

# ACM WEST

## Update on Legal, Legislative, and Policy Issues at the Federal and State Levels

### UPDATE ON SECTION 621 ORDERS

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# A Brief History of the FCC's Section 621 Orders

- *FCC Actions*

- 1<sup>st</sup> Order 22 FCC Rcd 5101 (2007)

- 2<sup>nd</sup> Order 22 FCC Rcd 19633 (2007)



- Recon Order 30 FCC Rcd. 810 (2015)

- 3<sup>rd</sup> Order 34 FCC Rcd 6844 (2019)

- *Anticipated FCC action 2023*

- *Court Decisions*

- *Alliance for Community Media v FCC*, 529 F.3d 763 (6th Cir. 2008)

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

- *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021)

# 1<sup>st</sup> and 2<sup>nd</sup> Orders (Martin FCC)

- *1<sup>st</sup> Order (2007)* established new rules designed to encourage cable competition by allowing *NEW* applicants for a cable franchise to get franchises more easily. For example, LFAs can't:
  - Exceed specified timeframes when issuing a decision on a new entrant's application
  - Impose unreasonable build-out mandates
  - Impose impermissible franchise fee requirements (non-incidental, non-cable, PEG operations payments)
  - Deny an application for failure to agree to certain PEG and I-Net obligations
  - Deny an application based on issues related to non-cable services or facilities
- *2<sup>nd</sup> Order (2007)* applied *1<sup>st</sup> Order's last three* rules to *INCUMBENT* cable providers, more or less, e.g.
  - Imposed same franchise fee limits
  - But said requiring an established incumbent operator to have a greater PEG carriage obligation or provide greater PEG support than a fledgling new entrant may be reasonable
  - Jurisdiction over both applies only to provision of cable services over the cable systems and not non-cable services

# ACM Court Challenge and Recon Order (Wheeler FCC)



- 1<sup>st</sup> Order upheld in *Alliance for Community Media v FCC*, 529 F.3d 763 (6th Cir. 2008)
- *LARGE GAP IN TIME.....*
- FCC Recon order (2015):
  - disagreed that only in-kind payments unrelated to cable service count toward the five percent franchise fee cap and affirmed that cable-related in-kind exactions also count toward the cap
  - affirmed that LFAs may not use their franchising authority to regulate non-cable services provided by either an incumbent or new entrant
  - determined that the 2<sup>nd</sup> Order applied only to local (rather than state) franchising processes but suggested that interested parties can request the FCC to revisit this issue in the future

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

- Sixth Circuit decided:
  - In-kind Payments: Vacated FCC's finding that all cable-related exactions are "franchise fees"
  - "Mixed Use Rule": Vacated FCC's finding that LFAs cannot use Title VI authority to regulate non-telecommunications (i.e., internet) services provided by incumbent cable operators because of I-Nets

# 3<sup>rd</sup> Section 621 Order (Pai FCC)

- 2019 FCC (by 3-2 vote, *Rosenworcel and Starks dissenting*)
- Devised another iteration of in-kind rule:
  - Most in-kind franchise obligations (other than buildout and PEG capital cost obligations) count against the Cable Act's 5% fee cap
  - In-kind obligations valued at "fair market value" (47 CFR §76.42(a))
  - *Did not decide if PEG channel capacity should be PEG capital or in-kind*
- Slightly modified mixed-use rule:
  - An LFA 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 I-Nets. (47 CFR §76.43)

## *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021)

- What the Sixth Circuit Sent Back to the FCC:
  - In-Kind Rule: Upheld the rule, except only the “marginal cost” of fulfilling a franchise obligation – not fair market value – constitutes a “franchise fee”
  - Mixed-Use Rule:
    - Questioned the rule as written, saying it “does not follow from the Act’s terms,” and concluded LFAs may regulate a cable operator’s non-cable services unless inconsistent with the Cable Act.
    - But it found a cable operator’s franchise included the right to use its cable system, located in the public right-of-way, to provide information services



# Anticipated Remand (Rosenworcel FCC)

- Once fifth Commissioner confirmed, FCC may conduct a rulemaking on remand in 2023
  - revise the “in-kind” rule
  - address the “mixed use” rule’s textual inconsistency with the Act
- Comment and reply comment period will provide an opportunity for interested parties to persuade the FCC to address key issues left open or subject to dispute





# Questions?

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