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Sixth Circuit Delivers Mixed Results in Appeal of FCC's Franchise Fee Order

May 26, 2021 | *Jeffrey M. Bayne, Lauren L. Springett*

On May 26, 2021, the U.S. Court of Appeals for the Sixth Circuit issued an opinion granting in part and denying in part the consolidated petitions for review of the Federal Communications Commission's Franchise Fee Order. *City of Eugene, Or. v. FCC*, No. 19-4161 (6th Cir. May 26, 2021). The Franchise Fee Order ruled that most nonmonetary, cable-related obligations in a franchise agreement between a cable operator and a local franchising authority are a "franchise fee" within the meaning of the Cable Act and therefore subject to the Act's 5% cap on franchise fees. 47 U.S.C. §§ 542(b), (g). In response to a decision by the Supreme Court of Oregon upholding the City of Eugene, Oregon's application of a 7% telecommunications right-of-way fee to cable operators providing broadband service, the FCC also limited the ability of state and local franchising authorities to regulate, and impose fees on, non-cable services provided by cable operators.

The Sixth Circuit upheld the FCC's ruling that nonmonetary, cable-related franchise obligations *permitted* by the Cable Act are franchise fees and thus subject to the Act's 5% cap, while nonmonetary, cable-related franchise obligations *mandated* by the Act are not. However, in a major victory for local governments, the Sixth Circuit rejected the FCC's ruling that these "in-kind" franchise obligations must be valued at fair market value, holding that they instead must be valued at the cable operator's marginal cost of fulfilling them. Valuing franchise obligations at marginal cost rather than fair market value will significantly reduce the in-kind rule's adverse financial impact on local governments.

The Sixth Circuit also largely upheld the FCC's ruling that franchising authorities cannot regulate non-cable services provided by cable operators, finding that "[t]he [Cable] Act . . . preempts [local government] actions that violate or circumvent any of its provisions."

In another partial victory for local governments, the Sixth Circuit agreed that application of the City of Eugene's 7% telecommunications right-of-way fee to cable operators was not a "franchise fee" under the Cable Act. But the court nevertheless upheld the FCC's ruling that application of Eugene's fee to cable operators' broadband services was preempted as impliedly inconsistent with other Cable Act provisions. A copy of the court's opinion is available here.

Spiegel attorneys Jim Horwood, Tim Lay, Jeff Bayne, and Lauren Springett represented a coalition of local governments and access channel interests, including the City of Eugene, in the appeals, with Tim Lay arguing the case before the Sixth Circuit.

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