FCC Regulation of Cable Services Goes Into Effect

On August 2, 2019, the Federal Communications Commission (FCC) adopted new rules again impacting the ability of local governments to regulate and engage with telecommunications companies. Specifically, effective September 26, 2019, the FCC now limits the ability of cities, villages, and all local franchising authorities (LFAs) to:

1. Charge in-kind cable-related contributions separately from franchise fees, and
2. Regulate mixed-use services, including broadband internet service offered over cable systems that are provided by a cable operator.

Much like the December 2018’s Small Wireless Facility Order, the FCC maintains that the regulations are necessary to “promote broadband investment and deployment.”

**In-Kind Contributions**
Under Section 622 of the federal Cable Communications Act, a cable franchise agreement may not impose franchise fees that are greater than 5% of the cable service’s gross revenues. However, most franchise agreements reflect additional, non-cash obligations that are negotiated between the LFA and the cable provider. Non-cash responsibilities typically include build-out requirements to ensure cable service access in specific areas, and payments to support public, educational, and governmental access (PEG) channels.

In the recent Order, the FCC determined that “in-kind” payments (e.g., build-out requirements, PEG capital costs and channel capacity) are considered franchise fees. This requires the fair market value of all such in-kind contributions be calculated and counted as part of the maximum franchise payments permitted under federal law. However, the FCC has not issued guidance as to the methodology that should be used to calculate fair market value of in-kind contributions, such as PEG channel capacity.

**Regulation of Mixed-Use Services**
In addition to the restrictions related to in-kind payments, local governments are
now prohibited from regulating mixed-use or non-cable services provided by cable operators, unless the regulation is related to channel capacity on institutional networks. As many households throughout the State are favoring broadband subscriptions separate from, or instead of, cable TV subscriptions, this restriction effectively prohibits local governments from overseeing the service used by most residents. Moreover, the regulation eliminates the ability of cities and villages to ensure cable broadband internet access is provided to every neighborhood within their jurisdiction.

**Future Forecast**

While the rules became effective on September 26, litigation challenging the Order and the FCC’s authority to adopt the regulations is expected. That being said, the FCC appears steadfast in its resolve to eliminate as many costs as possible faced by the members of the telecommunications industry in the name of promoting broadband investment. NYCOM, in conjunction with the National League of Cities, opposed this Order and will fight any further efforts by the FCC to restrict local control and/or local revenues. We will also continue to provide information and guidance to our members in the wake of these regulations.

Please contact NYCOM Counsel Rebecca Ruscito (rebecca@nycom.org) if you have any questions on the FCC order.