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Alliance for Communications Democracy
2019 Annual Meeting

Legal Report on Court and FCC
and
Decisions and Activities During 2018-2019

Portland, OR
July 11, 2019

Court and FCC Proceedings in Which ACD Participated During 2018-2019

***Manhattan Community Access Corp. v. Halleck*, U.S. Supreme Court No. 17-1702, Issued June 17, 2019.**

- Court held 5-4 that Manhattan Community Access Corp. (MNN) is not a state actor subject to the First Amendment.
 - ACD (with ACM and NATOA) filed an *amicus* brief and succeeded in getting the Court to refrain from addressing the claim NCTA raised in its *amicus* brief that requiring cable operators to carry PEG channels violated their First Amendment rights: “A distinct issue not raised here is the degree to which the First Amendment protects *private* entities such as Time Warner of MNN from government regulation requiring those private entities to open their property for speech by others.”
 - But the majority decision went on to say: “Depending on the circumstances, the First Amendment might . . . constrain the local government’s operation of the public access channels. We decide only the case before us in light of the record before us.”
- What’s next?
 - Will NCTA bring its First Amendment claim in another case?
 - Local governments operating PEG channels are subject to First Amendment scrutiny.
 - Non-profit organizations operating PEG channels should adopt best practices to assure fair treatment (although the Court held that MNN was not a state actor subject to First Amendment constraints, it expressly did not consider whether any state laws or contractual provisions constrain MNN’s editorial discretion).
 - Will the Court’s decision make some localities more reluctant to rely on non-profits to operate PEG channels? Or will it make the non-profit option more attractive?

***Comcast v. Sacramento Metro. Cable Television Commission*, 923 F.3d 1163 (9th Circuit 2019) – ACM and ACD filed an *Amicus* Brief in support of SMCTC.**

- Court dismissed without prejudice Comcast’s lawsuit against SMCTC because money damages as sought by Comcast were barred by federal Cable Act.
- Lower court had held that Comcast is not entitled to deduct fees paid to California PUC under DIVCA (state law) from franchise fees paid to SMCTC, finding that DIVCA’s PUC fees are not subject to 5% federal cap because they were imposed on all video providers and on all utilities.
- Lower court had held that payments Comcast collects from subscribers to pay PEG fees under DIVCA are not required to be included in gross revenues for calculating franchise fees as SMCTC had argued.

- The 9th Circuit vacated the lower court’s decision, which means that neither the good part of the decision nor the bad part can be cited as precedent.
- What’s next?
 - Will Comcast engage in “self-help” by unilaterally withholding a portion of franchise fee payments, thereby likely forcing SMCTC to sue to recover such amounts?

***Comcast v. Vermont Public Utilities Commission*, U.S. District Court for the District of Vermont (No. 5:17-cv-161) – ACD is providing financial support to the Vermont Access Network.**

- The PUC decision requires Comcast to (1) include program-specific scheduling information for PEG channels in the Interactive Program Guide and (2) provide PEG remote origination.
- The PUC decision also requires a 550-mile line extension by Comcast, which Comcast challenges on First Amendment grounds.
- The court, on September 20, 2018, granted in part and denied in part the PUC’s motion to dismiss the state law and First Amendment counts of the complaint.
 - It dismissed Comcast’s First Amendment claim that the line extension requirement burdens Comcast’s speech.
 - It declined the PUC’s request to dismiss Comcast’s Vermont state law claims on the basis of sovereign immunity.
- The court, on February 20, 2019, ruled largely in favor of the PUC and VAN to limit the evidentiary record to what was before the PUC when it issued its decision in 2017.
 - Pursuant to the court’s practice, the case is subject to mediation to attempt to resolve the issues by agreement.
 - Two mediation sessions have been held.
 - A third session is scheduled for July 11.
 - If not settled, the case is scheduled for trial by January 20, 2020.

FCC Proposed Rule for Cable franchise fees: September 25 Further Notice of Proposed Rule Making in *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable television Consumer Protection and Competition Act of 1992*, MB Docket 05-311 – ACD joined with ACM and several local governments in filing initial and reply comments.

- The FCC proposes to allow cable operators to credit against the 5% franchise fee cap all “in-kind” obligations imposed on them by their franchise agreements.
- In-kind includes “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.” The only exceptions under the proposed rule would be the cost of complying with franchise build-out requirements and PEG capital costs

- FNPRM suggests that in-kind contributions be valued at “fair market value” rather than their cost.
- FNPRM also suggests that the value of PEG channels be considered “in-kind” so that the value can be offset against the 5% franchise fee cap.
- FNPRM suggests that PEG capital costs may be limited to PEG facility “construction” costs.
- FNPRM misreads the 6th Circuit’s decisions in *ACM v. FCC* and *Montgomery County v. FCC*. It also selectively cites to only certain of the purposes of the federal Cable Act, but completely ignores Congress’s goals of “assur[ing] that cable systems are responsive to the needs and interests of the local communities they serve” and “assur[ing] that cable systems provide the widest possible diversity of information services and sources to the public, consistent with the First Amendment’s goal of a robust marketplace of ideas—an environment of ‘many tongues speaking many voices.’”
- Thousands of comments opposing the FCC’s proposal were filed by PEG and local government interests, as well as by several public interest organizations. In addition, 15 U.S. Senators and 25 members of the House of Representatives have stated their opposition to the FNPRM.
- The FNPRM will likely be considered by the FCC at its August 1 meeting.
- What’s next?
 - Parties aggrieved by FCC action can seek reconsideration from the FCC (not likely to be successful) or a stay of any new rules (also not likely to be successful).
 - Parties can file in a U.S. court of appeals seeking to overturn FCC’s decision.
 - If a court appeal is filed, a stay of the rules pending decision on the merits can be sought from the court (although obtaining a stay would be a longshot).
 - Congressional action to overturn the FCC can be sought (also a long shot).