



# Understanding and Responding to the FCC Cable In-Kind and Mixed Use Order

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# Overview -- 4 Elements of Order

- Fair Market Value (FMV) of In-Kind Franchise Obligations is subject to 5% Cable franchise fee cap.
- Parties are to negotiate franchise modifications to account for FMV of In-Kind benefits within a reasonable period of time (120 days) and any franchise term that is inconsistent with the order is subject to preemption.
- LFAs may not regulate the provision of any non-cable services, including cable broadband, provided over the cable system of a cable operator, with the exception of channel capacity on institutional networks.
- “[T]he rules and decisions adopted in this Order apply to state-level franchising actions and regulations.” Order at ¶ 113



# Timeline

Event	Date
FCC Released Order	August 2, 2019
Order Published in Federal Register	August 27, 2019
Deadline to file for Circuit Lottery	September 6, 2019*
<b>Effective Date</b>	<b>September 26, 2019</b>
Deadline to file Appeal	October 28 , 2019

\* City of Eugene has filed in the 9<sup>th</sup> Circuit.

We will also need to file a stay request with the FCC. Though it will be unlikely to succeed, it avoids the argument that a court should decline a stay request because we didn't ask the FCC first.



# Background – How We Got Here

*Montgomery County v. FCC, 863 F.3d 485 (6th Cir. 2017)*

Local government challenged a 2007 FCC Order extending to incumbent cable operators rules established to apply to competitive entrants.

6th Circuit decided:

- In-kind Payments: Vacated FCC's finding that all cable-related exactions are "franchise fees"
- "Mixed Use Rule": Vacated FCC's orders finding that local franchising authorities are barred from regulating the provision of non-cable services by incumbent cable providers.
- 3rd Report and Order is the FCC's do-over after the 6th Circuit loss



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# In-Kind Rule Expressed as a Formula

(Franchise Fees + PEG Grants (cash) + FMV of In-Kind contributions, including I-Net)

MINUS

(PEG Capital + Costs of complying with build out, incidentals, customer service [over and above FCC standards?])

MUST BE LESS THAN OR EQUAL TO

(5% of Gross Revenue from Cable Service)\*\*\*

\*\*\*Please Note: The 5% of Gross Revenue is the Cable Act's definition and may be higher than what your state provides for as a franchise fee. Some state laws only capture subscriber revenue. Federal captures subscriber and ancillary revenue.



# In-Kind Order

- Allows a cable operator to credit against franchise fees the market value of all “in-kind” obligations required under a state or local cable franchise.
  - “In-kind” includes include “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” (§ 25)
  - “In-kind” does not include the cost of build-out requirements or PEG capital costs
  - “In-kind” does not currently include the fair market value of PEG channel capacity.



# What Might Be an In-Kind Contribution?

- Institutional Networks
- Complementary Cable Service to Government Buildings
- PEG Studio Operated by Cable Operator
- Video-On-Demand
- Customer Service Beyond FCC Rules
- Video Transmission Paths/PEG Transport
- Discounted Enterprise Services
- ROW Requirements
- Relocation, Restoration, Maintenance



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# Possible Timeline for Resolving FMV Disputes

September 27, 2019

Contact by Operator with FMV estimate

Discussions between the Parties – up to 120 days

Resolution or Self-help

Resolution/Litigation

Congressional Assistance

- Review your documents. Make sure that benefits that arise out of a settlement are not claimed as a franchise benefit.
- Have you examined if you are spending any of your franchise fee for PEG Capital expenses? If so, those are not counted toward the 5% cap.
- Can you make claim that you are a franchise in effect on October 1984 and it is an ongoing term?
- Don't forget about 47 USC §542 (e)
- **“(e)Decreases passed through to subscribers** Any cable operator shall pass through to subscribers the amount of any decrease in a franchise fee.”
- It is very likely that a cable operator will engage in self-help. That is reducing the cable franchise fee and require you to litigate to obtain a refund.
- Do you have a performance bond to use as an offset?
- There will be a federal appeal to determine if the FCC simply misread the Act, 35 years of experience and their own precedent – still, you may need to litigate locally to recover fees.
- Need to build Congressional opposition to any effort to extend offset status to PEG channel capacity.
- ***This issue is deferred in the Order.***



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# Mixed-Use Rule & Impact

- A franchising authority may not regulate the provision of any services other than cable services offered over the cable system of a cable operator, with the exception of channel capacity on institutional networks. (New 47 CFR §76.43)
  - Preempts regulation of any facilities and equipment of cable operator used in the provision of any services other than cable services;
  - Adopts cable operators' argument that a cable franchise authorizes installation of any equipment in RoW, regardless of use for cable service, including Wi-Fi and small cells;
  - Impact: Impedes local authority to ensure consistent regulations apply to providers of similar services.



# Impact of Order on States with State Cable Franchises

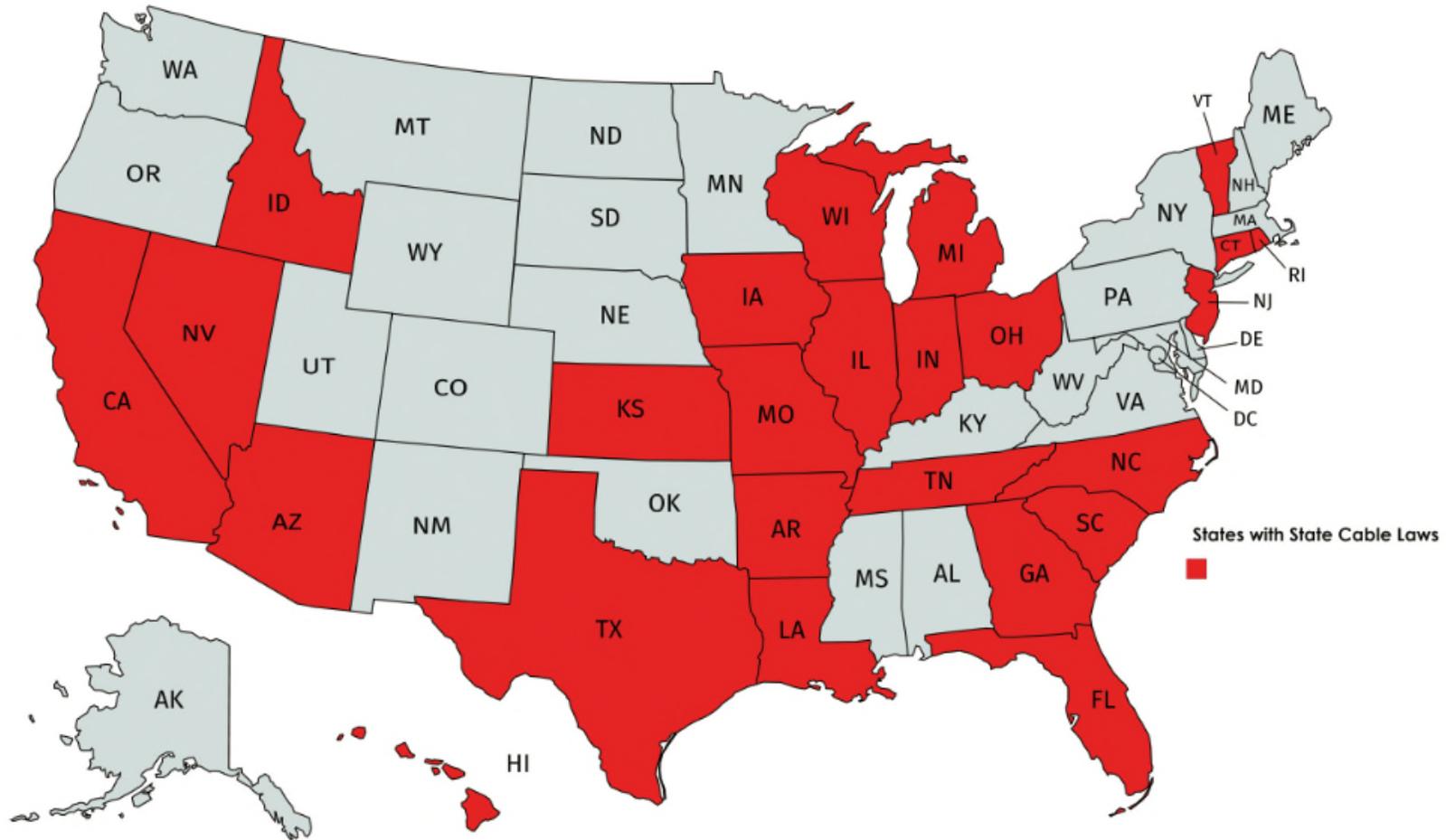
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# Order Applies in 23 States with State Cable Franchise Laws



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# Upsetting State Level Deals

- From 2005 to 2009, 23 states in an effort to jump-start competition moved cable franchising from local to state government.
- Legislatures felt they cut a fair deal on franchise fees, PEG, and connections to government buildings, schools and libraries.
- FCC just overturned all of those deals.
- Unclear how FCC expects franchise modification discussions to unfold in state franchising states.



# What Should You Be Doing?

The following slides are based on  
Michael Lynch of Boston's  
presentation to NLC of 8/27/19



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Assess the Impact

Alert Internal Stakeholders

Advise External Stakeholders

Ask for Support to Challenge and Congressional Support

Awaits Cable's Knock on the Door



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# Checklist

## Research

1. *Franchises*
2. *Side Letters*
3. *Settlements*
4. *Operator offerings (marketing) v. (requirements)*
5. *Institutional Network and Service Agreements (I-Net's and SLA's)*
6. *State franchising statute, if applicable*
7. *Urge/encourage/plead with Revenue & Law departments, as well as PEG Media Centers, to join planned appeal of the Order*

## Inform

### **Confirm PEG Access:**

- *Funding -- in particular, differentiate capital from operating.*
- *In-Kind contributions (programming, resources, etc.)*
- *For both I-Net and PEG Video Return - estimate number of lines, mileage or linear footage, equipment & maintenance.*
- *Connections & drops -- how many & what level of service (Basic, Standard, etc.?)*

## Prepare for notice

### **Prepare to ask Operator Q's (RFI)!**

### **Confirm/settle views on:**

1. *Franchises*
2. *Side Letters*
3. *Settlements*
4. *Operator offers (marketing) v. (requirements)*
5. *Institutional Network and Service Agreements (I-Net's and SLA's)*
7. *State franchising statute, if applicable*



# Analysis – Understanding the Numbers before Cable Challenges Them

## **Funding**

*Review & organize your buckets of capital v. operating*

- *Assign values to muni contributions (staff, office space, leases, etc.*
- *Prepare an all-funds view of cable & PEG*
- *Identify any ‘pass thru’ to subscriber of existing costs*
- *Fair market value (FMV) - challenge Operator’s calculations by researching comps!*

## **What You Receive for FF and PEG Fees & Other**

1. Fees
2. PEG “capital grants”
3. PEG operating
4. Equipment, studios or facilities from Operator
5. PEG transport (Video Return)
6. Free or discounted muni-service
7. Institutional networks (“I-Nets”)
8. Any other non-cash benefits to gov or PEG - not the public!

## **Do not include:**

1. *Capital expense/contributions for PEG Access.*
2. *Build-out of cable plants for subscribers,*
3. *Customer service -- office,, CSR’s, etc.*
4. *Channel capacity -- (though this might change in a year - thank you Cmmr. O’Rielly!*



# Alerting Internal and External Stakeholders

- Dust off your renewal cheat sheet of terms and review for impact through the lens of this Order.
- Prepare a risk memo for Revenue Dept. outlining estimated financial and services impact of Order implementation.
- Copy to your Law Department & Electeds..... loss of longtime revenue and services is a compelling argument for legal action.
- Inform policy, digital equity & IT staff -- you'd be surprised how few will realize the impact of reduced services and revenue



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# Be Prepared!

Governing Documents

Collect Offsets

Time Line

*Franchise Agreement(s)*

*Side Letters*

*Settlements*

*Operator offers (marketing) v.  
(requirements)*

*Institutional Network and Service*

*Agreements (I-Net's and SLA's)*

*State franchising statute, if applicable*

## Offsets at “fair market value” (FMV)

No idea what that FMV means .... not cost-based, but what the operator thinks something is worth.

And, it needs to be a franchise in-kind benefit -- differentiate between what the Operator gives in “community benefits” v. what is “required” in the contract.

No clarification on who receives the write-off -- the operator or the consumer. Assuming subscribers are paying for these LFA requirement, subscribers should be re-imburses. If not, it's just a wealth transfer from local governments to Cable Operators!

LFA's have 120 days to negotiate with the operator (from when -- I don't know!)

Don't go looking for trouble, let the Operator knock first.



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