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Cities from Los Angeles to Boston are fighting a Federal Communications Commission decision they say will cost them millions by letting cable TV providers such as Comcast Corp. partly pay them with services like free air time instead of money.
At least 46 cities are asking federal appeals courts to undo an FCC **order** they argue will force them to raise taxes or cut spending on local media services, including channels that schools, governments, and the general public can use for programming. The lawsuits reflect a larger clash of interests among localities, media companies, and the FCC brought on by the agency's tactic of promoting broadband deployment nationwide—especially in rural areas with spotty or no internet access—by easing rules for business.

The order's backers say cable companies won't be as willing to invest in internet services, and build infrastructure, if they have to provide public access TV and other telecommunications services on top of the franchise fees they're required by statute to pay. "American consumers expect and deserve next-generation broadband networks and shouldn't have to see that progress slowed by some localities' attempts to evade Congress's statutory framework and impose duplicative taxes and fees," Michael Powell, president and CEO of NCTA—The Internet & Television Association, said in a statement after the FCC approved the order, which took effect Sept. 26.

Cities, though, see a future of diminished returns. "We're going to see a chilling effect that cable companies are having on their communities," Angelina Panettieri, principal associate for technology and communications at the National League of Cities in Washington, said. The cities, along with eight counties and the state of Hawaii, have filed seven petitions in three different circuit courts, Bloomberg Law data show. Los Angeles filed challenges twice as both a city and a county. Most of the cases are being consolidated in the U.S. Court of Appeals for the Ninth Circuit, and the cable industry hopes a ruling will clarify which services may count toward the fee.

Under federal law, franchise fees are capped at 5% of an operator's cable service revenue in each jurisdiction. The FCC's order lets cable

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companies calculate and subtract from the 5% the market value of cable-related, non-monetary contributions, such as public-access channels and free advertising slots. The order also prevents local governments from regulating the companies' broadband internet services.

Cable operators pay $3 billion per year in franchise fees to state and local governments, according to the NCTA. Each franchise agreement is different, with cities asking cable companies for any number of services, such as new networks for schools or public libraries, and each has a different company-determined value. If companies contribute less than 5% in cash, cities will have to reduce their public media budgets, stop offering services, or cut into other programs to make up the difference, Christopher Ali, associate professor in the University of Virginia's media studies department, said. The order also stifles municipal decision-making authority over franchise terms, Ali said. "It allows cable companies to call the shots a lot more than they used to," he said.

But the NCTA and FCC say consumers will ultimately suffer if cable companies can't get credit for services like public-access TV, and as a result cut down on other investments. An NCTA-commissioned study found that consumer welfare losses, such as poor or no rural internet access, would amount to $40 billion by 2023 if operators cut back on upgrades.

The FCC issued the order after the U.S. Court of Appeals for the Sixth Circuit struck down two previous orders in 2017. The court in **Montgomery County v. FCC** said the FCC failed to explain why the Communications Act allowed non-monetary contributions to count toward franchise fees. The court sent the matter back to the agency, which issued the new rule based on an interpretation that the law doesn't exclude "in-kind" contributions from the franchise fee definition.

Franchise fees under the law include "any tax, fee, or assessment of any kind imposed by a franchising authority," according to the new order, and "those terms should be interpreted expansively and given 'maximum breadth.'" FCC Chairman Ajit Pai, in announcing the order, said Congress exempted capital costs of public, educational, and governmental access channel equipment from counting toward the cap, and could have done likewise with non-monetary services, if that was its intent.

Gerard Lederer, counsel for some of the cities and a partner at Best Best & Krieger LLP in Washington, argues that interpretation "breaks with the plain reading of the statute and 35 years of past practice." The law differentiates between franchise fees and costs, showing that Congress understood there would be costs over and above the fees, he said. The Ninth Circuit may ultimately decide how to read the law, although the FCC has moved to get the matter transferred to the Sixth Circuit because that court is familiar with the issue. A transfer would "maintain continuity and consistency in the review of interrelated FCC orders," the agency said in its motion to transfer the case.

The FCC's order reflects the agency's overall effort to help the U.S. lead the global race to develop next-generation wireless networks. Pai has said every dollar spent on costs beyond the 5% franchise fee cap is a dollar that cable companies could spend on wireless upgrades

instead. The commission has eased other regulations toward the same goal, including limiting what local governments can charge wireless carriers to deploy small cell equipment for a 5G buildout. Dozens of cities and counties are challenging that order in another case pending in the Ninth Circuit.

The franchise order is part of “much larger agenda to diminish the power of municipalities,” Ali said. “We’re seeing this battle between municipalities and big media, and big media is winning.” The cases are Anne Arundel County v. FCC, 9th Cir., No. 19-72760, petition transferred 10/31/19; City of Pittsburgh v. FCC, 3d Cir., No. 19-03478, petition filed 10/29/19; Alliance for Commc’n v. FCC, 9th Cir., No. 19-72736, petition transferred 10/28/19; State of Hawaii v. FCC, 9th Cir., No. 19-72699, petition filed 10/24/19; City of Chicago v. FCC, D.C. Cir., No. 19-01226, petition for review filed 10/24/19; City of Portland v. USA, 9th Cir., No. 19-72391, petition filed 9/19/19; City of Eugene v. FCC, 9th Cir., No. 19-72219, petition filed 8/30/19. – ***Bloomberg***

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The big wireless companies have been wrangling for years with the issues associated with placing small cells on poles. Even with new FCC rules in their favor, they are still getting a lot of resistance from communities. Maybe the future of urban/suburban wireless lies with the big cable companies. Cable companies have a few major cost advantages over the wireless companies, including the ability to bypass the pole issue.

The first advantage is the ability to deploy mid-span cellular small cells. These are cylindrical devices that can be placed along the coaxial cable between poles. I could not find a picture of these devices, and the picture accompanying this article is of a strand-mounted fiber splice box — but it's s good analogy since the size and shape of the strand-mounted small cell device is approximately the same size and shape.

Strand-mounted small cells provide a cable company with a huge advantage. First, they don't need to go through the hassle of getting access to poles, and they avoid paying the annual fees to rent space on poles. They also avoid the issue of fiber backhaul since each unit can get broadband using a DOCSIS 3.1 modem connection. The cellular companies don't talk about backhaul a lot when they discuss small cells, but since they don't own fiber everywhere, they will be paying a lot of money to other parties to transport broadband to the many small cells they are deploying.

The cable companies also benefit because they could quickly deploy small cells anywhere they have coaxial cable on poles. In the future, when wireless networks might need to be very dense, the cable companies could deploy a small cell between every pair of poles. If the revenue benefits of providing small cells is great enough, this could even prompt the cable companies to expand the coaxial network to nearby neighborhoods that might not otherwise meet their density tests, which for most cable companies is to only build where there are at least 15 to 20 potential customers per linear mile of cable.

The cable companies have another advantage over the cellular carriers in that they have already deployed a vast WiFi network comprised of customer WiFi modems. Comcast claims to have 19 million WiFi hotspots. Charter has a much smaller 500,000 hotspots

but could expand that count quickly if needed. Altice is reportedly investing in WiFi hotspots, as well. The big advantage of WiFi hotspots is that the broadband capacity of the hotspots can be tapped to act as landline backhaul for cellular data and even voice calls.

The biggest cable companies are already benefitting from WiFi backhaul today. Comcast just reported to investors that they added 204,000 wireless customers in the third quarter of 2019 and now have almost 1.8 million wireless customers. Charter is newer to the wireless business and added 276,000 wireless customers in the third quarter and now has almost 800,000 wireless customers.

Both companies are buying wholesale cellular capacity from Verizon under an MVNO contract. Any cellular minute or cellular data they can backhaul with WiFi doesn't have to be purchased from Verizon. If the companies build small cells, they would further free themselves from the MVNO arrangement — another cost savings.

A final advantage for the cable companies is that they are deploying small cell networks where they already have a workforce to maintain the network. Bother AT&T and Verizon have laid off huge numbers of workers over the last few years and no longer have the fleets of technicians in all of the markets where they need to deploy cellular networks. These companies are faced with adding technicians where their network is expanding from a few big-tower cell sites to vast networks of small cells.

The cable companies don't have nearly as much spectrum as they wireless companies, but they might not need it. The cable companies will likely buy spectrum in the upcoming CBRS auction and the other mid-range spectrum auctions over the next few years. They can use the 80 MHz of free CBRS spectrum that's available everywhere.

These advantages equate to a big cost advantage for the cable companies. They save on speed to market and avoid paying for pole-mounted small cells. Their networks can provide the needed backhaul for practically free. They can offload a lot of cellular data through the customer WiFi hotspots. And the cable companies already have a staff to maintain the small cell sites. At least in the places that have aerial coaxial networks, the cellular companies should have higher margins than the cellular companies and should be formidable competitors. – ***CircleID***

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