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6th Circuit Vacates FCC Orders Affecting Municipal Regulation of Cable Companies and Services

FACTS:

The federal Communications Act (Act) regulates the way cable services, which include video programming, reach viewers nationwide. Under the Act, cable companies may provide cable services only if local authorities (franchising authorities) grant them a cable franchise. The Federal Communications Commission has the authority to make rules as necessary to carry out the purposes of the Act i.e., rules governing how local governments may regulate cable companies and cable services. Under the Act, franchising authorities do not have unlimited discretion in granting a franchise. The Act further provides limitations as to the amount of franchise fee that may be required.

In 2007, the FCC adopted two orders establishing rules impacting how local governments could regulate cable companies and services. The second order, in particular, expanded the rules to include incumbent providers as well as new applicants. Local authorities objected, and in 2015 the FCC finally issued a third order. Several franchising authorities then petitioned the Sixth Circuit for review of the orders on several grounds. In particular, franchising authorities objected to the FCC's expansion of its interpretation of a "franchise fee" to include so-called "in-kind benefits" or exactions with no explanation or rationale, reducing, if not totally eliminating, the franchise fee.

In addition, the FCC had adopted a "mixed-use" rule, which in essence states that franchising authorities can regulate only the provision of cable services over "cable systems" as defined by the Act, even though cable systems can also support telecommunications services (such as phone) and information services (such as certain Internet add-on applications). Local franchising authorities objected on the basis that the rule would prevent them from regulating "institutional networks" or "I-Nets." Institutional networks provide various services to non-residential subscribers rather than just video services to residential subscribers. Although the FCC conceded that its ruling was not meant to prevent local franchising authorities from regulating institutional networks, the question remained as to whether local franchising authorities could regulate other services like "information services" as defined by 47 U.S.C. § 153(24).

Local franchising authorities also objected to the FCC's extension in the second order of the mixed-use rule to incumbent cable operators and not just new entrants.

QUESTION:

May the FCC adopt a rule regarding franchise fees that could be charged under the Act, which, in effect, undermines the Act, without providing explanation or reasons for such interpretation?

ANSWER:

NO. The Sixth Circuit held that from a substantive and procedural point of view, the FCC must determine and explain "franchise fees" to determine whether cable-related exactions are, in fact, franchise fees under the Act.

QUESTION:

Was there any statutory basis for application by the FCC of the mixed-use rule to incumbent cable operators, essentially barring local franchising authorities from regulating the provision of non-telecommunications services by such incumbent cable operators?

ANSWER:

NO. The extension of the mixed-use rule by the FCC to incumbent cable operators that were not common carriers was arbitrary and capricious.

Montgomery County of Maryland v FCC, Nos. 08-3023/15-3578, July 12, 2017.