

Case No. 07-3391 (and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

ALLIANCE FOR COMMUNITY MEDIA ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents.

**PETITION FOR REVIEW OF ORDER OF
THE FEDERAL COMMUNICATIONS COMMISSION**

**REPLY BRIEF OF INTERVENOR
CITY AND COUNTY OF SAN FRANCISCO
(PROOF COPY)**

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
DANNY Y. CHOU
Chief Appellate Attorney
WILLIAM K. SANDERS
Deputy City Attorney
1 Dr. Carlton B. Goodlett Place
City Hall, Room 234
San Francisco, California 94102
Telephone: (415) 554-6771
Facsimile: (415) 554-4757
E-Mail: william.sanders@sfgov.org

Attorneys for Intervenor
CITY AND COUNTY OF SAN FRANCISCO

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INTRODUCTION

Intervenor the City and County of San Francisco (the “City”) has challenged certain aspects of the determination by the Federal Communications Commission (“FCC”) in its *Report and Order and Further Notice of Proposed Rulemaking In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, 22 F.C.C. Rcd 5101 (2007) (the “Order”). The City argued that the FCC, consistent with the statutory language, should have construed the term “franchise fee” in the Communications Act to exclude certain application and other fees charged to an applicant for a cable franchise by a local franchising authority (“LFA”) because those fees are either: (i) not imposed on a “cable operator;” or (ii) subject to the statutory exclusion for fees that are “incidental to the awarding or enforcing” of a franchise.¹

In its opening brief, the FCC makes four arguments. First, the FCC argues that, because the City did not raise before the FCC the issue of whether application

¹ Opening Brief of Intervenor City and County of San Francisco (“City Brief”) at 3-7. The City also argued that voluntary payments for public, educational or governmental programming are not franchise fees. (City Brief at 8-9.) No further argument is required as to that point because the FCC has conceded it. *See* Opening Brief of the Federal Communications Commission on Petition for Review of Order of the Federal Communications Commission (“FCC Brief”) at 70, n.60.

or other fees are not imposed on a “cable operator,” that issue is not properly before this Court.² In making this argument, however, the FCC ignores the fact that nothing in its notice of proposed rulemaking informed the City or the other parties that the Order would include a construction of the term “franchise fee.” Therefore, neither the City nor any party should be required to have raised this precise issue before the FCC in order to address it here.

Second, the FCC argues that this issue is not before the Court because the City, as an intervenor, cannot raise an issue not addressed by the parties.³ This argument ignores that a number of parties to this proceeding have challenged the FCC’s proposed construction of the term “franchise fee.”⁴ Indeed, petitioners Alliance for Community Media, *et al.* (“ACM”) expressly adopted the City’s argument.⁵

Third, the FCC argues that the City’s construction of the term “franchise fee” would require this Court to ignore certain language in the statute.⁶ This

² FCC Brief at 65.

³ FCC Brief at 65.

⁴ *See* Opening Brief of Petitioners Alliance for Community Media, *et al.* (“ACM Brief”) at 54; Opening Brief of Petitioner Fairfax County (“Fairfax Brief”) at 54-55.

⁵ ACM Brief at 54.

⁶ FCC Brief at 65-66.

argument ignores two facts. First, LFAs award franchise *renewals* to cable operators. So the language in the exception is not superfluous. Second, certain LFA fees other than application fees that are incidental to the award of a franchise could be imposed *after* an LFA awards a franchise. So these fees would be considered franchise fees unless they are subject to the exception.

Finally, the FCC argues that it properly limited the statutory exclusion for fees that are “incidental to awarding or enforcing” a franchise to those types of fees expressly identified in the Communications Act or to other minor expenses.⁷ Nonetheless, the FCC erred because nothing in the statutory language or the legislative history suggests that Congress intended to limit the exclusion in this manner.

For these reasons, this Court should reverse the decision of the FCC and find instead that the term “franchise fee” does not include fees imposed by an LFA to process an application for a new cable franchise.

⁷ FCC Brief at 66. The FCC does not mention the City as having made this argument. *See* FCC Brief at 66. Regardless, the City did make this argument. *See* City Brief at 5-7.

ARGUMENT

THE FCC ERRED IN DETERMINING THAT CERTAIN LOCAL FEES ARE “FRANCHISE FEES.”

A. The City’s Argument that Application Fees Are Not Imposed on a “Cable Operator” Is Properly Before this Court.

For a fee to be a “franchise fee,” it must be imposed on a “cable operator . . . solely because of [its] status as such.” 47 U.S.C. § 542(g)(1). The City argues that application and other fees that an LFA might require from an applicant for a new cable franchise (including cost reimbursement) are not imposed on a cable operator because the applicant does not become a cable operator until a franchise is granted.⁸

Before addressing the merits of the City’s argument, the FCC argues that this Court should not even consider it for two separate reasons. First, the FCC argues that the City failed to raise this issue during the administrative proceeding that led to the Order. Second, the FCC argues that the City, as an intervenor, may not present an argument that has not been made by any petitioner.⁹ Neither of these arguments has merit.

The FCC opened this proceeding by issuing a notice of proposed rulemaking entitled *Implementation of Section 621(a)(1) of the Cable Communications Policy*

⁸ City Brief at 4.

⁹ FCC Brief at 65.

Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, 20 F.C.C. Rcd 18581 (2005) (the “NPRM”). Nothing in the NPRM forewarned the City, or any other party or interested person, that the FCC would construe the term “franchise fee” in the Communications Act in the rulemaking proceeding. In fact, the NPRM did not use the term franchise fee or even mention § 542(g), in which the term is defined.

As a result, the City did not address this section in its comments filed with the FCC, nor did the City have any reason to discuss it. The City could not have anticipated that the FCC would use the NPRM to construe the term franchise fee. Indeed, as ACM and amici curiae have noted, the FCC violated the public notice requirements of the Administrative Procedure Act by including in its Order matters that were not a “logical outgrowth” of the NPRM, including its discussion of § 542(g).¹⁰

Even if this Court were to find that the FCC’s construction of § 542(g) was properly included in the Order, the Court should nonetheless reject the FCC’s attempt to dismiss the City’s argument on procedural grounds. If the Court holds

¹⁰ ACM Brief at 58-59 and n.169, quoting *Shell Oil Co. v. EPA*, 950 F.2d 741, 750-51 (D.C. Cir. 1991); *see also* Amici Curiae Brief of National Association of Towns and Townships, *et al.* in Support of Petitioners Alliance for Community Media, *et al.* at 14-15.

otherwise, an administrative agency like the FCC will be able to duck criticisms of its construction of a statute by waiting until issuing a final order to address it. Any sense of justice and fair play should abhor such a result.

The FCC also asks the Court to ignore the City's argument because no petitioner raised it. But the issue of the proper construction of the term franchise fee in § 542(g) has been raised in the opening briefs filed by at least two petitioners.¹¹ Furthermore, ACM expressly incorporated the City's arguments into its opening brief.¹²

The FCC's procedural arguments lack merit, and the Court should consider the issues raised by the City.

B. Application and Other Fees Required To Obtain a Franchise Are Not Imposed on a "Cable Operator" and Are Not "Franchise Fees."

An entity that applies for a cable franchise is not a cable operator unless and until the LFA grants it a franchise. Thus, application and other fees that an LFA might require from an applicant for a cable franchise are not, and could never be, franchise fees subject to the five percent cap. Such fees are not imposed on a "cable operator" because of its "status as such." 47 U.S.C. § 542(g). The 12-

¹¹ See ACM Brief at 54; Fairfax Brief at 54-55.

¹² ACM Brief at 54.

month period by which the cap is measured simply doesn't start until after the franchise is granted. *See* 47 U.S.C. § 542(b).

The FCC dismisses the City's argument by stating the "there would have been no need for Congress to exempt charges that are 'incidental to the *awarding* . . . of a [sic] franchise' if the definition of 'franchise fee' did not reach fees imposed on applicants for new franchises."¹³ In proffering this argument, however, the FCC ignores two things.

First, existing cable operators are *awarded* franchise renewals. For this reason, even assuming that application fees "are incidental to the *awarding* . . . of the franchise," Congress still had reason to exempt those fees even if applicants for new franchises are not deemed to be cable operators.

Second, certain fees that might be imposed on a cable operator *after* the LFA granted a franchise may still be *incidental to awarding the franchise*. This would certainly be the case with bonds, letters of credit and insurance – only an entity that obtained a franchise would be required to incur such costs. An LFA could reasonably require such security as an incident to granting a franchise in order to secure the franchise operator's future performance. This might also be true for other types of fees not enumerated in the statute (*i.e.* permit fees, acceptance fees,

¹³ FCC Brief at 65-66, quoting 47 U.S.C. § 542(g)(2)(D).

etc.). By exempting incidental charges, Congress simply intended to insure that such costs would not be included in the five percent franchise fee cap.

C. The FCC’s Construction of the Word “Incidental” in § 554(g)(2)(D) Is Clearly Erroneous.

The Communications Act excludes from the five percent franchise fee cap any “charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages.” 47 U.S.C. § 542(g)(2)(D).

As the City explained in its opening brief, the FCC erred in limiting the word “incidental” to “the list of incidentals in the statutory provision.” The fees listed as incidental in the statute were intended as examples only; they were not intended to be a comprehensive list.¹⁴

In addition, the City showed that the FCC’s construction of the term “incidental” to also mean a “minor expense” is erroneous.¹⁵ Nothing in the statutory language or legislative history indicates that Congress intended the word incidental to mean minor or small. Furthermore, the FCC’s argument that certain minor incidental expenses would not be considered franchise fees contradicts its own construction of the statute. Either Congress intended, as the FCC suggests, to

¹⁴ City Brief at 4-7.

¹⁵ City Brief at 4-7.

limit the exclusion to bonds, security funds, etc. – or it did not. There is simply no basis for the FCC to determine that other types of fees could also be considered incidental *if they were minor in amount*. The statutory language simply does not support this construction.¹⁶

In support of its findings, the FCC cites a statement from the legislative history in which, according to the FCC, Congress noted that the “‘incidental to’ exception is to allow LFAs to impose ‘incidental requirements or costs necessary’ to award or enforce a franchise without regard to the 5 percent limitation.”¹⁷ What is telling about the FCC’s reliance on this legislative history is the FCC’s omission of some of the pertinent language contained therein. Read in its entirety, Congress stated that:

Franchise fee is defined by subsection 622(g) to include any tax, fee, or assessment imposed on a cable operator or subscribers solely because of their status as such. Also, franchise fee is defined so as not to include any bonds, security funds, or *other incidental requirements or costs necessary to the enforcement of the franchise*. Such charges or requirements may be imposed by the franchising authority in the franchise ordinance or the request for proposals.

¹⁶ As Fairfax County aptly noted, the FCC’s construction ignores the fact that in § 542(g)(D)(2) the preposition “to” follows the word “incidental,” which contemplates a relationship between the word incidental and awarding or enforcing a franchise. Fairfax Brief at 54-55.

¹⁷ FCC Brief at 66, quoting H.R. Report No. 98-934, at 64 (1984).

H.R. Report No. 98-934, at 64 (1984) (emphasis added).

Not only did Congress omit the word “*awarding*” in the legislative history, it used the term “*or other incidental requirements or costs*” – which follows a list of some types of expenses Congress later enumerated in the statute. This legislative history thus makes it clear that Congress did not intend the list to be exclusive. Instead, the list was intended to illustrate the types of fees an LFA could impose on a cable operator (regardless of the five percent cap) because Congress had determined that those fees were incidental to awarding or enforcing a franchise.

Intervenors supporting the FCC make the unsubstantiated claim that a construction of § 542(g)(2)(D) to exclude application fees and costs will cause LFAs to “outsource their role in negotiations,” thereby creating an “incentive to use delay as a negotiating tactic.”¹⁸ It is not the construction of § 542(g)(2)(D), however, that will force LFAs to seek outside consultants. With the tight deadline the FCC has now imposed on LFAs to review some applications for new cable franchises (90 days for application from current right-of-way users), LFA’s use of outside consultants could become increasingly necessary.

¹⁸ Brief of Intervenors United States Telecom Association, *et al.* in Support of Respondents at 46.

Many LFAs do not employ persons with the knowledge or expertise necessary to determine – before an interim cable franchise is “deemed granted” – whether the LFA should deny the application because the terms and conditions proposed by the applicant do not comply with federal, state or local laws. The only way for many LFAs to make that determination would be to rely on paid consultants who are experts in the field. It is only fair that applicants be held responsible for these costs, as Congress clearly intended.

CONCLUSION

This Court should find that the FCC abused its discretion and reverse the Order, along with granting such other, further and different relief as this Court deem just and proper.

Dated: October 4, 2007

Respectfully submitted,

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
DANNY Y. CHOU
Chief Appellate Attorney
WILLIAM K. SANDERS
Deputy City Attorney

By: _____
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for Intervenor
CITY AND COUNTY OF SAN FRANCISCO

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 14 point Times New Roman typeface. According to the “Word Count” feature in my Microsoft Word for Windows software, this brief contains 2,355 words up to and including the signature lines that follow the brief's conclusion.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on October 4, 2007.

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
Chief Energy and Telecommunications Deputy
DANNY Y. CHOU
Chief Appellate Attorney
WILLIAM K. SANDERS
Deputy City Attorney

By: _____
WILLIAM K. SANDERS
Deputy City Attorney

Attorneys for Intervenor
CITY AND COUNTY OF SAN FRANCISCO

PROOF OF SERVICE

I, KIANA V. DAVIS, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office, City Hall, 1 Dr. Carlton B. Goodlett Place, Room 234, San Francisco, CA 94102-0917.

On October 4, 2007, I served the following document(s):

**REPLY BRIEF OF INTERVENOR CITY AND
COUNTY OF SAN FRANCISCO
(PROOF COPY)**

on the following persons at the locations specified:

Christopher J. White, Esq.
Division of the Ratepayer Advocate
31 Clinton Street, 11th Floor
P.O. Box 46005
Newark, NJ 07102

Sam Feder
Laurence N. Bourne
Office of General Counsel
Federal Communications Commission
445 12th Street SW
Washington, DC 20554

Kenneth S. Fellman
Kissinger & Fellman PC
3773 Cherry Creek N. Dr., #900
Denver, Colorado 80209

Catherine G. O'Sullivan
U.S. Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Ave., N.W.,
Room 3224
Washington, D.C. 20530-0001

Alan G. Fishel
Jeffrey E. Rummel
Arent Fox LLC
1050 Connecticut Ave., N.W.
Washington, D.C. 20036

Tillman L. Lay
Spiegel & McDiarmid
1333 New Hampshire Ave., N.W.
Washington, D.C. 20036

Pierre H. Bergeron
Squire Sanders & Dempsey
312 Walnut, Suite 3500
Cincinnati, OH 45202-4036

Michael K. Kellogg
Austin C. Schlick
Kellogg, Huber, Hansen, Todd, Evans
& Figel
1615 M Street, N.W., Suite 400
Washington, DC 20036-3209

Rodney L. Joyce
Joyce & Associates
10 Laurel Parkway
Chevy Chase, MD 20815

Henry Weissman
Munger, Tolles & Olson, LL
355 South Grand Ave., 35th Floor
Los Angeles, CA 90071

Michael S. Schooler
National Cable & Telecommunications
Association
25 Massachusetts Ave., NW, Suite 100
Washington, DC 20001

Herbert E. Marks
Squire Sanders & Dempsey
1201 Pennsylvania Ave., N.W.
Washington, DC 20004

Robert B. McKenna
Tiffany West Smink
1801 California Street, 10th Floor
Denver, CO 80202

Jonathan Banks
United States Telecom Association
607 14th Street, N.W., Suite 400
Washington, D.C. 20005-2164

Michael A. Cardozo
Bruce Regal
NYC Law Department
Office of Corporation Counsel
100 Church Street
New York, NY 10007

Paul K. Mancini
AT&T Inc.
175 E. Houston, Room 1254
San Antonio, TX 78205

Gary Liman Phillips
AT&T Inc.
1120 20th Street, N.W., Suite 1000
Washington, D.C.

Robert B. Nicholson
Steven J. Mintz
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Ave., N.W.,
Room 3224
Washington, D.C. 20530-0001

Matthew C. Ames
Miller & Van Eaton, PLLC
1155 Connecticut Ave., NW, Suite 1000
Washington, DC 20036

Michael E. Glover
Verizon
1515 North Courthouse Road,
Suite 500
Arlington, VA 22201-2909

Steven J. Mintz
United States Department of Justice
Antitrust Division, Appellate Section
950 Pennsylvania Ave., N.W.,
Room 3224
Washington, D.C. 20530-0001

Howard J. Symons
Tara M. Corvo
Mintz, Levin, Cohn, Ferris, Glovsky
& Popeo
701 Pennsylvania Avenue, N.W.,
Suite 900
Washington, DC 20004-2608

Neal M. Goldberg
Michael S. Schooler
National Cable & Telecommunications
Assoc.
25 Massachusetts Ave., N.W., Suite 100
Washington, DC 20001

Joseph Van Eaton
Miller & Van Eaton, PLLC
1155 Connecticut Ave., NW
Washington, DC 20036

James N. Horwood
Spiegel & McDiarmid
1333 New Hampshire Ave., N.W. 2nd
Floor
Washington, D.C. 20036

in the manner indicated below:

- BY UNITED STATES MAIL:** Following ordinary business practices, I sealed true and correct copies of the above documents in addressed envelope(s) and placed them at my workplace for collection and mailing with the United States Postal Service. I am readily familiar with the practices of the San Francisco City Attorney's Office for collecting and processing mail. In the ordinary course of business, the sealed envelope(s) that I placed for collection would be deposited, postage prepaid, with the United States Postal Service that same day.

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct.

Executed October 4, 2007, at San Francisco, California.

KIANA V. DAVIS