

Public, Educational, and Governmental (PEG) Access Cable Television Channels: Issues for Congress

Charles B. Goldfarb
Specialist in Telecommunications Policy

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Summary

The environment for public, educational, and governmental (PEG) cable channels has been roiled by public policy and budgetary changes at the federal, state, and local levels and by technological changes in cable networks. More than 100 PEG access centers—which provide community groups and individuals free access to video production facilities and equipment, training, and programming time—have closed since 2005, and more may close when provisions in recently enacted state laws that eliminate requirements for cable companies to provide funding support take effect. Many PEG access centers, however, continue to have stable funding sources.

When awarding franchises for the use of public rights of way to offer cable television service, many local jurisdictions required the cable companies to set aside some of their channel capacity for PEG use and to provide financial support for those PEG access channels. Those channels are not mandated by federal law. But the Cable Communications Policy Act of 1984 amended the Communications Act to explicitly allow franchising authorities to require cable operators to set aside channel capacity for PEG use and to provide adequate facilities or financial support for those channels. These PEG provisions have been a primary vehicle for fostering in cable systems the long-standing U.S. media policy goal of localism.

Several recent developments are affecting the amount of financial support from cable providers and local governments for the PEG channels. In recent years, 21 states have enacted laws allowing cable systems to obtain statewide franchises. Some of these laws have abrogated or phased out PEG-related provisions in local franchise agreements requiring the franchisees to set aside channels, provide financial support, or provide studio facilities. In addition, the Federal Communications Commission (FCC) has adopted rules that may limit the amount of PEG financial support for non-capital costs that local franchise authorities can require of cable providers. Also, some local jurisdictions that have funded PEG operations are now facing budget deficits that are leading them to reduce or eliminate their PEG funding.

Driven by technological changes, some cable operators have begun to offer PEG channels in a fashion that may reduce consumer access to, and the quality of, those channels, and may raise consumer costs to obtain PEG channels. As traditional cable providers are migrating from analog to digital transmission of programming, some subscribers must obtain set-top boxes to receive PEG programming. AT&T's U-verse service uses a different platform for PEG channels than for commercial channels. It is more difficult for subscribers, especially the visually impaired, to access the PEG channels, and PEG programming cannot be recorded on a DVR, leading some to claim the service does not meet requirements in franchise agreements or in the Communications Act. AT&T responds that it meets all requirements and it is inappropriate to require it to deploy its network inefficiently to meet rules developed for traditional cable architecture.

One bill introduced in the 112th Congress, the Community Access Preservation (CAP) Act (H.R. 1746), would have allowed local jurisdictions in states that pass state franchise laws to require cable companies to provide PEG support equal to the greater of the amount required under the state law, the historical support required prior to enactment of the state law, or 2% of the gross cable revenues of the cable operator. That PEG support would not have been included in the statutory cap on franchise fees of 5% of revenues. The bill would have prohibited cable operators from charging subscribers for set-top boxes needed to receive PEG channels that are migrated from analog to digital tiers. The cable industry opposed the bill, claiming it would raise costs and rates and place cable operators at a competitive disadvantage with satellite television operators.

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Overview: The Environment Today

When awarding franchises for the use of public rights of way to offer cable television service, many local jurisdictions have required the cable companies to set aside some of their channel capacity for public access, educational, or governmental (collectively, PEG) use[1] and to provide financial support for those PEG access channels. These channels are perhaps best known for carrying local city council meetings, but they generally provide a significantly broader array of governmental, educational, community, religious, and political programming. Today, subscribers to more than 1,500 U.S. cable systems have access to PEG channels.[2]

PEG channels are not mandated by federal law. But the Cable Communications Policy Act of 1984 (P.L. 98-549) amended the Communications Act to explicitly allow franchising authorities to require cable operators to set aside channel capacity for PEG use and to provide adequate facilities or financial support for those channels.[3] These PEG provisions have been a primary vehicle for fostering in cable systems the long-standing U.S. media policy goal of localism.[4]

The environment for PEG channels has been roiled by a number of public policy and budgetary changes at the federal, state, and local level and by technological changes in cable networks. More than 100 PEG access centers—which provide community groups and individuals free access to video production facilities and equipment, training, and programming time—have closed since 2005, and others are threatened by severe funding cuts. Without the programming produced at PEG access centers, PEG channels may not be able to continue operations. At the same time, some subscribers now have greater difficulty accessing PEG programming. Not all PEG access centers and PEG channels are facing this bleak environment, however; many continue to have stable funding sources.

American Community Television, an organization that advocates on behalf of PEG access centers, estimates that the more than 1,500 PEG access centers in the United States manage

[1] Public access channels present video programming and other electronic information produced, directed, and engineered by community organizations and individuals. Educational access channels offer programming provided by school or college employees and students; it typically focuses on distance learning, school activities, and information that the schools and colleges want to distribute beyond their campus boundaries. Governmental access channels provide coverage of public meetings and information from local, state, and regional governments intended for the general public. Governmental channels also may provide, on closed-circuit, training programs for government employees. See "Access Basics," prepared by The Buske Group, http://buskegroup.com/PEG_Access_Basics.pdf.

[2] In the chapter on PEG access channels in its July 2011 report, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age,* http://www.ffc.gov/infoneedsreport, the Federal Communications Commission cited (at p. 170) a 1998 survey that reported that 18% of cable systems have public access channels, 15% have educational access channels, and 13% have governmental access channels. Since most cable systems serving the largest U.S. cities are required to make channel capacity available for PEG use, far more than 18% of U.S. households have access to PEG channels. The National Cable & Telecommunications Association reports (at http://www.ncta.com/Stats/CableSystems.aspx) that the number of U.S. cable head-ends (systems) has fallen from 11,408 in 1998 to 7,246 in 2010, as cable companies have followed the strategy of trading systems among themselves to create clusters of systems in fewer geographic locations rather than owning many individual systems scattered around the country. In some cases, contiguous systems are then combined and served by a single head-end, thus consolidating the number of systems, but it is unlikely that has resulted in fewer households receiving PEG channels.

[3] See Sections 611(a), (b), and (c) (47 U.S.C. §531(a), (b), and (c)) and 621(a)(4)(B) (47 U.S.C. §541(a)(4)(B)).

[4] Title VI of the Communications Act addresses cable communications. The first section of that title (§601) identifies six purposes of the title; one of these is to "establish franchise procedures and standards ... which assure that cable systems are responsive to the needs and interests of the local community" (47 U.S.C. §521(2)).

upwards of 5,000 cable television PEG channels.[5] Each week these channels carry 20,000 hours of new programs from local governments, schools, health and jobs organizations, social services agencies, and local residents.[6] Although these estimates are provided by PEG advocates and may be inflated, there is no question that PEG channels provide a very substantial amount of local programming. The PEG channels vastly outnumber the 354 public broadcast television stations, but the audiences for virtually all PEG channels are quite small.[7] Most PEG access centers have a paid staff of just one or two people, relying heavily on volunteers; one-third have annual budgets (operating and capital) of less than $100,000.[8]

Reductions in PEG Funding

According to a recent survey,[9]

> PEG Access Centers in at least 100 communities across the United States have been closed since 2005.... Hundreds more PEG Access Centers in six states affected by state franchising laws may be forced to close or experience serious threats to financial and in-kind support over the next three years.

These closures appear to be related to three developments that are reducing funding for some PEG access channels.

- In the past few years, 21 states have enacted laws allowing cable systems to obtain statewide franchises.[10] These state laws were motivated by the desire to ease broad geographic market entry into the cable television market by Verizon and AT&T by allowing them to obtain a single statewide franchise rather than having to negotiate many local franchises. To provide incumbent cable systems with competitive parity, many of the laws also allowed the incumbents to obtain statewide franchises or replaced certain local franchise requirements with less stringent statewide requirements. Some of these laws have abrogated or phased out PEG provisions in existing local franchise agreements that required the franchisees to set aside channels, provide financial or in-kind support, or provide studio facilities[11]—or cable companies have interpreted the laws to allow them to

[5] See http://acommunitytv.org.

[6] Testimony of Barbara Popovic, executive director of Chicago Access Network Television, on behalf of The Alliance for Community Media and Alliance for Communications Democracy, before the United States House of Representatives Appropriations Committee, Subcommittee on Financial Services and General Government, Hearing on Public, Educational, and Governmental (PEG) Access for Cable Television, September 17, 2008.

[7] Audience measurement (ratings) data do not exist for PEG stations, in part because the audiences are small and in part because there is no commercial interest willing to bear the costs associated with audience measurement.

[8] *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age*, Federal Communications Commission, July 2011, p. 170 and fns. 13 and 14, http://www.ffc.gov/infoneedsreport.

[9] "Analysis of Recent PEG Access Center Closures, Funding Cutbacks and Related Threats," prepared for Alliance for Communications Democracy with support from the Benton Foundation (ACD/Benton Survey), April 8, 2011, p. 2, http://www.theacd.org/uploaded_docs/2011_PEG_Access_study_1.pdf. Although this was not a random survey—it specifically sought input from access centers and channels facing funds cuts or closure—there is no reason to question the accuracy of its list of closures.

[10] These states are Texas, Virginia, Indiana, Kansas, North Carolina, South Carolina, New Jersey, California, Michigan, Missouri, Florida, Iowa, Georgia, Nevada, Ohio, Illinois, Wisconsin, Connecticut, Tennessee, Louisiana, and Idaho.

[11] For a compilation of the relevant provisions in these state franchising laws, see "State Cable Franchise Laws at a Glance, current as of 8/23/2011," prepared by The Alliance for Community Media, Best Best & Krieger, and (continued...)

reduce or eliminate PEG support. Some of the provisions now being abrogated or phased out required cable operators to provide hook-ups, facilities, or services without charge to schools, fire stations, and other governmental locations;[12] their elimination will force the local jurisdictions to bear the associated costs or reduce services.

- The Federal Communications Commission (FCC) initiated a rulemaking proceeding in the mid-2000s to implement Section 621(a)(1) of the Communications Act,[13] which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. The FCC determined that some local franchise authorities (LFAs) had set overly burdensome requirements for PEG support and concluded that LFAs could require cable systems to provide "satisfactory or sufficient" PEG support but not "significant" support. Section 622(b) of the Communications Act caps the total franchise fees that a local jurisdiction may impose on cable operators at 5% of gross cable revenues,[14] subject to certain exceptions.[15] The FCC concluded that any PEG-related assessment that is not a capital cost must be subtracted from the 5% statutory franchise fee cap,[16] defining capital costs as "those costs incurred in or associated with the construction of PEG access facilities," but excluding "payments in support of the use of PEG access facilities," which "are considered franchise fees and are subject to the 5 percent cap." This limit on how much funding a local franchising authority can require of a cable system was applied to incumbent cable companies as well as to new competitors. PEG supporters claim this interpretation represents a misreading of Congressional intent[17] and has created uncertainty about what constitutes capital costs, reducing PEG-related funding by cable companies.

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TeleCommUnity, http://www.allcommunitymedia.org/wp-content/uploads/2011/08/States-at-a-Glance-Franchise-Rules.pdf.

[12] See, for example, Matthew Hathaway, "Charter shutting off free cable to area government offices," *St. Louis Post-Dispatch*, August 17, 2011, http://www.stltoday.com/news/local/metro/article_0028c552-dd0b-56c3-9377-7e88edeeb541.htm. More generally, see "Assessing the Damage: Survey shows that state video franchise laws bring no rate relief while harming public benefits," results of a May 2008 online survey conducted by the Alliance for Community Media (ACM Survey), http://www.cantv.org/keepusconnected/Harm-Survey-Report.pdf.

[13] 47 U.S.C. §541(a)(1).

[14] 47 U.S.C. §542(b).

[15] Section 622(g)(2)(B) of the Communications Act (47 U.S.C. §542(g)(2)(B)) explicitly excludes from the 5% cap *all PEG-related assessments* in franchise agreements in effect on October 30, 1984; most agreements in effect on that date have expired but been renewed. Section 622(g)(2)(C) (47 U.S.C. §542(g)(2)(C)) only excludes PEG-related *capital* costs from the 5% fee cap for agreements in effect after that date.

[16] *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*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, adopted December 20, 2006 and released March 5, 2007 (FCC Cable Franchising Report and Order), ¶ 109, and *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*, MB Docket No. 05-311, Second Report and Order, adopted October 31, 2007 and November 6, 2007, ¶ 11.

[17] See, for example, *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*, MB Docket No. 05-311, Dissenting Statement of Commissioner Jonathan S. Adelstein, stating that the House Report on the legislation explicitly distinguishes between the monetary payments that comprise the franchise fee and the provision of services, facilities, and equipment for PEG channels, institutional networks, or other uses.

- Historically, many jurisdictions imposed a franchise fee of 5% of gross cable revenues on franchisees and then used a portion of those revenues to support PEG operations. But some local jurisdictions that have long provided such support for PEG operations are facing budget shortfalls that are forcing them to reduce their PEG funding.[18] This appears to be happening more frequently in those local jurisdictions that, as a result of state laws, no longer have franchising authority.

According to the ACD/Benton Survey, almost half of the survey respondents providing financial data reported a decrease in funding between 2005 and 2010 and 20% of the respondents that receive in-kind support from their cable operators reported reductions in that support.[19]

At the same time, many PEG access centers and channels have not been affected by these changes. Fifty-five percent of the respondents in a PEG access benchmarking study performed in 2010 said their public access funding had increased over the past two years, while 36% said that it had remained the same or gone down.[20] Those access centers that receive a fixed percentage of their local cable companies' cable revenues are enjoying increased funding as overall cable revenues continue to increase; others have benefited from funding escalators in their franchise agreements.

Systematic data do not exist on the funding and financial strength of PEG access centers. It appears, however, that while many access centers continue to enjoy stable funding sources, a sizeable portion are facing abrupt and significant funding reductions that may challenge their existence.

Requirements in franchise agreements to provide PEG access channels impose two types of costs on cable systems: the direct costs of providing facilities and/or financial support for PEG centers and the opportunity costs of allocating channels to noncommercial PEG entities when those channels could generate revenues if put to commercial use. Although no data have been collected to estimate how substantial these direct and opportunity costs are, they clearly are not negligible. Cable systems therefore have the incentive to minimize the amount of their system capacity allocated to PEG channels and the level of outlays they must make in support of PEG channels.

Cable service providers subject to the PEG provisions in the Communications Act include traditional cable operators, such as Comcast and Time Warner, as well as landline telecommunications firms that have recently entered the multichannel video programming distribution (MVPD) market, such as AT&T and Verizon. These telecommunications firms, like traditional cable operators, use the public rights of way. AT&T continues to assert that its video service is not a cable service and should not be subject to cable franchise agreements.[21] On July

[18] According to Sue Buske, a member of the Board of Directors of the Alliance for Community Media, a PEG advocacy organization, a partial list of local jurisdictions in which PEG access operations have been closed or have had their budgets reduced due to cutbacks in franchise fee funding or general fund funding includes: South Bend, Mishawaka, Hammond, Valparaiso, Muncie, Lafayette, Plymouth, Elkhart, and Michigan City, IN; Reno, Sparks, and Washoe County, NV; LaVerne, Oceanside, Millbrae, Vallejo, and Healdsburg, CA; Bainbridge Island and Seattle, WA; Tucson, AZ; Framingham, MA; Reading, PA; Aspen, CO; Batavia, IL; and Atlanta, GA.

[19] ACD/Benton Survey, p. 2.

[20] Front Range Consulting, Inc. and Riedel Communications, Inc., *2010 PEG Access Benchmarking Study,* p. 12, http://acommunitytv.org/act-now/other-resources/.

[21] See, for example, *In the Matter of Petition for Declaratory ruling of the City of Lansing, Michigan, on Requirements for a Basic Service Tier and the PEG Channel Capacity Under Sections 543(b)(7), 531(a), and the Commission's* (continued...)

26, 2007, the U.S. District Court for Connecticut found that AT&T's service is a cable service subject to cable franchising and on July 10, 2008, that court confirmed the decision, which had been appealed by AT&T. On March 5, 2010, however, the Second Circuit of the U.S. Court of Appeals vacated the district court decision as moot because, prior to that decision, the Connecticut legislature enacted a new Video Franchise Act that "unambiguously required AT&T to obtain a video franchise before providing video service in the state," thus leaving the federal district court without jurisdiction.[22]

Changes in Cable Network Technologies and Architectures

Cable service providers are making significant technological changes to their networks that are changing the way they provide PEG channels to end users. Traditional cable providers are migrating in stages from analog to digital transmission of their programming, so not all programming has yet been shifted to digital transmission. During the transition, operators are offering popular channels in both formats—that is, providing both a digital channel and an analog channel—but the operators prefer not to tie up their network capacity for both digital and analog transmission of less popular programming. Therefore, many cable operators have chosen to provide the lightly viewed PEG channels only on digital tiers that require a subscriber with an analog television set to obtain a set-top box with a digital-to-analog converter for reception.

Some cable operators are providing these set-top boxes to subscribers for free during the digital transition, but others are charging.[23] When operators have taken the latter course, some PEG advocates and local jurisdictions have objected that this places subscribers in the position of having to pay for the set-top box or not receive PEG programming. These parties claim this is inconsistent with the terms of local franchise agreements and the intent of Section 623(b)(7)(A)(ii) of the Communications Act[24] that cable operators must make a basic tier of programming (including any PEG channels required by the franchise authority) available to all subscribers at a low price. These groups have petitioned the FCC to issue a declaratory ruling that PEG channels must be carried on the basic service tier and treated equally with other basic service tier channels.[25] AT&T and others in the cable industry have filed comments opposing

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Ancillary Jurisdiction Under Title I; In the Matter of Petition for Declaratory Ruling of Alliance for Community Media, et al., that AT&T's Method of Delivering Public, Educational, and Government Access Channels Over Its U-verse System is Contrary to the Communications Act of 1934, as Amended, and Applicable Commission Rules; In the Matter of Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc. et al. CSR-8227, 8126, and 8128, MB Docket No. 09-13, Comments of AT&T Opposing Petitions for Declaratory Ruling, March 9, 2009, p. 2.

[22] *Office of Consumer Counsel v. Southern New England Telephone Co.,* No. 09-0116-cv, United States Court of Appeals, Second Circuit, March 5, 2010.

[23] For example, as discussed in greater detail below, in Michigan when Comcast initially migrated its PEG channels from its analog tier to its digital tier, it announced that it would provide each subscribing household one digital set-top box free for one year, but would charge for set-top boxes needed for other television sets in the household and would charge after the first year for the initially free set-top box. Those terms were modified in a settlement agreement with several Michigan jurisdictions that brought suit. Later, as part of obtaining approval from the FCC for its merger with NBC-Universal, Comcast agreed to PEG-related conditions that included (1) not migrating PEG channels to digital delivery until the system has converted to all-digital distribution (that is, until all analog channels are eliminated) or until the governmental entity responsible for the system's PEG operations expressly agrees, whichever comes first; and (2) carrying all PEG channels on its digital starter tier or an equivalent tier that reaches at least 85% of its subscribers.

[24] 47 U.S.C. §543(b)(7)(A)(ii).

[25] See *In the Matter of Petition for Declaratory Ruling of the City of Lansing, Michigan, on Requirements for a Basic* (continued...)

those petitions.[26] To date, the FCC has not issued any declaratory rulings in response to these petitions.

AT&T has introduced its U-verse service, which provides multi-channel video service using Internet Protocol (IP) technology and a network architecture that does not "broadcast" the signals of all the program networks to the end user, but rather allows the subscriber to use a set-top box to "call up" the desired video stream from a single centralized hub in each metropolitan area, where the video file is stored. AT&T says it would be prohibitively expensive to use this architecture for the many PEG access channels in a metropolitan area and therefore has chosen to offer PEG programming in a different fashion that is more akin to the way it handles Internet traffic. It has created a separate platform for PEG, placing the PEG programming for all jurisdictions in a metropolitan area on a single channel (99). PEG viewers must go to channel 99, pull down a menu that identifies each of the local jurisdictions, select the desired jurisdiction to get a menu that identifies all the PEG programming for that jurisdiction, and then select the particular program. In addition to the time required to do this, and the particular difficulty for visually impaired viewers, the programming cannot be recorded on a DVR and picture quality is impaired.

Some PEG advocates and local jurisdictions claim AT&T is offering PEG programming in an inferior and discriminatory fashion that does not meet the requirements of local franchise agreements or the Communications Act. For example, the Alliance for Community Media and other parties filed a petition with the FCC asking it to make a declaratory ruling that, among other things, "AT&T's systematic discrimination against PEG programming in terms of accessibility, functionality, and signal quality violates Sections 611, 623, and 624(e) of the Communications Act and FCC rules and policies."[27] AT&T responded that U-verse is not a cable service subject to those requirements, but that in any case it meets all those requirements and would be required to deploy its IP network inefficiently in order to meet requirements developed for traditional cable architecture.[28] The FCC has not yet issued a ruling on the petition.

PEG access channel requirements do not apply to direct broadcast satellite (DBS) systems (DirecTV and DISH Network). Although DBS providers compete with cable operators in the MVPD market, DBS is a satellite service, not a cable service, does not require the use of public rights of way, and is not subject to cable franchising requirements. By federal law, if a satellite operator chooses to offer its subscribers local broadcast television station signals in a local market it must provide the signals of all full-power broadcast stations in that market, but it need not offer PEG channels, which are cable channels, not broadcast channels.[29]

(...continued)

Service Tier and the PEG Channel Capacity Under Sections 543(b)(7), 531(a), and the Commission's Ancillary Jurisdiction Under Title I, MB Docket No. 09-13, City of Lansing Petition for Declaratory Ruling, January 27, 2009, and *In the Matter of Petition for Declaratory Ruling Regarding Primary Jurisdiction Referral in City of Dearborn et al. v. Comcast of Michigan III, Inc. et al.*, MB Docket No. 09-13, City of Dearborn Petition for Declaratory Ruling, December 9, 2008.

[26] See the Comments of AT&T Opposing Petitions for Declaratory Ruling.

[27] *In the Matter of Petition for a Declaratory Ruling that AT&T's Method of Delivering Public, Educational and Government Access Channels Over Its U-verse System is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules,* Petition for Declaratory Ruling of Alliance for Community Media, et al., January 30, 2009.

[28] See Comments of AT&T Opposing Petitions for Declaratory Ruling.

[29] There likely would be a number of technological and cost challenges associated with providing the PEG channels (continued...)

With the development of the Internet, it is possible to distribute PEG programming online, where it would not consume scarce cable capacity for which there is commercial demand. Indeed, many PEG access centers already distribute their programming online. But Internet access is not universal and therefore relying upon the Internet to replace rather than extend cable distribution of PEG programming might not be consistent with the long-standing public policy goal of fostering localism. Moreover, use of the Internet for distribution does not eliminate the problem of funding PEG program production.

PEG-Related Provisions in the Communications Act

There are four key sections in the Communications Act relating to PEG access channels.

Section 611, which is entitled "Cable Channels for Public, Educational, or Governmental Use," allows a franchising authority to

- establish requirements in a franchise with respect to the designation or use of channel capacity for PEG use (but only to the extent provided in this section);[30]
- require that channel capacity be designated for PEG use and to establish rules and procedures for the use of the channel capacity so designated;[31] and
- enforce any requirement in any franchise regarding the provision or use of such channel capacity. Such enforcement includes the authority to enforce any provisions of the franchise for services, facilities, or equipment proposed by the cable operator which relate to PEG use of channel capacity, whether or not required by the franchising authority.[32]

Section 621, entitled "General Franchise Requirements," includes the instruction that, in awarding a franchise, the franchising authority may require adequate assurance that the cable operator will provide adequate PEG access channel capacity, facilities, or financial support.[33]

Section 622, entitled "Franchise Fees," sets a cap on the franchise fee that a franchising authority may charge at 5% of the cable operator's gross revenues,[34] but explicitly states that the term "franchise fee" does not include (1) in the case of a franchise in effect in October 1984, payments that are required to be made by the cable operator during the terms of such franchise for, or in support of the use of, PEG access facilities, or (2) in the case of any franchise granted subsequently, capital costs that are required by the franchise to be incurred by the cable operator for PEG access channels.[35] Thus, franchise authorities may impose certain PEG costs on a cable provider over and above the 5% franchise fee limit.

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over DBS. For example, in many cases there are many jurisdiction-specific PEG channels in a single local market and the bandwidth needed to uplink and downlink all those channels likely would tax the capacity of satellite systems.

[30] Section 611(a), 47 U.S.C. §531(a).

[31] Section 611(b), 47 U.S.C. §531(b).

[32] Section 611(c), 47 U.S.C. §531(c).

[33] Section 621(a)(4)(B), 47 U.S.C. §541(a)(4)(B).

[34] Section 622(b), 47 U.S.C. §542(b).

[35] Sections 622(g)(2)(B) and (C), 47 U.S.C. §542(g)(2) (B) and (C).

Section 623(b), entitled "Establishment of Basic Service Tier Rate Regulations," includes the instruction that each cable operator provide its subscribers a separately available basic service tier to which subscription is required for access to any other tier of service. That basic service tier—which is subject to price regulation by the franchising authority if the FCC has not made the determination that the cable provider faces effective competition—must include any PEG access programming required by the franchise of the cable system to be provided to subscribers.[36]

Legislation That Had Been Introduced in the 112th Congress: H.R. 1746, the Community Access Preservation (CAP) Act

In the 112th Congress, Representatives Baldwin and LaTourette introduced the Community Access Preservation (CAP) Act, H.R. 1746, which sought to mitigate the impact of provisions in state franchising laws that may reduce resources and support for PEG access centers and also to sustain consumer access to PEG channels. Under that bill:

- If a state enacted a law affecting the number of channels a franchising authority may require a cable operator to designate for PEG use, a local government subdivision could require the cable company to provide the greater of the number of channels the operator was providing in that subdivision prior to enactment of the state law or up to three channels.[37]
- If a state enacted a law affecting cable system franchising requirements relating to support for PEG use of a cable system, a cable operator would owe to any local government subdivision in which the operator provides cable service an amount to be determined by the subdivision but not to exceed the greatest of: (a) the amount of support provided in the last calendar year ending before the effective date of the state legislation; (b) the average annual amount of support provided over the term of the franchise under which the cable operator was operating before the effective date of the state law; (c) the amount of support that the cable operator is required to provide to the subdivision under the state law; or (d) an amount of support equal to 2% of the gross revenues of the cable operator from the operation of the cable system to provide cable services in the subdivision. The forms of support for PEG use include all cash payments, in-kind support, and free services that the operator provides to the subdivision for PEG use of the cable system. This amount would be adjusted for inflation using the Gross National Product Price Index.[38] Support provided to any subdivision had to be dedicated to PEG use of channel capacity.

[36] Section 623(b)(7)(A)(ii), 47 U.S.C. §543(b)(7)(A)(ii).

[37] In the bill, a local government subdivision was defined as follows: (1) a franchising authority that derives its power to grant a franchise from state or local law, except that (2) in a state that adopts a state law with PEG franchising requirements, an entity that was considered a franchising authority deriving its power to grant a franchise from state or local law prior to the effective date of the state law.

[38] The Gross National Product Price Index (GNPPI) measures changes in the prices of all final goods and services produced by an economy. In comparison, the Consumer Price Index only measures the price changes for a fixed basket of goods and services purchased directly by consumers. The GNPPI therefore provides a broader picture of inflation in (continued...)

- The definition of "franchise fee" in Section 602(g)(2)(A) and (B) of the Communications Act[39] was modified to explicitly exclude *for any cable franchise*, not just for those franchises in effect on October 30, 1984, payments that are required by the franchise to be made by the cable operator for, or in support of the use of, PEG access facilities. Since franchise fees are subject to a statutory cap of 5% of gross cable revenues, this exclusion would allow local jurisdictions to impose PEG-related fees in addition to a 5% franchise fee.
- The cable operator had to carry the PEG signals from their point of origin to subscribers without material degradation and without altering or removing content or data. This provision would prohibit the cable operator from eliminating closed captioning or lessening other capabilities.
- The cable operator had to provide the PEG signals to, and make them viewable by, every subscriber, without additional service or equipment charge. This would prohibit a cable operator from migrating PEG channels to a digital tier while continuing to offer commercial channels on an analog tier and then charging analog customers for a set-top box to obtain the PEG channels.
- The cable operator had to provide to the local government subdivision, free of charge, any transmission services and the use of transmission facilities that are necessary to carry the PEG signals to end users. Some cable operators had begun to charge local jurisdictions for such transmission service and facilities; this provision was intended to end that practice.
- Local government subdivisions, as well as states, were given the authority to enforce the provisions outlined above.
- A local government subdivision could not impose additional PEG-related requirements on a cable system unless that subdivision was the franchising authority at the time the requirements were imposed or the state law authorized the subdivision to impose such requirements.
- The FCC had to submit within 180 days of enactment of the CAP Act a report containing an analysis of the impact of state franchising laws on PEG use of cable systems; an analysis of the impact of the conversion from analog to digital transmission technologies on PEG use of cable systems; recommendations for changes to this section of law required to preserve and advance localism and PEG use of advanced communications systems, including broadband systems; and recommendations for changes to this section of law, after cable systems have converted to a fully digital delivery system, relating to requirements for the accessibility of PEG channel capacity and the placement of such channel capacity, except that the recommendations could not include allowing cable operators to impose additional charges on subscribers with respect to the quality, availability, functionality, or placement of that channel capacity.
- The definition of cable service in Section 602(6) of the Communications Act was modified by inserting the following words in *italics*: 'the term "cable service"

(...continued)

the economy. The GNPPI is constructed by the Bureau of Economic Analysis in the Department of Commerce.

[39] 47 U.S.C. §542(g)(2)(A) and (B).

means, *regardless of the technology or transmission protocol used in the provision of service,* (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." This was intended to include AT&T's U-verse service in the definition of cable service.

As will be explained below in the discussion of specific issues, the National Cable & Telecommunications Association (NCTA) opposed the bill. PEG advocates supported the bill.

PEG-Related Policy Issues

It is difficult to quantify the impact of the various public policy, budgetary, and technological changes on the PEG environment because limited systematic data exist relating to PEG channels.

- Comprehensive data are not available on the portion of PEG financial support for capital and operating costs that currently comes from fees on cable companies, in-kind contributions from cable companies, payments from the general revenues of local jurisdictions, private contributions, foundation grants, or other sources—though the cable companies have generally been the primary funders and local jurisdictions the second largest funders.
- In its rulemaking proceeding, the FCC made no attempt to measure the extent to which existing cable franchisees or franchise applicants were required to pay PEG operating expenses or offer in-kind services; it cited limited anecdotal evidence of a handful of local jurisdictions seeking to impose onerous requirements.
- Neither the FCC nor stakeholders (cable companies or PEG advocates) have attempted to construct estimates of the likely scale of cutbacks in funding from cable companies as state laws take effect and from local jurisdictions as tight budgetary conditions prevail. As a result, it is difficult to project the aggregate impact of the funding cuts that PEG access centers are experiencing or are likely to experience, although it is possible to identify cases in which such cuts have resulted in closings.
- Neither the cable industry nor the FCC has quantified the opportunity costs associated with setting aside channels for PEG use. Cable companies would receive some revenues from commercial use of those channels, but given that most cable networks offer hundreds of channels and that the marginal channels attract very small audiences, the opportunity costs associated with PEG channels, though not negligible, are likely to be small.[40] Consumer welfare losses also are likely to be small since the foregone commercial channels would attract few viewers. Although it is difficult to measure the intensity of demand for services for which there is no price, some viewers appear to attach a high value to PEG programming. (Indeed, these viewers might choose cable service over satellite service precisely because they cannot receive PEG channels over satellite.)

[40] As will be discussed below, AT&T claims that given its network technology and architecture, there are very high network costs associated with providing PEG service that do not exist for more traditional cable architectures.

> Moreover, Congress has long viewed local programming as having public benefits that should be fostered.

There is evidence, however, that the various public policy and budgetary changes, especially the elimination of requirements for cable companies to support PEG channels, are threatening the financial viability of PEG access centers in the affected states.

State Franchising Laws

Section 602(10) of the Communications Act defines "franchising authority" to mean any governmental entity empowered by federal, state, or local law to grant a franchise.[41] As recently as five years ago, most states left cable franchising authority entirely to local jurisdictions (local franchising authorities or LFAs). About 10 states had some role in the franchising process, but many of these just reviewed locally negotiated agreements.

Since 2006, 21 states—Texas, Virginia, Indiana, Kansas, North Carolina, South Carolina, New Jersey, California, Michigan, Missouri, Florida, Iowa, Georgia, Nevada, Ohio, Illinois, Wisconsin, Connecticut, Tennessee, Louisiana, and Idaho—have enacted laws establishing statewide cable franchises.[42] Most of these laws were enacted in 2006 and 2007, though their impact often was felt later since some provisions did not take effect immediately. These state laws were motivated by the desire to ease broad geographic market entry by Verizon, AT&T, and others by allowing them to obtain a single statewide franchise rather than having to negotiate many local franchises. To provide incumbent cable systems with competitive parity, many of the laws also allow incumbents to obtain statewide franchises upon the expiration of their local franchise agreements or to replace certain local franchise requirements with less stringent statewide requirements.

There are great differences among the state laws and their impact on the requirements for cable company provision of PEG channel capacity and PEG financial and technical support varies significantly.[43] Most significant from the PEG perspective, a number of state laws in effect have

[41] 47 U.S.C. §522(10).

[42] For a detailed description of state cable franchise laws, see "State Cable Franchise Laws at a Glance, Current as of 8/23/2011," prepared by The Alliance for Community Media, Best Best & Krieger, and TeleCommUnity, http://www.allcommunitymedia.org/wp-content/uploads/2011/08/States-at-a-Glance-Franchise-Rules.pdf.

[43] Some of the state laws set specific terms, conditions, and maximum or minimum requirements that are applicable in all the local jurisdictions in the state served by the franchise applicant. Others explicitly require the franchise applicant to match the requirements imposed on the incumbent cable provider in each local jurisdiction at the time the law was enacted, that is, the franchise requirements vary from local jurisdiction to local jurisdiction. Some laws, which would allow incumbent cable franchisees to apply for a state franchise upon the completion of their current local franchises, set statewide requirements that would apply to both incumbent and new franchisees when the incumbent's existing local franchise expires, but require both to follow the existing local franchise requirements in the interim. Yet others allow both incumbents and new entrants to immediately obtain statewide franchises subject to statewide requirements, in effect annulling some or all of the terms of the incumbent cable operators' existing local franchise agreements. As a result, the impact of these state laws on the requirements for the provision of PEG channel capacity and PEG financial and technical support varies significantly from state to state. For example, the state franchising laws in Texas, Virginia, Indiana, California, Michigan, Florida, Nevada, Ohio, Illinois, and Wisconsin require new entrants that seek to offer service in multiple local jurisdictions in a state to match the specific PEG channel capacity requirements currently imposed on the incumbent cable providers by the local franchising authorities in each jurisdiction (while setting certain minimum levels for situations in which there is no incumbent provider). In contrast, the state franchising laws in Kansas, North Carolina, South Carolina, New Jersey, Missouri, Iowa, and Georgia set statewide maximum or minimum PEG channel capacity requirements that are unrelated to the requirements in the existing franchise agreements of incumbent cable providers. The state franchising laws have even greater variation with respect to requirements for the (continued...)

sunset provisions for PEG support for both incumbent cable companies and new entrants, as shown in **Table 1**.

Table 1. States with Laws that Eliminate PEG Support Requirements

State	Impact on Incumbent Cable Operators	Impact on New Cable Operators
Nevada	Support requirements end upon expiration of the incumbent's local franchise agreement	No PEG support requirements
Kansas	Support requirements end upon expiration of the incumbent's local franchise agreement	No PEG support requirements
Missouri	Support requirements end upon expiration of the incumbent's local franchise agreement	No PEG support requirements
South Carolina	Support requirements end upon expiration of the incumbent's local franchise agreement	No PEG support requirements
Iowa	Support requirements end upon expiration of the incumbent's local franchise agreement	Support requirements end upon expiration of the incumbent's local franchise agreement
Wisconsin	Support requirements ended in the first half of 2011	Support requirements ended in the first half of 2011
Ohio	Support requirements end upon the expiration or termination of the incumbent's local franchise agreement or January 1, 2012, whichever is earlier	Support requirements ended upon the expiration or termination of the incumbent's local franchise agreement or January 1, 2012, whichever was earlier
Georgia	Support requirements end upon the expiration of the incumbent's local franchise agreement or July 1, 2012, whichever is earlier	Support requirements ended upon the expiration of the incumbent's local franchise agreement or July 1, 2012, whichever was earlier
Florida	Support requirements end upon the expiration of the incumbent's local franchise agreement or July 1, 2012, whichever is earlier	Support requirements ended upon the expiration of the incumbent's local franchise agreement or July 1, 2012, whichever was earlier
New Jersey	Support requirements have been eliminated except that statewide franchise holders must provide equipment and training	Support requirements have been eliminated except that statewide franchise holders must provide equipment and training

Source: Compiled by CRS from "State Cable Franchise Laws at a Glance, current as of 8/23/2011," prepared by The Alliance for Community Media, Best Best & Krieger, and TeleCommUnity, at http://www.allcommunitymedia.org/wp-content/uploads/2011/08/States-at-a-Glance-Franchise-Rules.pdf, and other sources.

Other state laws set caps on, but do not eliminate, the PEG support requirements that can be imposed on cable operators. For example, the Texas law sets a cap of 1% of gross cable revenues and the Virginia law sets a cap of 1.5% of gross cable revenues.

(...continued)

state franchisee to provide PEG financial support. Some state laws (for example, Texas, Indiana, Michigan, Florida, Iowa, Georgia, and Ohio) require new entrants that seek to offer service in multiple local jurisdictions to provide the same level of support as is currently imposed on the incumbent cable providers by the local franchising authorities in each of those local jurisdictions. Others (for example, Virginia, California, and Illinois) set specific statewide minimum or maximum levels of PEG support, in terms of a percentage of revenues. Yet others (for example, Kansas, South Carolina, Missouri, and Nevada) do not require the new entrants to provide any PEG support.

Sometimes a state law does not end PEG financial support requirements, but eliminates a particular type of support that PEG access centers have heavily relied upon for their operations. For example, in California, there is a process for local jurisdictions to continue to require cable systems to pay a PEG fee of up to 1% of the franchisee's gross revenues, but those jurisdictions cannot require the franchisee to provide PEG studios, institutional networks, or other non-cash support. PEG advocates claim that Time Warner, Charter, and Comcast have discontinued providing studios in a number of communities in California and as a result 51 communities have closed access centers.[44] However, in some of these communities (for example, Long Beach), consortiums of local arts organizations and foundations, working with the local PEG advocates, were able to reopen access centers. Similarly, based on state laws that affected PEG requirements, some cable operators that were operating PEG channels in Indiana and Illinois have closed their PEG access centers, on as little as 30 days' notice.[45]

Some states laws have placed minimum programming requirements on PEG channels even as they have eliminated or set caps on cable company PEG support requirements.[46] For example, in Georgia, Texas, and Michigan, PEG channels are required to provide at least eight hours of non-repeat programming content daily, but Georgia has eliminated PEG support requirements and both Texas and Michigan have capped support requirements. In Texas, Time Warner stopped airing San Antonio Public Access because the channel could no longer meet the 8-hour non-repeat daily programming requirement.[47]

More broadly, LFAs and PEG advocates claim that the new laws, as interpreted by new entrants and incumbent cable companies, have resulted in limitations on the PEG fees that localities can impose on franchisees, the elimination of free access to video equipment and television studio space previously provided to PEG programmers by franchisees, the elimination of cable company staff was previously provided to operate the access centers where PEG programming is produced, degradation of PEG signal quality rendering it no longer comparable to that of commercial channels, and inferior channel placement for PEG channels.[48] As a result, some PEG advocates and local governments claim that statewide requirements fail to meet the needs of their local communities. They say this is of particular concern because there is wide variation among communities regarding what PEG programming should be made available and how it should be delivered.

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[44] According to the ACD/Benton study, Charter PEG access centers have been closed in Glendale, Long Beach, Los Angeles, and Malibu; Comcast PEG access centers have been closed in Alameda County, Albany, Ashland, Castro Valley, Cherryland, Fremont, El Cerrito, Hayward, Kensington, Richmond, San Leandro, Dan Lorenzo, San Pablo, Newark, and Union City; and Time Warner PEG access centers have been closed in Avocado Heights, Baldwin Park, Carlsbad, Carson, City of Industry, Compton, Costa Mesa, El Segundo, Fountain Valley, Fullerton, Garden Grove, Gardena, Hacienda Heights, Hawthorne, Huntington Beach, Lawndale, La Puente, Los Alamitos, Los Angeles, North Whittier, Ojai, Oxnard, Placentia, Puente Hills, Santa Ana, South Whittier, Stanton, Tustin, Valinda, and Westminster.

[45] See, American Community Television, "For many states, time is running out ... ," http://www.acommunitytv.org/actnow/troubleinthestates.html.

[46] *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age,* Federal Communications Commission, July 2011, p. 173 and fn. 63, http://www.ffc.gov/infoneedsreport.

[47] One criticism of some PEG access centers is that they rely too heavily on studio production of their programming and fail to exploit opportunities for field production, such as local high sports coverage, that could be used to expand their original programming. See *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age,* Federal Communications Commission, July 2011, p. 177, http://www.ffc.gov/infoneedsreport.

[48] See, for example, Josh Goodman, "Unscripted Ending: The Picture Gets Blurry for Public Access Television," *governing.com*, January 31, 2008, available at http://www.governing.com/topics/technology/unscripted-ending.html.

Systematic data are not available on how much PEG support—in cash, facilities, equipment, services, personnel, etc.—has been reduced as a result of the state laws—and how much additional reduction will occur as local franchise agreements expire and as the 2012 sunset dates in various state laws are reached. But these state laws clearly have and will continue to have very major impacts on PEG support. It is unlikely that alternative sources, such as private donations and foundation grants, will be able to generate enough funds in the near term to replace the loss in cable company support,[49] and thus some state laws may potentially have an existential impact on PEG access centers and channels.

As noted above, two provisions in the CAP Act legislation introduced in the 112th Congress were intended to explicitly address the impact of the state bills. One provided that, if a state limits the number of channels a franchising authority may require a cable operator to designate for PEG use, a local government subdivision could require a cable company to provide the greater of the number of channels the operator was providing in that subdivision prior to enactment of the state law or up to three channels. The other provision would have entitled local governments to require a cable operator to provide PEG support even if a state enacted a law eliminating or restricting such requirements. The provision would have set a cap on the amount that could be required[50] and would have required that those funds be dedicated to PEG use of channel capacity.[51]

The cable industry opposed the provisions in the CAP Act that would have allowed local jurisdictions to impose PEG requirements beyond those set under state law or in statewide franchise agreements. NCTA claimed the CAP Act would increase cable company costs and lead to higher cable rates, and that since these requirements would not have applied to satellite operators the cable companies would have been placed at a competitive disadvantage.[52] It also stated that the CAP Act would have allowed a local government subdivision to "trump the decisions made by the state franchising authority." NCTA incorrectly claimed, however, that the CAP Act would have allowed local franchising authorities to impose "unlimited PEG-related costs."[53]

[49] For example, in its July 2011 report, *The Information Needs of Communities: The Changing Media Landscape in a Broadband Age,* the Federal Communications Commission found (at p. 173 and fn. 62) that because PEG access centers are largely volunteer-run they often lack the stable leadership and staffing that media funders and foundations need to be able to construct an ongoing partnership (http://www.ffc.gov/infoneedsreport).

[50] The cap would have been the greatest of: (a) the amount of support provided in the last calendar year ending before the effective date of the state legislation; (b) the average annual amount of support provided over the term of the franchise under which the cable operator was operating before the effective date of the state law; (c) the amount of support that the cable operator is required to provide to the subdivision under the state law; or (d) an amount of support equal to 2% of the gross revenues of the cable operator from the operation of the cable system to provide cable services in the subdivision. The forms of support for PEG use would have included all cash payments, in-kind support, and free services that the operator provides to the subdivision for PEG use of the cable system. This amount would have been adjusted for inflation using the Gross National Product Price Index. Support provided to any subdivision would have had to be dedicated to PEG use of channel capacity.

[51] The CAP Act also would have instructed the FCC to perform and submit to Congress an analysis of the impact of the enactment of state video service franchising laws since 2005 on PEG use of cable systems.

[52] "The Community Access Preservation Act ("CAP Act") Is Bad for Consumers, Video Competition, and Local Municipalities," National Cable & Telecommunications Association release, May 2011, http://www.ncta.com/DocumentBinary.aspx?id=974.

[53] Ibid.

FCC Rulings Affecting PEG Funding

In 2007, the FCC adopted rules and provided guidance that set restrictions on the process and requirements that local franchising authorities may employ when considering franchise applications from potential new cable service providers (such as telephone companies) and incumbents.[54] The FCC based its actions on Section 621(a)(1) of the Communications Act,[55] which prohibits franchising authorities from unreasonably refusing to award competitive franchises for the provision of cable services. The stated intent of the orders was to foster the ability of competitors to gain entry into video service markets and to enhance broadband development. The FCC argued that, under the current rules, competitors attempting to enter new markets faced unreasonable regulatory obstacles.

In reaching its conclusions and constructing the specific rules constraining LFA requirements, the FCC admitted that for some of the allegedly restrictive requirements "few parties provided specific details."[56] It referred to only a single incident to support its conclusion that disputes involving LFA-mandated contributions in support of PEG services and equipment were impeding video deployment and may have been leading to unreasonable refusal to award competitive franchises.[57] It relied on statutory construction, rather than empirical evidence, when concluding that "adequate PEG access channel capacity, facilities, and financial support" means "satisfactory or sufficient" rather than "significant" support,[58] and gives LFAs the freedom to establish their own PEG requirements "provided that the non-capital costs of such requirements are offset from the cable operator's franchise fee payments."[59] That is, any PEG-related assessment imposed on the cable operator that is not a capital cost must be subtracted from the 5% fee cap, rather than imposed over and above the 5% fee. In its decision upholding the FCC's First Report and Order, the Sixth Circuit Court of Appeals found, based on the legislative history of the Cable Act, that costs relating to PEG equipment should be considered capital costs as long as they were incurred in or associated with the construction of PEG access facilities.[60]

Since Section 622(g)(2)(C)[61] of the Communications Act only excludes PEG-related *capital* costs from the 5% fee cap for agreements in effect after October 30, 1984, the FCC's reliance on statutory construction seems straight-forward. But PEG advocates and the two FCC commissioners who dissented from the orders argue that the 1984 Cable Act permits a broader interpretation of what may be required from franchisees over and above the 5% franchise fee.[62]

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[54] *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*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, adopted December 20, 2006 and released March 5, 2007 (FCC Cable Franchising Report and Order), and *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*, MB Docket No. 05-311, Second Report and Order, adopted October 31, 2007 and November 6, 2007. The orders did not address the processes and requirements of state franchising authorities.

[55] 47 U.S.C. §541(a)(1).

[56] FCC Cable Franchising Order, ¶ 105.

[57] Ibid., ¶ 109 and fn. 361.

[58] Ibid., ¶ 112.

[59] Ibid., ¶ 113.

[60] *Alliance for Community Media, et al. v FCC*, No. 07-3391, 6th Cir. June 27, 2008.

[61] 47 U.S.C. §542(g)(2)(C).

[62] See, for example, "Dissenting Statement of Commissioner Jonathan S. Adelstein," amended to the FCC Cable Franchise Report and Order, p. 105.

They point to legislative history, including the House report accompanying the Cable Act, which states that the franchise fee does not include "any franchise requirements for the provision of services, facilities or equipment."[63] They claim that the reference to "services" suggests that cable franchisees can be required to pay for non-capital PEG-related franchise requirements over and above a 5% franchise fee.

Since the Communications Act does not define capital costs or service costs, PEG advocates and LFAs claim they are left with a large degree of uncertainty about what assessments LFAs may impose on cable franchisees over and above the franchise fee. Historically, many franchise agreements have required cable franchisees to pay for non-capital PEG-related costs, including salaries, training, travel expenses, rent, and some maintenance expenses. Going forward, cable franchisees that are required to pay a 5% franchise fee probably will be able to deduct these PEG costs from the franchise fees they pay LFAs.

It is difficult to measure the impact that the FCC rules have had on PEG funding and on the financial viability of PEG access centers because neither the FCC, nor the PEG community, nor the cable industry has collected data on the levels and stability of PEG funding sources that might shed light on the impact, if any, of the FCC rules. For example, how common had it been for LFAs to require cable franchisees to make payments, over and above the 5% franchise fee, for PEG operations (as opposed to PEG capital costs)? In those cases, what are the realistic alternative funding options available for operating costs? To what extent, if at all, are private donations and foundation grants feasible options? If these options might be feasible in the long-run, but not short-run, how would PEG access centers stay afloat during the interim period?

The CAP Act introduced in the 112th Congress would have removed the distinction between capital and non-capital cost funding requirements and overruled the funding limitations in the FCC rules, setting higher caps on the amount of PEG funding a local jurisdiction could require. It explicitly would have allowed a local jurisdiction to continue to require a cable operator to provide PEG support, over and above any mandated franchise fee, up to the limits set in the bill.

NCTA opposed these CAP Act provisions overruling the FCC rules, claiming they would have increased cable company costs and thus put upward pressure on cable rates and would have placed cable companies at a competitive disadvantage with satellite operators, which do not have PEG requirements.[64]

AT&T's U-verse Service

AT&T offers its U-verse multichannel video programming distribution service using an all-Internet Protocol (IP) technology platform. It is building out an optical fiber network to neighborhood nodes and using the existing copper connections already in place from those nodes to subscribers' premises.[65] (Each neighborhood node serves several hundred end user customers.)

[63] H.Rept. 98-934, p. 65.

[64] See "The Community Access Preservation Act ("CAP Act") Is Bad for Consumers, Video Competition, and Local Municipalities," National Cable & Telecommunications Association release, May 2011, http://www.ncta.com/DocumentBinary.aspx?id=974.

[65] Details about AT&T's U-verse service are based on a meeting that CRS staff had with AT&T staff on August 11, 2008.

This is a less capital-intensive alternative to the fiber-to-the-premises network being deployed by Verizon in its FiOS network.

As copper has less capacity than fiber, the AT&T network does not simultaneously "broadcast" the signals of multiple video channels all the way to the customer premises, as cable companies do and as Verizon does with its FiOS network. Rather, it employs IP technology that allows the subscriber to use the set-top box to "call up" the particular video stream it desires from a centralized place where the video file is stored—the video hub office serving the designated market area (DMA) in which the subscriber is located or, if that video stream has already been requested by a neighbor served by the same neighborhood node, that neighborhood node.

The major constraint on the AT&T U-verse network is the capacity of the copper loop. Currently, U-verse can provide at most two high-definition channels to a household simultaneously, and for many customers it can offer only a single high-definition channel at a time. To attain the level of audio and video signal compression needed to offer service, AT&T must encode the program signals using MPEG-4 compression methods. (MPEG-4 is an industry standard.)

The content that AT&T receives from programmers is not encoded in MPEG-4 and therefore must be recoded. Each additional video stream (which appears as a "channel" to a subscriber) imposes two categories of incremental costs on AT&T: the cost of additional equipment to encode the programming and the cost of additional dedicated capacity on an AT&T server at a national or DMA hub to store the video stream. For programming that is provided in a continuing, changing flow—such as the programming of a cable or broadcast channel or a PEG channel—each additional video stream requires dedicated encoding equipment to recode the ongoing stream. For programming that is received once and then stored—such as the program library used for video-on-demand "channels"—there is no need for dedicated encoding equipment. Encoding equipment used for one video on demand program can be re-used for another video-on-demand program. Thus the incremental equipment cost associated with an additional video-on-demand program selection is lower than that associated with a cable or broadcast network or PEG channel.

AT&T claims that the incremental encoding and server capacity costs associated with an ongoing video stream, such as that required for a cable or broadcast network or for a PEG channel, is approximately $200,000. In a large metropolitan area, with many local jurisdictions, each of which currently has several PEG channels, the upfront incremental cost of offering multiple PEG channels thus could be several million dollars.[66]

AT&T therefore has chosen not to make PEG programming available to subscribers in the same fashion that it makes commercial programming available. Instead, it treats PEG content the same way it treats Internet traffic. It has created a separate platform for PEG, with a single channel, channel 99, at which subscribers can find PEG programming, just as they have one channel for Internet access. The PEG content is not encoded in MPEG-4. Rather, the subscriber goes to channel 99 and pulls down a menu that identifies each of the local jurisdictions in the subscriber's DMA and, after clicking on the desired jurisdiction, gets a menu that identifies all the PEG programs for that jurisdiction, for the subscriber to choose from. The selected program is then downloaded to the user's set top box.

[66] At the same time, it is likely that AT&T's U-verse video revenues, and its network build-out and marketing expenses, in a large metropolitan area would be substantial and therefore the relative burden of these upfront costs might not be large.

PEG advocates claim there are a number of problems with this system.[67]

- The subscriber may experience substantial delay—it can take a minute or more to first go to channel 99 and then navigate two drop-down menus—in getting to (and then away from) the chosen PEG program; the program (and the PEG channel) is not available in the same seamless fashion as non-PEG programming and channels.
- The PEG programming is not shown on AT&T's program guide; there is no way for the subscriber to know what programming is on a PEG channel without going to the channel.
- The AT&T PEG platform has not been fully accessible to hearing-impaired and visually-impaired viewers. It appears that AT&T has worked with Microsoft to better accommodate closed captioning for the hearing-impaired, but it continues to be difficult for the visually-impaired to perform the channel navigation required to get to and from PEG channels.
- AT&T PEG platform does not provide the capability to record the programming on a DVR.
- The picture quality on the AT&T PEG platform is inferior to that on AT&T's commercial channels; PEG is transmitted at a lower resolution and the picture may stutter when displaying rapid motion, as in a sports program.
- By requiring the PEG programmers to deliver their signals to a DMA-wide geographic area, rather than the local jurisdiction, those programmers may be liable for additional costs associated with the broader distribution of copyrighted materials.

On January 30, 2009, a group of PEG advocates filed a petition with the FCC seeking a declaratory ruling that AT&T's method of delivering PEG channels over its U-verse system is contrary to the Communications Act and FCC rules.[68] Citing a lack of FCC action on the petition, the PEG advocates filed another petition in September 2010,[69] but to date the Commission has not acted on the petitions. In July 2011, American Community Television announced that PEG advocates asked eight state attorneys general to investigate PEG inaccessibility for the blind and visually impaired over AT&T's U-verse service.[70] American Community Television also has called for the FCC to condition approval of the proposed AT&T/T-Mobile merger on the fulfillment of specific PEG commitments, analogous to the PEG conditions (discussed in the

[67] See, for example, Todd Spangler, "AT&T Knocked for 'Inferior' PEG Channels," *Multichannel News*, January 31, 2008.

[68] *In the Matter of Petition for a Declaratory Ruling that AT&T's Method of Delivering Public, Educational and Government Access Channels Over Its U-verse System Is Contrary to the Communications Act of 1934, as amended, and Applicable Commission Rules,* MB Docket No. 09-13, CSR-8126, Petition for Declaratory Ruling of Alliance for Community Media, et al., January 30, 2009.

[69] See, for example, Jonathan Make, "Lack of FCC Action on PEG Filings Cited in New Petition," *Communications Daily,* September 22, 2010, at pp. 6-7, and Nate Anderson, "FCC asked to probe AT&T treatment of public access channels," *ArsTechnica,* http://arstechnica.com/tech-policy/news/2009/02/atts-u-verse-faces-fcc-complaint-over-peg-channels.ars.

[70] "Attorneys General in Eight States Asked to Investigate U-verse PEG Inaccessibility for the Blind and Vision Impaired," American Community Television, July 14, 2011, available at http://acommunitytv.org by first selecting "news" in the drop-down menu and then selecting "July 2011."

previous section of this report) that were part of the FCC order approving the transfer of broadcast licenses in the Comcast-NBC Universal merger.[71]

AT&T has filed detailed comments opposing the petitions for declaratory ruling.[72] It explains that its IP network architecture is fundamentally different from the architectures used by the cable companies and Verizon, and contends that it is inappropriate to require it to deploy its network inefficiently in order to meet requirements conceived for traditional cable architecture. It argues that, even though its U-verse service is not a cable service and therefore not subject to the PEG requirements in the Communications Act and in FCC rules, the U-verse service nevertheless fully meets all those requirements. It also claims that its provision of PEG access offers subscribers three benefits: subscribers can view the PEG programming of all the local jurisdictions in their DMA, not just the programming of their specific community; channel 99 is an easy-to-remember, prime channel location; and PEG programming will be in a digital format that can easily be used for the Web, which enables communities to more easily provide the same content over the Internet.

AT&T and its critics in the PEG community have constructed, and made available online, dueling videos that purport to show, respectively, the virtues and the vices of AT&T's U-verse provision of PEG programming. AT&T's video is available at http://uverseonline.att.net/uverse/peg; its critics' video is available at http://www.youtube.com/watch?v=dlJ6Wtk1cqc.

The CAP Act introduced in the 112th Congress did not directly address these issues relating to PEG accessibility on AT&T's U-verse service, although the provision requiring cable companies to carry signals for PEG use from the point of origin of the signals to subscribers without material degradation and without altering or removing content or data provided, with the clarification that cable service is defined without regard to technology or transmission protocol, would have provided a statutory basis for ensuring that the PEG channels provided by AT&T included closed captioning for the hearing impaired.

Local Institutional Networks (I-nets)

An institutional network is a communications system capable of transmitting video, voice, and/or data signals over optical fiber, coaxial cable, or both, among governmental, educational, and possibly other nonresidential users.[73] Many local governments have required cable operators to construct and maintain, or in some fashion provide support for, an institutional network as a condition for the initial grant, transfer, or renewal of a cable franchise. Section 611(b) of the Communications Act[74] allows a franchising authority to require a cable franchisee to set aside channel capacity on an institutional network constructed or operated by the cable operator for educational or governmental use.

[71] "American Community Television Calls for PEG Commitments in the AT&T/T-Mobile Merger," American Community Television press release, March 29, 2011, http://acommunitytv.org/2011/03/american-community-television-calls-for-peg-commitments-in-the-attt-mobile-merger/.

[72] Comments of AT&T Opposing Petitions for Declaratory Ruling.

[73] The following description of institutional networks comes from a report entitled "The FAQs about Institutional Networks," prepared by the Baller Herbst Law Group, http://www.baller.com/library-art-faq.html.

[74] 47 U.S.C. §611(b).

In the past, when cable systems typically were designed only to transmit television programming one way from cable operators to residential users, cable operators generally dedicated a limited number of channels to governmental and educational use or constructed stand-alone cable systems for that purpose. Today, cable systems routinely are constructed as hybrid fiber/coaxial cable networks with sufficient capacity and two-way capabilities to accommodate I-net requirements in a single integrated system. In some recent franchise agreements, local governments have obtained a number of "dark" optical fibers in addition to, or in lieu of, channel capacity, and are furnishing the end-user electronic equipment necessary to "light" the fibers themselves—providing vast amounts of broadband capacity at low cost.

These new generation I-nets can support a broad range of uses, including high-speed Internet and intranet access; large-file uploads and downloads; program and data sharing within and among city departments and offices; geographic information system mapping (including graphic, tax, zoning, utility, right of way, legal, and other information in a single database that is searchable from any location); video conferencing; distance learning; vocational training; medical imaging; traffic control; environmental monitoring; management of water, sewer, and electric utilities; remote meter reading; video arraignments and depositions; video surveillance and security; emergency services; advanced library services and cataloguing; computer assisted design and computer assisted manufacturing; city-side or area-wide PBX-like 4-digit dialing; and direct access to long distance providers, avoiding local access charges.

According to a fact sheet on I-nets prepared by the Baller Herbst Law Group, which represents many state municipal leagues and local governments on communications and utilities issues, the National Association of Telecommunications Officers and Advisors (NATOA) conducted a survey, to which 48 communities with I-nets responded, that found that in 56% of these communities, the cable operator built all or most of the I-net; in 13%, a telephone company built all or most of the I-net; and in 44% the local government itself built all or substantial components of the I-net.[75] In 44% of those communities, the cable operator owns and maintains all or a portion of the I-net; in 19% a telephone company does so; and in 67% the local government owns and maintains all or a portion of the I-net. 25% of the responding communities share operations with a cable company and 19% share operations with a telephone company or electric utility.

The new statewide franchising laws tend not to require new entrants to provide I-nets in their areas of operation if the incumbent cable company has already provided these facilities and there is no identified need to construct redundant networks. Some of these laws also would reduce or eliminate the I-net requirements in existing local franchise agreements or require the jurisdiction to pay the incremental cable network costs associated with providing the I-net.

When the Alliance for Community Media performed an online survey of its members and NATOA members from around the country in May 2008 to assess the impact of statewide laws,[76] it sought information on how the laws affected educational and governmental access channels and I-nets as well as public access channels. Of the 204 respondents, 26% reported a loss of or reduction in public cable drops in schools, libraries, and other public centers and 41% reported a

[75] These percentages, reported by the Baller Herbst Law Group at http://www.baller.com/library-art-faq.htm, exceed 100%, suggesting either that some of the communities that responded to the survey had multiple I-nets or counted both the local government and the cable or telephone company when the task for building the I-net was shared.

[76] "Assessing the Damage: Survey shows that state video franchise laws bring no rate relief while harming public benefits," reported results of a May 2008 online survey conducted by the Alliance for Community Media, http://www.cantv.org/keepusconnected/Harm-Survey-Report.pdf.

loss of or reduction to services to I-nets that connect PEG facilities to schools and government institutions. These survey results must be viewed with some caution, however. The survey was not scientifically performed; PEG programmers or local officials who have experienced reductions in support likely would have had a greater incentive to participate in the online survey.

Cable providers' I-net requirements may also have been clouded by the recent FCC orders which created ambiguity about what constitutes capital costs (and, therefore, what can be charged over and above the 5% franchise fee).

Author Contact Information

Charles B. Goldfarb
Specialist in Telecommunications Policy
cgoldfarb@crs.loc.gov, 7-7252