

Memorandum



CITY OF DALLAS

DATE October 5, 2018

TO Honorable Mayor and Members of the Dallas City Council

SUBJECT City Attorney's Office Update – Response to Recent FCC Actions

Background

The Federal Communications Commission has recently taken several actions that threaten the City's local and other municipalities authority to manage and receive fair compensation for the use of the public right-of-way. Two of the most important are the "Small Cell" order and the cable "In-Kind Offset" proposed rule. The "Small Cell" order creates a \$2 billion unfunded mandate (by the FCC's own estimate) that caters to the wants of the wireless industry at the expense of the City's and local control. The second, an "In-Kind Offset" Cable proposed rule, will drastically reduce or eliminate future cable franchise fee payments to local governments. Both items were adopted by the FCC, the cable "In-Kind Offset" proposed rule on September 25th and the "Small Cell" order on September 26th. This FCC effort to push a pro-industry agenda to the detriment of local communities is unprecedented in its breadth and its reliance on weak evidence and questionable legal theories.

The Small Cell Order

In the order the FCC concludes that Sections 253 and 332(c)(7) of the Telecommunications Act of 1996 limit state and local governments to charging fees that are no greater than a reasonable approximation of their costs for processing applications and for managing deployments in the rights-of-way. In other words, the FCC determines that local and state government may *not receive any compensation* for the value of the public property that the FCC has mandated be made available for private companies to use for their for-profit businesses. This is an industry favorite argument that has been repudiated by the courts on numerous occasions dating back to the 1800's. One of the cases reiterating the legal principle that the appropriate method of determining right-of-way compensation is rent is a case pursued by the City of Dallas. There the Federal Fifth Circuit Court of Appeals held that "franchise fees are not a tax . . . but essentially a form of rent: the price paid to rent use of public rights-of-ways." *City of Dallas, Tx et al. v. FCC*, 118 F.3d 393 (5th Cir. 1997).

The order is, in effect, a huge transfer of public property rights from local taxpayers into the hands of private companies to be used as those companies see fit. Some of the details of this order are similar to the provisions of Texas Local Government Code Chapter 284, also known as SB 1004, that was passed in 2017. That legislation is currently being challenged by Texas cities including the City of Dallas. But a victory in that lawsuit will be for naught if this FCC order is allowed to stand unchallenged.

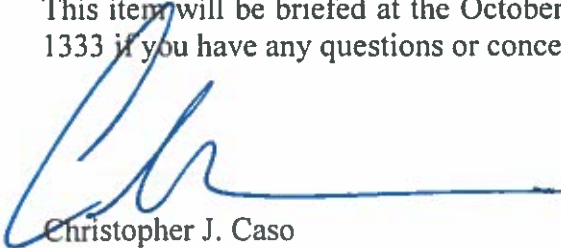
The Cable In-Kind Offset Order

Like the Small Cell order, the proposed cable In-Kind Offset proposed rule, if it becomes effective, will rob local governments of billions of dollars of revenue. The proposed rules would allow cable companies to offset the value of in-kind services they have provided to cities (a practice common since the first cable franchises) against the franchise fee that would otherwise be paid to the city. In Dallas, this would include the value (as determined by the cable company) for the channels used to provide Public, Educational and Government programming (P.E.G. channels), as well as the services provided to City facilities such as City Hall, libraries, recreation centers, fire stations and police substations, not to mention the services provided to D.I.S.D. and others. Based on amounts that have been suggested for the value of these in-kind service, these offsets could completely eliminate the almost \$10 million annually the City receives in cable franchise fees. It is worth noting that these in-kind services cost the cable companies little or nothing to provide to the City, but the FCC didn't limit the offset to the cable companies' *costs* (as it did with city right-of-way fees) but instead would allow the cable companies to recover the *claimed market value* of those services.

Advantage of a joining the consortium of cities and city organizations

While this will be a costly and lengthy fight, it is the only path forward if cities want to stop or lessen the devastating and permanent negative financial and aesthetic impacts these orders will have on our communities. Fortunately, participating in the consortium will allow the City of Dallas to protect its interests much more cost-effectively than pursuing a challenge independently. It will also facilitate coordination of its legal efforts with other cities around the country.

This item will be briefed at the October 17, 2018, City Council Meeting. Please call me at 670-1333 if you have any questions or concerns about this item.



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- M. Elizabeth Reich, Chief Financial Officer
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