



Maine Municipal
Association

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To: Key Municipal Officials

Fr: Garrett Corbin, State and Federal Relations

Re: Federal Preemption of Local Franchise Fees and Small Cell Tower Review

Date: October 29, 2018

You may have received an email on Friday from the Community Television Association of Maine (CTAM) regarding two recent actions by the Federal Communications Commission (FCC) that impact the municipal cable television franchise authority, as well as local planning review for the siting of what are being referred to as “small cell” wireless antennae.

In an effort to provide you with an update as to the Maine Municipal Association’s approach to these two separate but similarly unwelcome developments, please find below for your reference a general summary of what has occurred in Washington, the potential impact on municipalities, and MMA’s response.

Small Cell Preemption

Federal Action. On Wednesday, September 26, the FCC issued a [declaratory ruling, report, and order](#) restricting the ability of municipalities to review and manage a new type of wireless antenna facility that is reportedly slated to be deployed in the coming months and years, likely in highly developed areas first, i.e., more populated municipalities and downtowns.

Local Impact. According to the [National League of Cities](#), there are three key impacts of the order.

When it goes into effect on January 14, 2019, the order will: (1) limit the municipal processing of small cell siting applications to either 60 or 90 days; (2) limit local fees to only a “reasonable approximation” of “reasonable costs” directly related to maintaining the rights of way and small cell facilities, up to the caps of \$100 per site application, and \$270 per year for ongoing fees on antennae located in the municipal right of way; and (3) limit aesthetic review requirements to those that are “reasonable” when compared to requirements for other entities located in the right of way.

In addition to these specific limitations, MMA is concerned by the FCC's broad interpretation that any local requirement which "inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment... can constitute an effective prohibition of services even if it is not an insurmountable barrier." Because "effective prohibitions" are disallowed by the [Federal Telecommunications Act of 1996](#) (sections 332(c)(7)(B)(i)(II) and 253(a)), the wireless communications industry will have a new basis, pursuant to this order, to take the position that ordinary municipal management of access to the local right of way is illegal.

MMA Response. On July 20, MMA sent a letter to Senators Collins and King expressing the Association's objection to a bill pending in the Senate, S. 3157, the "STREAMLINE Small Cell Deployment Act." The bill would codify in federal statute similar restrictions on local governments' ability to thoughtfully manage the expected wave of deployments of these antennae in the coming months and years. In the 2019 edition of the annual Federal Issues Paper and related lobbying in Washington, D.C., the Association will likely highlight as a matter of serious concern industry efforts, now endorsed by the FCC, to encroach on Maine's time-honored home rule authority. MMA is also convening a meeting in November of managers of municipalities most likely to be impacted by small cell deployments in the near term to determine whether a collective response at the state level is warranted. Several cities outside of Maine are also challenging the FCC order in court.

Cable Franchise Rollback

Federal Action. On September 25, 2018, the FCC publicly released a [notice of a rulemaking proposal](#) which would allow cable entities' in-kind contributions to count as part of its franchise fee contribution, and would eliminate local authority over non-cable services provided over cable systems. Specifically, the FCC proposes that any in-kind cable obligations other than capital costs for public, educational, and governmental access (PEG) channels and cable build-out requirements included in franchises should be considered a "franchise fee", counting the value of those obligations toward the 5 percent gross revenue cap on franchise fees.

Local Impact. According to the [NLC](#), the value of channel capacity for PEG stations, complementary connections to school or government buildings, and electronic program guides could be included. When taken at fair market value, the monetary franchise fees could be entirely eliminated. Municipal involvement in broadband provision in conjunction with cable companies would be precluded as well, including local review of wireless equipment attached to cable infrastructure. The result could also lead to different federal regulatory schemes regarding local regulation of equipment in the right of way, depending on whether the infrastructure is owned and operated by a wireless company or a cable company.

MMA Response. The Association is working with the NLC to determine the most effective next steps given the perceived likelihood that the FCC will adopt its proposed rule without amendments that reverse or significantly ameliorate the negative consequences for the municipal oversight of cable franchises. Should the rule be enacted as proposed, MMA's 2019 Federal Issues Paper and related lobbying will likely explore the option of a response by the legislative branch to this action by the executive branch.

Additional Input

Please do not hesitate to contact me at 1-800-452-8786 or gcorbin@memun.org with questions or comments. You are also welcome to share any concerns you have with your representative on MMA's [Legislative Policy or Executive?] Committee by emailing them directly or through [Laura Ellis at lellis@memun.org or Rebecca Lambert at rlambert@memun.org].