FCC Releases New Rules to Streamline the Local Cable Franchising Process for Telephone Companies and Other New Video Entrants

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On March 5, 2007, the Federal Communications Commission (FCC) released its order setting forth in greater detail the rules it adopted late last year (by a 3-2 vote) to streamline the local cable franchising process. In this order, the FCC acted to preempt localities from imposing requirements—for telephone companies and other new video entrants—that it concluded have served as unreasonable barriers that impede the federal goals of enhanced cable competition and accelerated broadband deployment. At the same time, the FCC also issued a notice of proposed rulemaking, looking toward prompt extension of these same streamlining benefits to incumbent cable operators (effective on the expiration of their current franchises). The order has already generated substantial opposition from local franchising authorities (LFAs) and the cable industry, both of which are likely to challenge it in court.

In streamlining the franchising process and preempting LFAs from taking action inconsistent with its reforms, the FCC relied primarily on its statutory authority to carry out the Cable Act's mandate that LFAs "may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise." The FCC interpreted that mandate to cover not only the unreasonable denial of a cable franchise, but also unreasonable delay in action on a franchise application and the conditioning of a franchise on unreasonable terms. The Commission also relied on Section 706 of the Telecommunications Act of 1996, which directs it to accelerate broadband deployment by promoting competition and removing barriers to infrastructure investment. A major source of disagreement between the Republican majority and the Democratic dissenters is the question of whether or not the FCC in fact holds the authority to "federalize" the franchise process—a question that will no doubt figure prominently in the inevitable forthcoming appeal.

Background

Recently, telcos have begun to extend their fiber optic networks closer to subscribers' homes, in order to offer video and faster, more advanced broadband services. While these advanced networks hold the long-sought hope of offering full-fledged competition to traditional cable systems, telcos have complained that the requirement of having to obtain individual franchises from the 30,000 LFAs across the country amounts to an unreasonable barrier to entry that is depriving consumers of these benefits. Telcos also report unreasonable demands by LFAs during the negotiation process that further restrict their ability to compete. These have included conditioning a franchise on service deployment to large geographic areas that may not track the telco's service area or that make entry inefficient and costly; requiring new entrants to offer facilities or services unrelated to providing cable service; demanding franchise fees that exceed the statutory 5 percent fee cap; and requiring that new entrants fund public, educational and government (PEG) programming and facilities and/or build institutional networks (I-Nets) that are redundant with those the cable incumbents already provide. Telcos are also subject to "level-playing field" requirements that compel new entrants to abide by the same franchise terms and conditions to which cable incumbents agreed (in their case, in return for what usually amounted to de facto monopoly franchises).

Prior to the FCC's order, Congress had considered, but failed to adopt, legislation to address these abuses, and some states had enacted statewide franchising laws or other reforms intended to rein in the process. But statewide franchise reform bills have failed in some states, and the number of state-level franchises remains small in comparison to the many thousands of franchise requirements still imposed at the LFA level. The telcos therefore looked to the FCC for relief.

The New Cable Franchising Rules

The FCC adopted the following measures aimed at **local** requirements that it concluded were unreasonable barriers for new entrants. It elected not to preempt any **state** laws addressing cable franchising, however—including those that may raise the same exact problems.

- **Time Limit:** The FCC established a 90-day deadline for LFAs to act on franchise applications from entities with existing rights-of-way authority, and six months for applicants without such authority. Failure to act within these time periods will result in the grant of a franchise application on an interim basis, subject to continued negotiations as to terms. LFAs may toll the deadline period pending receipt of "any information required by applicable state and local laws." It is unclear whether this use of a tolling process will be subject to abuse, or whether new entrants will accept the risks of investment on the basis of interim authority that can later be revoked or burdened by significant obligations.

- **Build-Out:** The FCC preempted LFAs from conditioning a franchise on unreasonable build-out mandates. While the FCC did not define comprehensively what mandates it would view as unreasonable, it noted that the following might qualify: requirements that an applicant be capable of serving everyone in a franchise area before it begins providing service to anyone; requiring a telco to build out beyond its existing footprint before providing any video service; requiring build-out in a shorter time period than that afforded the cable incumbent; requiring an applicant to cover lower density areas than the incumbent; requiring build-out to communities or buildings to which the new entrant cannot obtain either access on reasonable terms or reasonable access to, and use of, rights of way; requiring build-out to areas that cannot be reached with standard equipment; and imposing more stringent build-out requirements than those placed on incumbent operators.

- **Franchise Fees:** The FCC found unreasonable the conditioning of a franchise on non-incidental payments above and beyond the new entrant's payment of 5 percent of gross revenues. Non-incidental payments are defined to include attorney's fees, consultant fees and application or processing fees unrelated to cost. The FCC also made clear that a franchisee is not required to pay fees on revenues from non-cable services—including, for example, high-speed Internet access services. Further, in-kind payments or fee requests made by LFAs that are unrelated to the provision of cable service are subject to the 5 percent cap, as are PEG support payments such as for salaries or training (as opposed to capital construction costs).

- **PEG and Institutional Network Requirements:** The FCC rules provide that LFAs may not impose more burdensome PEG carriage requirements on new entrants than those applicable to incumbents. LFAs also may not impose demands for duplicative PEG facilities and services, or require an applicant to pay for a communications network for nonresidential I-Net subscribers that will not be constructed. The FCC found it reasonable, however, to impose an obligation to share the costs of PEG facilities with an incumbent operator, if assessed on a per-subscriber basis.

- **Level-Playing Field Provisions:** The FCC concluded that requiring a new entrant to meet substantially all the terms and conditions imposed on the incumbent cable operator "may" be unreasonable. It noted that new entrants are not, as the cable operators have argued, operating on a "level playing field." Most notably, they will not enjoy a captive market and have no assured market position in which to recoup their substantial investments. As noted above, however, the FCC preempted only those level-playing field provisions adopted by LFAs, not the states.

- **Preemption of Customer Service Laws:** The FCC tentatively concluded that it could not preempt local or state customer service laws that exceed the Commission's standards, and that it could not prevent cable operators and LFAs from agreeing to more stringent standards. It seeks further comment on this issue.

Conclusion

The Commission's effort to jump start cable competition by streamlining the local franchising process highlights the increasing tension between federal and state or local policies in the regulation of the communications sector, an issue that has surfaced recently with respect to VoIP and even wireless services. Here, as in those sectors, the FCC has sided with the industry in favor of a less regulatory approach, with an eye toward facilitating competition not just in video, but in broadband and the so-called "triple play" of voice, data and video as well. Telcos will surely rush to take advantage of the FCC order, which could lead to interesting quandaries if the order ultimately is overturned even while telcos hold provisional new franchises pursuant to FCC authority. Two FCC commissioners have raised questions about the validity of the order, though the telcos and many industry observers have argued that the order treads well-established jurisdictional and policy grounds. In the meantime, the states may independently advance the competitive vision shared by the FCC through statewide legislative reform—and, if a telecom bill is finally in the cards, the Democratic majority in Congress could have the final say.

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