

SCAN NATOA CHAPTER MEETING

TELECOM 101

PASADENA, JAN. 15, 2015

Current Legal Issues Affecting the Telecommunications Industry

Gail A. Karish
Best Best & Krieger LLP



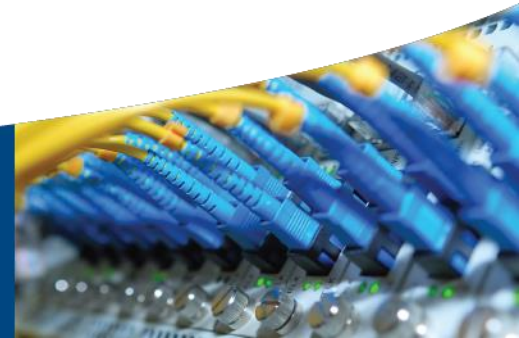
Cable Television and Broadband

Cable Television Franchises

- Federal & State Law
- Recent developments

Broadband

- Federal & State Law
- Recent developments



Cable Television

State law generally defines authority to issue cable television franchises

- Traditionally, cities and counties issued cable franchises
- California adopted state franchise model in 2006

47 USC § 521 *et seq.* establishes certain parameters

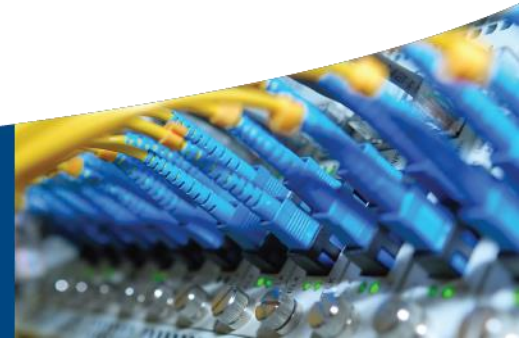
- Ban on exclusive franchises
- Franchise fee capped at 5 % of gross revenues
- Public, Educational and Government (PEG) fees used for capital expenditures
- Rate regulation/charge regulation
- Franchise renewal rights
- Transfers shot clock
- Cable-related – cannot use cable authority to regulate telephone/Internet service



Cable Television

Digital Infrastructure and Video Competition Act of 2006

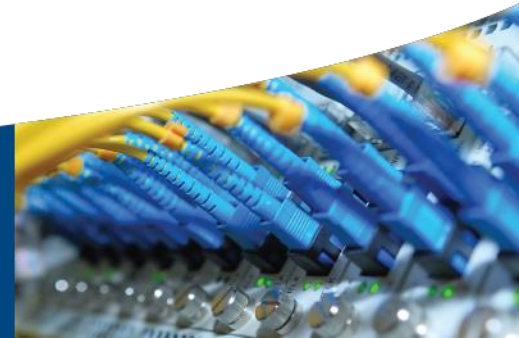
- Pub. Util. Code §§ 5800-5970
- Franchise holder identifies jurisdictions in which it will offer services
- Incumbents transition to statewide franchises when new entrants serve market or as local franchises expire or after July 1, 2014
- California Public Utilities Commission (CPUC) issues franchises under highly streamlined process



Cable Television

Basic terms of DIVCA franchise

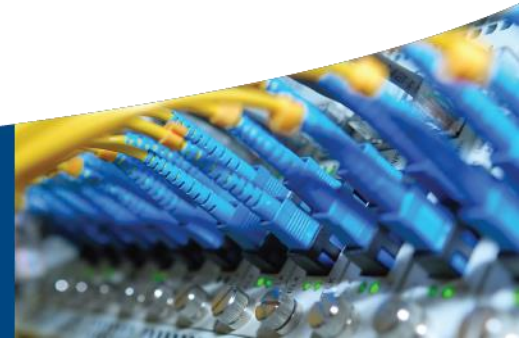
- 10 year term
- 5% franchise fee
- PEG fee 1% (up to 3% if grandfathered) by ordinance
- 3 PEG channels (or more if grandfathered)
- No Institutional Networks
- No in-kind services
- No significant build out requirements



Cable Television

Enforcement split between CPUC and localities

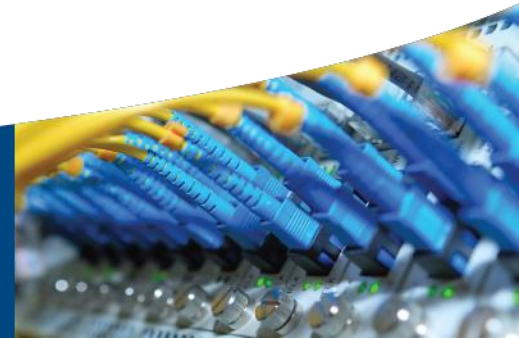
- CPUC responsible for:
 - Granting applications for franchises
 - Enforcing antidiscrimination and build-out rules
 - Preventing cross-subsidization (use of telephone revenues to pay for deployment of video infrastructure)
- Localities responsible for:
 - Franchise fees
 - PEG requirements
 - Customer complaints
 - Right of Way management



Cable TV – Recent Developments

RENEWALS of DIVCA franchises

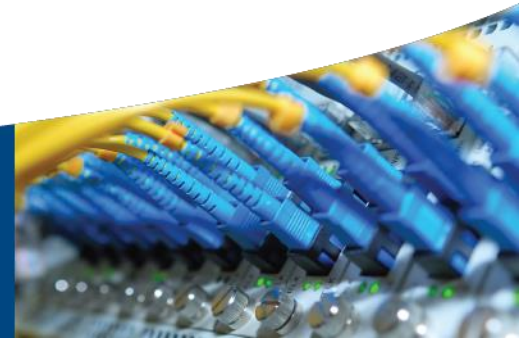
- Pub. Util. Code §§ 5850, 5840(d)
- CPUC Rulemaking R.13-05-007
- CPUC Decision D.14-08-057
- Effectively decided that renewals would be as streamlined as the initial application process



Cable TV – Recent Developments

Comcast-Time Warner Cable-Charter transactions

- No review under DIVCA, Pub. Util. Code §§ 5970, 5840(d), (l), (m)
- BUT, CPUC initiated proceeding under authority to review telecom license transfers (more on this later)
- Participation at federal level (FCC review) only viable option to address cable-related issues (CA jurisdictions filed requesting conditions be placed on merger - more on this later too)



Cable TV – Recent Developments

PEG Channels

- Pub. Util. Code § 5870
- AT&T Channel 99 PEG platform: Los Angeles, SMCTC, and El Segundo reached a settlement with AT&T, who agreed to provide “custom PEG solution” with PEG channels accessed via standard guide (*City of LA, et al. v. AT&T*)
- Channel Relocations: CA Court of Appeal has ruled City has “absolute discretion” in determining whether to agree to a request for reassignment of PEG channels (See *City of Glendale v. Marcus Cable Associates*)

PEG Studios and I-Nets

- As a result of DIVCA, at least 50 PEG studios in CA have closed as of October 2013 (Source: <http://buskegroup.com>)
- Court of Appeal has confirmed no further obligation to provide free I-Net to City if I-Net obligation is tied to the franchise and not for indefinite use (See *City of Glendale*)



Cable TV – Recent Developments

PEG Fees and Proposition 26

- Pub. Util. Code § 5870(n) – must establish by ordinance
- Attorney General Opinion 13-403 pending

PEG and Franchise Fee payments

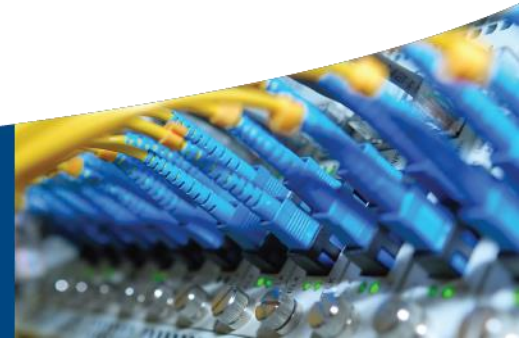
- Federal law (47 U.S.C. §555a(a)) preempts state law (PUC §5860(h)), prevents cable operator from offsetting overpayments of PEG fees against future franchise payments (See *City of Glendale*).
- City of Los Angeles has sued TWC claiming the company withheld nearly \$10 million in franchise fees from 2008-2011 by offsetting value of in-kind PEG support obligations (the exact amount owed in PEG fees) from its franchise fee payments.



Cable TV – Recent Developments

PEG fee expenditures

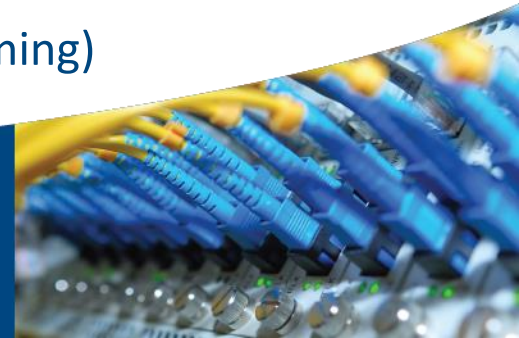
- Under Federal Cable Act, franchise fees exclude “capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities”, 47 USC 542(g)(2)(C).
- CA Court of Appeal confirmed broad reading of “capital costs” being those that are “incurred in, or that pertain, concern, or bear relation to PEG channel capacity, facilities or equipment, or the construction thereof.” (See *City of Glendale*).
- But Court found City improperly used PEG fees for operational costs through a leasing mechanism.



Cable TV – Recent Developments

PEG Merger Conditions:

- Conditions imposed in Comcast-NBCU Merger:
 - Prohibited adoption of delivery methods that would result in “material degradation of signal quality.”
 - Required development of a pilot platform to host PEG content On Demand
- Conditions requested by local government and PEG advocates in Comcast-TWC Merger:
 - Require PEG programming resolution be equal to commercial broadcast affiliates
 - Require timetable for HD rollout for PEG channels
 - Technological parity (ability to DVR PEG programming)
 - Closed captioning for PEG programs



Cable TV – Recent Developments

The Community Access Preservation Act

- Sponsored by Senator Tammy Baldwin (D-WI) and Senator Edward Markey (D-MA)
- First introduced in 2009, reintroduced in 2011 and 2013. Has not yet been reintroduced this session.
 - Change federal law to allow PEG funds to be used for capital or operating expenses
 - Preempt state laws limiting PEG funding. PEG channels would receive the GREATER of:
 - The historical level of support prior to state franchising laws; OR
 - The amount required under current state franchising laws; OR
 - Up to 2% of the gross revenues of the operator.
 - Ensure PEG channels are transmitted without charging local governments.
 - Require the FCC to study effects of state franchising laws.



Cable TV – Recent Developments

FCC Rulemaking on Over the Top Video Services

- In re Promoting Innovation and Competition in the Provision of Multichannel Video Programming Distribution Services (MB Docket No. 14-261)
- Requests public input about classification of Internet-based video programmers (Aereo) as MVPDs with rights and obligations under the Communications Act such as retransmission consent, closed captioning and video description.
- Tentative conclusion that video services offered over the Internet by cable operators should not be regulated as cable services.
- Shift to “over-the-top” delivery models could jeopardize franchise fees and PEG requirements.
- Comments due Feb. 17, 2015. Reply Comments due March 2, 2015



Cable TV – Recent Developments

House Energy & Commerce Committee White Paper on Updates to the Communications Act

- Gathering info for possible telecom law re-write. Sixth paper focuses on market for video content and distribution
- Eg. of questions posed: “Cable systems are required to provide access to their distribution platform in a variety of ways, including program access, leased access channels, and PEG channels. Are these provisions warranted in the era of the Internet?”
- Comments due January 23, 2015
- Available at <http://energycommerce.house.gov/sites/republicans.energycommerce.house.gov/files/analysis/CommActUpdate/20141210WhitePaper-Video.pdf>



Broadband

Federal & State Law

- *Light regulation at both levels*
- All broadband service providers (cable modem, DSL, wireless) classified as “information service” providers exempt from Title II's common carrier requirements
- *National Cable & Telecommunications Ass’n v. Brand X Internet Servs., 125 S. Ct. 2688 (2005)*
- Voice over Internet Protocol (VOIP) telephone services unclassified by FCC but subject to many of the same requirements as telecommunications common carriers, e.g. 911
- Other IP enabled services largely unclassified or unregulated



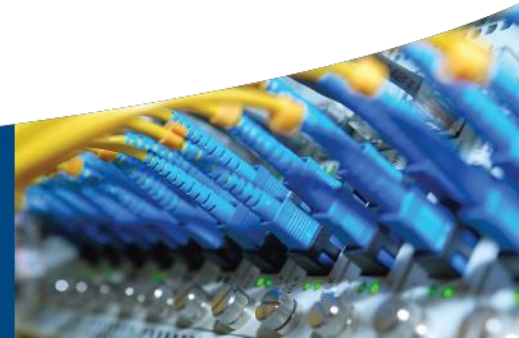
Broadband – Recent Developments

State Law on VOIP and IP enabled Services

- Pub. Util. Code § 710 (SB 1161)
- Enacted September 2012
- CPUC preempted from regulation until Jan. 1, 2020 except as required or delegated by federal law or expressly provided otherwise in statute

CPUC review of Comcast-TWC Merger

- Focused on:
 - Safety and reliability of voice and broadband services
 - Broadband deployment to elementary and secondary schools and unserved and underserved areas
 - Consumer protection



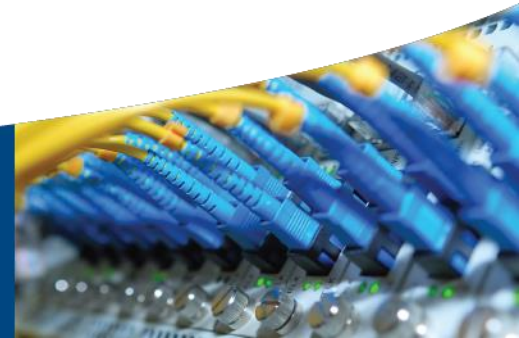
Net Neutrality

Net neutrality: An open internet requires a commitment to three standards:

- Transparency (required disclosures by ISPs)
- No-Blocking (free access to all available content)
- Non-Discrimination (cannot differentiate based on content)

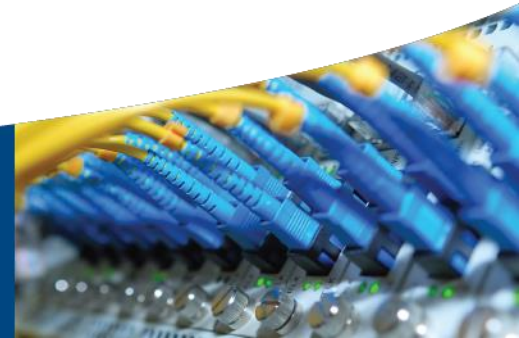
FCC Rulemaking on “Net Neutrality”

- In re Protecting & Promoting the Open Internet, 2014 FCC LEXIS 1689 (F.C.C. May 15, 2014) (GN Docket No. 14-28)
- Prior efforts largely struck down by courts though recognizing that Section 706 (47 USC § 1302) vests the FCC with affirmative authority to enact measures encouraging the deployment of broadband infrastructure, Verizon v. FCC, 740 F.3d 623 (D.C. Cir. 2014)
- Proposed order would allow for “fast lanes”



Net Neutrality

- Fast lanes would allow ISPs to advantage their own content, effectively preventing delivery of competitive services via the Internet.
- Eg., this could mean PEG streaming loads slower and buffers more than streaming services provided by ISPs, making it less likely audiences will stream it.
- President Obama recently urged the FCC to reclassify broadband under Title II (telecom service)
- FCC Chairman Tom Wheeler has since indicated he favors reclassification with forbearance
- Order expected in February



Summary

Cable Television

- DIVCA controls cable franchising at the state level, but federal law and FCC proceedings also relevant
- OTT could jeopardize franchise fees and PEG requirements if not regulated as MVPDs
- FCC Merger Conditions can protect local interests
- CAP Act would support PEG but long term effort

Broadband

- Lightly regulated but regulators recognize this is the service that matters going forward and regulatory re-classification could be coming
- Net neutrality and broadband deployment issues driving the change



Questions?



Gail A. Karish

Gail.Karish@bbklaw.com

Best Best & Krieger
300 South Grand Avenue
25th Floor

Los Angeles, CA 90071

Tel: (213) 617-8100

Fax: (213) 617-7480

Website: www.bbklaw.com

