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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 76

[MB Docket No. 05-311; DA 20-148; FRS 16523]

Local Franchising Authorities' Regulation of Cable Operators and Cable Television Services

AGENCY: Federal Communications Commission.

ACTION: Interpretive rule.

SUMMARY: In this document, the Media Bureau, Federal Communications Commission (Commission), clarifies a Media Bureau order denying a motion for stay of the Commission's Third Report and Order in the above-mentioned docket.

DATES: This interpretive rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] and applicable beginning February 11, 2020.

FOR FURTHER INFORMATION CONTACT: For additional information on this proceeding, contact Raelynn Remy of the Media Bureau, Policy Division, at Raelynn.Remy@fcc.gov or (202) 418-2120.

SUPPLEMENTARY INFORMATION: This is a summary of the Media Bureau's Order on Reconsideration, DA 20-148, adopted and released on February 11, 2020. The full text is available for public inspection and copying during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, SW, Room CY-A257, Washington, DC 20554. This document will also be available via ECFS at <https://docs.fcc.gov/public/attachments/DA-20-148A1.docx>. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. The complete text may be purchased from the Commission's copy contractor, 445 12th Street, SW, Room CY-B402, Washington, DC 20554. Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

Synopsis

1. By this Order, we grant NCTA – The Internet & Television Association’s (NCTA’s) Petition for Clarification¹ of the Media Bureau’s Order Denying Motion for Stay of the Commission’s Third Report and Order² in the above-captioned proceeding.³ In its Petition, NCTA requests that the Bureau remove from the Stay Denial Order certain language in paragraph 21 that “creates the potential for confusion and the appearance of a conflict with the Third Report and Order.” In particular, NCTA asks that the Bureau excise two statements from paragraph 21. These statements are: “The rules in the [Third Report and Order] did not supersede provisions in existing franchise agreements on their effective date” and “[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the [Third Report and Order’s] requirements.”

2. After reviewing the record developed in response to the Petition,⁴ we agree with NCTA that these statements could be interpreted “to conflict with the Third Report and Order’s plain directives and require procedures not mandated by the Commission.” In particular, we note that the Third Report and Order states that “[i]f a franchising authority refuses to modify any provision of a franchise agreement that is inconsistent with this Order, that provision is subject to preemption under section 636(c).” We also note that the Third Report and Order “encourage[s] the parties to negotiate franchise modifications within a reasonable time,” and “find[s] that 120 days should be, in most cases, a reasonable time for the adoption of franchise modifications.” Contrary to these statements in the Third Report and Order, the statements that NCTA is seeking to excise from the Stay Denial Order could be construed as authorizing local franchising authorities (LFAs) to enforce unlawful franchise provisions unless and until a cable operator has proven to a court that they are unlawful.

¹ NCTA Petition for Clarification of Order Denying Motion for Stay, MB Docket No. 05-311, filed Nov. 15, 2019 (Petition). Although NCTA did not title its submission as a petition for reconsideration, we will treat it as a petition for reconsideration because it seeks further review of the Stay Denial Order.

² The Third Report and Order became effective on September 26, 2019 (84 FR 44725, Aug. 27, 2019).

³ An extensive discussion of the historical background of this proceeding is set forth in the Third Report and Order and the Stay Denial Order (<https://docs.fcc.gov/public/attachments/DA-19-1149A1.docx>); thus, we do not reiterate it at length here. After the Stay Denial Order was issued, certain municipalities sought a judicial stay of the Third Report and Order in the Ninth Circuit. That court subsequently transferred challenges to the Third Report and Order then pending before it, including the motion for judicial stay, to the Sixth Circuit.

⁴ The Media Bureau issued a Public Notice seeking comment on NCTA’s petition (84 FR 66186, Dec. 3, 2019). One party filed comments opposing the Petition. One party filed comments in support of the Petition.

3. We disagree with the National Association of Telecommunications Officers and Advisors (NATOA) that removing the relevant statements from paragraph 21 of the Stay Denial Order undermines our reasons for denying the stay petition. That argument ignores our two primary reasons for finding that LFAs will not suffer irreparable harm, absent a stay. First, we concluded in the Stay Denial Order that the injury claimed by LFAs (municipalities' loss of critical facilities and services) is speculative. We determined that localities can maintain access to critical facilities and services by adjusting revenues and expenses in response to changes in franchise fee revenue streams—for example, LFAs can maintain critical facilities and services “either by prioritizing some in-kind contributions over others or by prioritizing in-kind contributions over the fees they would otherwise recover.”⁵ Second, we concluded that the harm alleged by LFAs (loss of free services) was an economic loss, which under well-established case law, does not, in and of itself, constitute irreparable harm. These grounds alone were sufficient for denying the administrative stay request.

4. NATOA claims that budget amendments and procurement processes to authorize payment for services previously furnished pursuant to a cable franchise are often lengthy, and that LFAs “cannot . . . start the process without knowing what value a cable operator will assert for non-monetary franchise obligations that [would be] offset against franchise fee payments.”⁶ However, NATOA provides no evidence that any cable operator would abruptly cease services or take other unilateral action during the pendency of the appeal that would adversely affect municipalities, or create immediate or irreparable harm. Instead, as we explained in the Stay Denial Order, “the Order encouraged LFAs, in response to a request from a cable operator, to negotiate franchise terms that conform to the *Order* in a reasonable amount of time . . . Thus, for example, an LFA is not required to assess the costs of in-kind contributions that it currently receives from a cable operator (*e.g.*, free cable service) against the franchise fee until the cable operator asks the LFA to amend the terms of its franchise.” Accordingly, consistent

⁵ As NCTA notes, “revenues would be recoverable in the event that the Third Report and Order is ultimately overturned on appeal, further undermining the notion that such losses could constitute irreparable harm.”

⁶ NCTA asserts that this argument is baseless and states that “[a]ll NCTA seeks in its Petition is what the Third Report and Order already provided: clarification that parties should negotiate timely and in good faith to reach mutually agreeable franchise terms that comply with the Cable Act and rulings set forth in the Order.”

with the terms of this order, we grant NCTA's petition.

5. We therefore conclude that the following two sentences in paragraph 21 of the Stay Denial Order misinterpret the Order: "The rules in the [Third Report and Order] did not supersede provisions in existing franchise agreements on their effective date" and "[i]f negotiations fail, the terms in the franchise remain in effect unless and until a cable operator challenges those terms and proves that the terms violate the [Third Report and Order's] requirements." The same is true of the sentence in paragraph 21 of the Stay Denial Order that reads: "At that point, the LFA and the cable operator have 120 days to renegotiate the franchise agreement." Instead, we find, in accordance with the Third Report and Order, that the LFA and the cable operator have a reasonable period of time to renegotiate the franchise agreement, which in most cases is 120 days. If negotiations fail, the cable operator and the LFA can continue to rely on the processes and remedies that may be contained in their franchise agreement or that are otherwise available.⁷

6. Accordingly, it is ordered that, pursuant to the authority contained in sections 4(i), 4(j), 303(r), and 405 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i)-(j), 303(r), and 405 and the authority delegated in §§ 0.61, 0.283, and 1.106 of the Commission's rules, 47 CFR 0.61, 0.283, and 1.106, this Order in MB Docket No. 05-311 is adopted. It is further ordered that the Petition for Clarification of Order Denying Motion for Stay pending judicial review of the Third Report and Order in this proceeding, filed by NCTA, is granted to the extent indicated above. It is further ordered that this Order shall be effective upon its release.

FEDERAL COMMUNICATIONS COMMISSION.

Thomas Horan

Media Bureau.

⁷ For example, the cable operator and the LFA can take the dispute to court or, in the case of an interpretive dispute regarding the scope of the rules adopted in the Third Report and Order, request a declaratory ruling from the Commission.

[FR Doc. 2020-04707 Filed: 3/5/2020 8:45 am; Publication Date: 3/6/2020]