensation for the commercial use of this publicly owned resource.

For cable companies, the Federal Cable Act capped ROW use fees on cable revenues at 5% of gross revenues earned within a jurisdiction from the operation of a cable system to provide cable services, which historically has included revenues generated from the provision of cable video/TV and related services such as equipment rental and installation.

The contractual agreements between cable companies and cities, which allow firms to operate in the public ROW in in exchange for fees and other provisions negotiated under the Cable Act, are called franchises, and the fees are referred to as franchise fees.

Historically, franchise agreements negotiated under the federal Cable Act have required a community benefit element whereby cable companies provide certain gratis or in-kind services aside from fees paid to jurisdictions. For instance, cable companies often provide to the local governments access to cable channels to be used for public, education, and government (PEG) community TV communications purposes. Also, the franchises commonly have provisions requiring cable company to provide *gratis* TV/video services to government owned buildings, such as city halls, schools, libraries, and fire and police stations where 24 hour news and weather channels could be readily accessible during times of emergency.

II. The FCC Order

The value of these negotiated community benefit services has never been considered in the calculation of the 5% franchise fee cap. However, the Federal Communications Commission (FCC) recently adopted an order (August 1, 2019) that proposes a new landscape that runs contrary to how franchise agreements have been implemented across the country for decades and how these agreements have been interpreted by the courts.

Specifically, the order proposes to change the ground rules for how in-kind services are considered in this calculation---the value of the non-monetary, in-kind contributions will likely be quantified at “fair market value” and that value then deducted from the 5% franchise fee paid to a municipality. The August 1 order requires that the in-kind services, such as *gratis*/free cable services to government and education buildings, be valued by the cable company (at market value) and that the value be deducted from the franchise fees paid to the local government.

The rule provides that, at least for now, capital costs, costs of build-out, and the value of customer service need not be deducted from the fees. Further, the order does not allow the offset for PEG channel capacity at this time, although there is language in the order that suggests there is a high likelihood that an offset will be required for PEG channel capacity within the next 12 months.

III. Local Government Impact of the FCC Order

The new FCC order will reduce the franchise fees cable companies pay to local governments IF the municipality continues to accept the *gratis* services they had previously accepted. In the Eugene/Springfield area, for instance, Comcast provides *gratis* basic cable services to each fire and police station, public schools, city hall, county courthouse, public library and all other government buildings owned by Eugene, Springfield and Lane County. The new rule contemplates a negotiation process in which the municipalities will be able to decide whether to (1) continue to receive the in-kind contribution, acknowledging a reduction in the franchise fees; (2) discontinue the contribution in order to maintain the full fee payment of 5% of gross revenues; or (3) reduce the contribution (e.g., continue free cable service so some buildings and not others) and accept the commensurate adjustment of the franchise fees. The municipal response will typically trigger the need for a formal franchise amendment by local government bodies.

The issue of PEG channel access was not specifically decided in this order. That is, the FCC did not directly rule whether the value attributable to Comcast’s provision of bandwidth that allows broadcasting on the PEG channels must be deducted from franchise fees. However, language in the order did suggest that a determination on that issue will be forthcoming in the next year. Local government telecommunications experts around the country anticipate that the ultimate decision will be to require the value of PEG channel capacity be deducted from franchise fees. As there are four PEG channels in the Eugene/Springfield area, this will be an issue that will have to be addressed in the very near future.

The immediate issue, however, relates to *gratis* cable services to government-owned and school buildings. Cable commission staff has reached out to Comcast to attempt to determine what value will be attributed to the *gratis* cable services to public buildings. Comcast recently provided the information included in Attachment 2 to this memo. More clarity from Comcast on the valuation method would be extremely helpful in determining which services are worth retaining. Jurisdictional staff has also been working to determine the potential impact of the *gratis* TV services within their own jurisdictions, and has contacted their respective school districts to attempt to gather similar site and use information from the schools.

The order does not become effective until 30 days after its publication in the Federal Register. As of the writing of this memo, publication is anticipated on August 27, 2019, which would make the order effective on September 26, 2019.

IV. <u>Conclusion</u>

While the FCC Cable order will most certainly be litigated by national municipal associations and local governments across the nation, unless a stay is granted by the courts, elected officials will be placed in the position of making some tough short- and long-term decisions. Staff will continue to keep the commission apprised as events unfold, and will likely be returning in the coming months with options to revise the current franchise to address these issues or wrap them into the franchise renewal that is currently in negotiation.

Attachments:

1. NATOA Summary of FCC Order
2. Estimates of Value of *Gratis* Services to Public and Government Buildings