UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Case Nos. 19-4161/4162/4163/4164/4165/4166/4183

CITY OF EUGENE, OREGON (19-4161); CITY OF PORTLAND, OREGON, et al. (19-4162); STATE OF HAWAII (19-4163); ALLIANCE FOR COMMUNICATIONS DEMOCRACY, et al.(19-4164); ANNE ARUNDEL COUNTY, MARYLAND, et al. (19-4165); CITY OF PITTSBURGH, PENNSYLVANIA (19-4166); CITY OF CHICAGO, ILLINOIS, et al. (19-4183),

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents,

NCTA-THE INTERNET AND TELEVISION ASSOCIATION (19-4161–4166/4183); THE ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS (19-4162); CITY OF NEW YORK (19-4162); BLOOMFIELD TOWNSHIP, MICHIGAN, et al. (19-4165); CITY OF AURORA, COLORADO, et al. (19-4183),

Intervenors.

O R D E R

Before: MCKEAGUE, GRIFFIN, and KETHLEDGE, Circuit Judges.

PER CURIAM. Over the past fifteen years, the Federal Communications Commission has published a series of written orders that, together with the Communications Act, 47 U.S.C. § 151 *et seq.*, set forth the rules by which state and local governments may regulate cable providers. Several of those governments and some affiliated entities moved to enjoin the FCC's most recent order, which, among other things, interprets a term in the Act—"franchise fees"—in a manner that restricts the concessions that those governments may demand from cable providers. We deny the motion.

This court has already twice reviewed the FCC's interpretation of the term "franchise fee" as used in the Communications Act. *See Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008); *Montgomery Cty. v. FCC*, 863 F.3d 485 (6th Cir. 2017). Under the Act, cable companies may provide cable services only if they are granted a cable "franchise" by their local government authorities. 47 U.S.C. §§ 522(9), 541(a)(2) and (b)(1). In exchange for a cable franchise, those authorities ("franchising authorities") may demand that cable companies provide not only cash, but also, among other things, facilities, equipment, and "broad categories of video programming or other services" that meet the community's cable-related needs. *See id.* §§ 541(a)(3)-(4), 544(b), 546(c)(1)(D). But at least some of those demands—those that are for "franchise fees"—are limited by the "franchise-fee cap," which places a ceiling on the total value of the cash and services that a franchising authority may collect from a cable company. The Act limits franchise fees to a maximum of five percent of the company's gross revenues for any 12-month period. *Id.* § 542(b).

In our most recent opinion in this matter, we agreed with the FCC that "franchise fees" can include noncash exactions, like free or discounted services. *See Montgomery Cty.*, 863 F.3d at 491 (6th Cir. 2017). The value of those exactions thus may count toward the five-percent cap. But we vacated as "arbitrary and capricious" the FCC's pronouncement that all "in-kind" cable-related exactions were necessarily "franchise fees" subject to that cap. *Id.* We therefore vacated the FCC's "Second Order" and directed the FCC to "determine and explain anew whether, and to what extent, cable-related exactions are 'franchise fees' under the Communications Act." *Id*. at 492.

The FCC did that in its "Third Order," which it entered in August 2019. *See* Local Franchising Authorities' Regulation of Cable Operators and Cable Television Services, 84 FCC Rcd. 44725-01, 2019 WL 4016825 (August 27, 2019). In that Order, the FCC concluded among other things that most, though not all, in-kind cable-related exactions are franchise fees that count toward the five-percent cap. *Id.* at ¶ 8.

A group of franchising authorities and associated trade groups petitioned for review of the Third Order, which took effect at the end of September. *See* 47 C.F.R. § 76.42. The franchising authorities also asked the FCC to stay the Order; the FCC denied that request. The franchising authorities then moved to enjoin the Third Order pending our review of it. The FCC—along with an intervenor, "NCTA – The Internet & Television Association"—opposed that motion.

In considering a motion for injunctive relief, we typically consider four factors: first, whether the movant has a strong likelihood of success on the merits; second, whether the movant would suffer irreparable injury without the injunction; third, whether issuance of the injunction would cause substantial harm to others; and fourth, whether the public interest would be served by issuance of the injunction. *See A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917–18 (6th Cir. 2018).

Here, the only part of the Third Order that the franchising authorities challenge in their motion to stay is the FCC's interpretation of "franchise fee." Hence the franchising authorities provide no basis for us to enjoin other parts of the Order, notably the FCC's "mixed-use" rule or its preemption conclusions. We therefore consider only whether to enjoin the FCC's definition of "franchise fee."

We begin with the likelihood of success on the merits. In the Third Order, the FCC observed that the Act's definition of "franchise fee" specifically excludes five taxes, fees, or assessments that a franchising authority might seek from a cable provider. Order at ¶ 14–15; *see* 47 U.S.C. § 542(g). Two of those exclusions comprised in-kind cable-related exactions. *See* 47 U.S.C. § 542(g)(2)(B) and (C). The FCC thus concluded that the term "franchise fee" generally included all other cable-related, nonmonetary exactions, because otherwise Congress would have had no need to include any such exactions in its list of exceptions to the definition. Order at ¶ 15–16. But the FCC did exempt several other in-kind, cable-related services from the franchise-fee cap—namely, network "build-out costs" and costs related to FCC-imposed "customer service requirements." *Id.* §§ 541(a)(2)(A)–(B), 552(a)(1). According to the FCC, the Act mandates those costs, so counting those costs against the franchise-fee cap would be "inconsistent with the statutory text and structure." Order at ¶ 57–58. We are inclined to think, at this preliminary stage, that all of that reasoning is correct. And though we remain open to any argument that the franchising authorities choose to make in their merits briefing, their arguments in the motion to stay do not, at this stage, persuade us that the FCC's interpretation of "franchise fee" is mistaken.

Our decision in the last appeal should make clear to everyone that we take seriously the franchising authorities' disagreements with the FCC regarding interpretation of the Act. But in essence the franchising authorities have asked us to enjoin what appears to be a correct interpretation of a federal statute. We lack authority to do that. *See, e.g., Louisiana-Pacific Corp. v. James Hardie Bldg. Prods., Inc.*, 928 F.3d 514, 517 (6th Cir. 2019). Thus, none of the other three factors of the test for preliminary injunctions would allow us to grant the motion here. *Id*. Moreover, we note that the FCC has provided a process for franchising authorities and cable companies to resolve in an orderly fashion any disputes that arise regarding the value of services provided in excess of the five-percent cap. *See Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984,* MB Docket No. 05-311, 2020 WL 755965 (MB Feb. 11, 2020), at ¶ 5. And NCTA's counsel affirmed at oral argument that cable companies would adhere to that orderly process. We expect they will do that.

The motion to stay the FCC's Third Order is denied.