

To: Moss & Barnett Clients and Interested Parties
From: Brian T. Grogan, Esq.

I. FCC Issues 2nd Order Further Limiting Municipal Franchising

On October 31, 2007, the FCC issued a Second Report and Order ("Second Order") extending to incumbent cable operators (Incumbents) regulatory relief which had previously been granted only to Competitive Video Providers (CVPs). The Second Order was published in the Federal Register on November 23, 2007 and becomes effective December 24, 2007.

The below summary addresses 10 of the most frequently asked questions from Local Franchising Authorities (LFAs) regarding the Second Order.

1. If my state has recently adopted legislation offering CVPs and Incumbents a statewide franchise, does the Second Order have any impact on my community?

Answer: Yes. In the Second Order the FCC states that its statutory interpretations represent the Commission's view as to the meaning of various statutory provisions and as such "these interpretations are valid immediately." Because the interpretations do not depend on section 621 (a) (1) of the Cable Act they are "valid through the nation." This position is a departure from the FCC's initial order regarding CVPs adopted on 12/20/06, released on 3/5/07, in Docket No. 05-311 (First Order). In the First Order the FCC emphasized that its ruling did not impact "state" franchising authority nor did it preempt state statutes which dictate how an LFA is to issue franchises. The Second Order clarifies that all interpretations by the FCC regarding franchise fees, public, educational and governmental (PEG) financial support, and institutional networks apply regardless of state law. Thus LFAs located in states where CVPs must remit up to a 5% franchise fee and 1% or more in PEG support payments could be impacted by the FCC's statutory interpretations.

2. Are LFAs required to process franchise renewals within 90/180 days, the same as they are required to process applications from CVPs?

Answer: No. The 90/180 day shot clock requirement which the FCC imposed in its First Order with respect to applications from CVPs does not apply to Incumbents seeking franchise renewal. Renewal of local franchises (to the extent still relevant under applicable state law) is addressed by the Cable Act at 47 USC § 546. Under § 546 Incumbents must still provide LFAs with written notice of their intent to seek renewal of their local franchise 30 to 36 months prior to franchise expiration.

3. Does the Second Order have any impact on an Incumbent's requirement to build out to un-served areas within a jurisdiction?

Answer: No. The Second Order concludes that the build out flexibility the FCC sought to provide CVPs in the First Order is not applicable to Incumbents. The FCC reasoned that these issues were already addressed within existing local franchises and in most cases Incumbents had substantially built out the jurisdictions which they serve. However, the build out requirements and level playing field provisions of Incumbent franchises may still have an impact on the requirements an LFA may impose upon a CVP applying for a competitive franchise.

4. Will the Second Order reduce franchise fee payments received by an LFA from an Incumbent?

Answer: Possibly. Franchise fees will likely not be impacted but an Incumbent could seek to offset certain in-kind payments from franchise fees thereby reducing the revenue received by the LFA. In the Second Order, the FCC concluded that its interpretation of statutory provisions contained in the First Order regarding franchise fees, in-kind obligations and PEG support fees should apply equally to CVPs and Incumbents.



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Therefore, if an Incumbent franchise requires a full five percent (5%) franchise fee on gross revenues, there is some risk that the Incumbent may seek to utilize the Second Order to support a modification of certain in-kind franchise obligations. This issue will vary significantly between LFAs depending upon state law and the requirements of the local franchise.

5. Will free cable service to schools and public buildings be jeopardized?

Answer: Not likely. The FCC addressed this issue in the legal challenge to the First Order. LFAs had raised arguments that the First Order could allow CVPs, and now Incumbents, to offset the costs associated with free service to schools and public buildings against franchise fee payments made to LFAs. The FCC replied to these arguments by stating that the First Order's "analysis of in-kind payments was expressly limited to payments that do not involve the provision of cable services." (See, *Alliance For Community Media v. FCC*, Brief in Opposition to Motion for Stay before the Sixth Circuit, Case No. 07-3391, footnote 16).

6. If a local franchise has obligations requiring the Incumbent to financially support PEG channels, do these obligations remain enforceable?

Answer: Most likely. The FCC concluded "that the non-capital costs of PEG requirements must be offset" from the Incumbent's franchise fee payments. The FCC attempted to draw a line between capital costs and operational costs in support of PEG. The FCC concluded in the First Order that "capital costs refer to those costs incurred in or associated with the construction of PEG access facilities." In its brief before the Sixth Circuit, the FCC clarified that purchasing equipment used to provide PEG access may well be a capital cost as opposed to "salaries and training" which the FCC would consider "payments in support of the use of PEG access facilities" and therefore counted toward the 5% franchise fee cap. LFAs with PEG support requirements in a local franchise should carefully review the requirements and the use of the designated PEG funds to determine the enforceability of the franchise requirement under the Second Order.

7. Does the Second Order automatically change conflicting requirements in a local franchise or a state franchise?

Answer: Possibly. The FCC acknowledges that local franchise agreements involve contractual obligations, and that certain contractual terms have been implemented as the result of settlement agreements negotiated at the time the local franchise was granted. The FCC concludes that "the facts and circumstances of each situation must be assessed on a case-by-case basis under applicable law to determine whether our statutory interpretation should alter the Incumbent's existing franchise agreement." However, the FCC also states that the Second Order "should in no way be interpreted as giving Incumbent's a unilateral right to breach their existing contractual obligations."

8. Can an Incumbent unilaterally change a local franchise or are there specific procedures which must be followed?

Answer: Specific procedures must be followed. Some local franchises have provisions which address modification under a "most favored nation" (MFN) clause. MFN clauses generally allow an Incumbent to adjust franchise obligations if the LFA grants a competing franchise to a CVP. The FCC determined that MFN clauses are unaffected by the First and Second Orders and that those clauses may allow Incumbents to obtain relief from franchise obligations in certain cases.

The Second Order also addresses the question of franchise modification without an MFN clause in the local franchise. The FCC cited section 625 of the Cable Act which allows an Incumbent to obtain a modification from an LFA: 1) if the Incumbent can show that it is "commercially impracticable" to comply with a requirement for equipment or facilities; or 2) if the Incumbent can demonstrate that the mix, level and quality of "services" required by a franchise at the time it was granted will be maintained following the modification.

9. What if the Incumbent simply stops complying with certain local franchise obligations arguing that if the CVP is not obligated to provide certain

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services/equipment the Incumbent should not have to comply with such requirements?

Answer: The Incumbent must still comply with the local franchise. The local franchise remains enforceable against the Incumbent even if a CVP franchise is granted on different terms. To obtain relief Incumbents must follow the amendment procedures contained in the local franchise or otherwise available under an MFN provision or section 625 of the Cable Act . The LFA can impose any remedies available via the franchise or state and federal law for the Incumbent's non-compliance.

10. What is the status of legal challenges to the FCC's First Order and Second Order regarding local franchising?

Answer: Pending. The Sixth Circuit granted expedited review of the case challenging the First Order. The case has been briefed but no oral argument has yet been scheduled. The national municipal organizations and others are expected to file a petition for reconsideration of the Second Order with the FCC. Municipal groups have also filed with the Sixth Circuit seeking to have the Sixth Circuit obtain jurisdiction over any challenges to the Second Order.

II. Minneapolis Broadband Wireless System Up and Running.

The City of Minneapolis, Minnesota joined the ranks of many large jurisdictions worldwide that have partnered with the private sector to provide nearly ubiquitous wireless broadband coverage of the entire City. The 55 square miles covered by the system makes it one of the larger citywide wireless services in the country. The system is based on a unique contract that pays the City substantial revenue for the use of certain infrastructure provided by the wireless provider, U.S. Internet (USI). The City's contract with USI, drafted by Brian Grogan of Moss & Barnett, allows USI to use certain City infrastructure, including traffic signals, light poles and other facilities, to obtain citywide coverage. The City, in turn, has contracted with USI to migrate a number of City services to the wireless broadband network including security cameras, public safety communications and other City services.

With the City as an anchor tenant of the system the financial model for USI is vastly different than other the "free service" or "advertising supported" models which have failed for other wireless carriers over the last several years. As the anchor tenant, Minneapolis was also able to negotiate strong enforcement provisions within its contract with USI. These provisions allow the City to enforce compliance for the benefit of all users citywide. The contract provisions include: a ten-year price cap of \$20.00 on citywide 1-megabyte service; 99% reliability citywide; aggressive timetables for outage restoration; penalties for failure to meet various service level requirements and related obligations. In addition, the City received several upfront capital contributions to help bridge the "digital divide" within the City. The City also receives five percent (5%) of USI's revenues from the system to support ongoing programs within the City.

Early indications are that the system has been well received by initial users and the City and USI are continuing to work on addressing troubled areas where existing assets are unavailable for the placement of required equipment. For additional information regarding the Minneapolis broadband wireless system and/or the contract which the City entered into with USI, please feel free to contact Brian Grogan at Moss & Barnett.

III. Tenants Living in Apartments May No Longer Be Locked Into a Single Choice For Cable Service.

On November 13, 2007, the FCC released a report and order which voids exclusive access and service clauses in video contracts between cable operators and multiple dwelling units (MDUs). This decision does not effect bulk rate agreements or exclusive marketing arrangements although these contractual arrangements are to be further reviewed by the FCC. At issue was whether tenants in an apartment building would be able to take advantage of competitive services in the marketplace or whether the building owner would have the right to enter into an exclusive arrangement with a cable operator. The order applies not only to condominiums and apartments but also to centrally

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managed real estate developments including gated communities, mobile home parks, and related facilities. The order does not prohibit DirecTV or the Dish Network from entering into exclusive agreements although these too are under further review by the FCC. The order will undoubtedly be appealed by the cable industry given that in some communities as many as a third of the population or more may reside in MDUs. Moss & Barnett has been actively involved in assisting MDUs and others regarding such exclusive agreements related to the provision of voice, video and data services. For further information please contact Moss & Barnett.

IV. FCC seeks information regarding pole rental rates for broadband attachments.

On November 20, 2007, the FCC issued a notice of proposed rule making seeking input regarding the rates to be charged by utility companies for access to their poles as well as the terms for such access. Cable and telecommunications companies have raised numerous arguments before the FCC regarding increasing pole

rates and their impact on the deployment of broadband services. The FCC's rulemaking tentatively concludes that rates for companies seeking attachments for broadband internet access service should be higher than the cable rate but no greater than the telecommunications rate. Apparently, if a cable operator sought attachment to poles solely to provide cable service the FCC's existing rates would be preserved but if the attachments were to be used for broadband internet access service higher rates may apply. There are a number of other issues addressed in the rulemaking regarding the terms and conditions of access to poles. While the FCC's existing regulations do not directly apply to municipal utilities, many municipal utilities have relied upon the FCC rate formula to support proposed pole attachment rates to private parties. Moss & Barnett advises many municipal utilities on pole attachment and conduit use agreements and will be monitoring the rulemaking proceeding as it moves forward.

Brian T. Grogan is a shareholder with the Minneapolis law firm of Moss & Barnett practicing in the firm's communications and business law departments. Since 1988 Brian has worked with governmental entities throughout the country on a variety of cable, telecom, wireless and broadband communications issues. In his business law practice Brian focuses on fiber leasing agreements and mergers and acquisitions in the communications and technology industries. He is a frequent presenter at state and national communications law conferences and is a past chair of the Communications Law Section of the Minnesota State Bar Association.

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