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Good News for Public Agencies and Communities on Regulation of Cable Systems

By Joseph Van Eaton and Gerard Lavery Lederer

An FCC order that local governments, schools and the public have opposed for almost a decade was reversed today by the U.S. Sixth Circuit Court of Appeals.

The case is Montgomery County v. FCC, which had its genesis in an FCC order issued in 2007 that some cable operators read to mean that:

a. localities could only regulate cable operators in their provision of cable services, and could not enforce customer service requirements in connection with their provision of non-cable, non-common carrier services (Internet service is an example of a non-cable service);

b. the value of any "in-kind" benefits that they provided to localities could be deducted from rent paid for use of the rights of way; and

c. localities could no longer require the operator to provide "institutional networks" – a portion of the cable system that is used to link community institutions, and that many localities use today to provide advanced public safety and educational services.

The FCC was asked to reconsider its order, and sat on that request for eight years, finally issuing a decision in late 2015. A coalition of communities from across the nation then pursued review in the Sixth Circuit (BB&K Partner Joseph Van Eaton served as lead counsel).

The Court found on Non-Cable Services:

"In sum, the FCC's orders offer no valid basis — statutory or otherwise — for its application of the mixed-use rule to bar local franchising authorities from regulating the provision of non-telecommunications services by incumbent cable providers. Thus, on the record now before us, the FCC's extension of the mixed-use rule to incumbent cable providers that are not common carriers is arbitrary and capricious."

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What that may mean: should the FCC reclassify Internet – now a common carrier service – and eliminate net neutrality, localities and states may have a clearer path to protecting consumers. It also means that privacy issues surrounding the provision of non-cable services can be addressed.

On Deduction of the Value of Benefits:

"The FCC's Second Order and Reconsideration Order do not reflect any consideration of this concern, which leads to the Local Regulators' second contention: that those orders contain scarcely any explanation at all for the FCC's decision to expand its interpretation of 'franchise fee' to include so-called 'in-kind' cable-related exactions…. And apart from a fleeting reference in the Reconsideration Order, the FCC has not even defined what 'in-kind' means."

What that may mean: restores the long-standing status quo, under which localities, as part of the grant of a cable franchise, required that operators provide benefits in the form of free services to community institutions, enforce requirements for discounts to elderly or disabled populations and ensure that operators provide good customer service. Claims by operators that these cannot be required should be rejected.

On institutional networks, the FCC conceded on brief that those could be required, and the court noted that concession, and confirmed it.

Now the matter goes back to the FCC, which could begin a franchising proceeding anew or decide that – aside from noting the impact of the court order on its decision – there is no need for further federal intervention into what are and should be local determinations.

Note: This article originally appeared on the now-defunct BBKnowledge blog, where Best Best & Krieger authors shared their knowledge on emerging issues in public agency law.