



The Future of Franchising

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***The power of love is a curious thing
Make a one man weep, make another man sing
Change a hawk to a little white dove
More than a feeling, that's the power of love –***

The Power of Love by Huey Lewis and the News

This song was written for the opening scene of the 1985 movie *Back to the Future*. When cable franchising was at its height.

If Huey Lewis changed the lyrics from 'love' to 'a cable franchise', it would still apply today.

If you're reading this Marty McFly, forget about the Sports Almanac

just bring back a copy of future legislation addressing fair compensation for broadband and OTT providers' use of public ROWs.

The Cable Franchise is Important

- **In many states a local or state issued franchise is the authority that allows the operator into public rights-of-way.**
- **What legal authority would an operator rely upon if the cable franchise no longer exists?**
- **While cable revenue may be decreasing the value of the franchise remains significant.**
- **Should broadband only providers be allowed to use the ROW without any fee for occupation**
 - Should all private companies be allowed to use public land for free?
 - Every big-box retailer get free public property for next building?

Marketplace Challenges

- **Decreasing Subscriber Base**
 - Over-the-Top (OTT) competition
- **Cable “gross revenues” decreasing**
 - Subscribers decreasing
 - Rates increasing
 - The “cable pie” is getting smaller
 - Adverse impact on franchise fee and PEG fees



Cable Subscriber Counts

Cable Company	2023 Subs	2022 Subs	2021 Subs	2020 Subs	2019 Subs	2018 Subs
Charter	14,706,000*	15,147,000	15,833,000	16,200,000	16,144,000	16,606,000
Comcast	14,985,000*	16,142,000	18,176,000	19,846,000	21,254,000	21,986,000
Cox	3,340,000*/**	3,050,000	3,390,000	3,650,000	3,865,000	4,015,000

Source: August 15, 2023 Leichtman Research Group, Inc.

*Estimates through 2Q of 2023

** LRG estimates for Cox and Mediacom



Subscriber/Franchise Fee Trend

Sample Data from an LFA with a population base of about 225,000

Year	Avg # of Subs/Mo	Avg Franchise Fee/Mo
2023	35,024	\$224,877
2022	37,826	\$233,897
2021	41,433	\$240,854
2020	44,385	\$235,768
2019	47,260	\$241,720
2018	49,983	\$251,010



What is OTT?

- OTT stands for **Over-the-Top**
 - Video service (cable TV) is obtained via the internet
- OTT providers are Netflix, Disney+, Apple TV, Hulu, others
 - Subscribers do not need cable, broadcast or satellite service
 - Just a broadband connection

My cable operator now says they are OTT

- Just because an operator claims to now be IP based and OTT does not make it accurate
 - they *may* still need a valid cable franchise and pay franchise fees, etc.
- If your City elects not to enforce such obligations on certain alleged “OTT” providers
 - will other incumbent operators continue to comply with the cable franchise?
- **Becoming an issue in cable franchise renewals**
 - competitive equity provisions

Can LFAs Regulate OTT Providers?

- Can LFAs require a local/state cable franchise?
- Can LFAs impose franchise fee obligations?
- Can LFAs require PEG channels?
- Can LFAs impose other ROW compensation?

Does OTT provider Need a Cable Franchise?

Cable Franchise Requirement

Federal Law (47 U.S.C. § 541(b):

A cable operator may not provide cable service without a franchise



What is a Cable Operator? - Federal

Any person or group of persons:

- A. **who provides cable service over a cable system** and directly or through one or more affiliates owns a significant interest in such cable system, or

- B. who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system.

47 U.S.C. § 522(5)



What is Cable Service?

- A. the **one-way transmission to subscribers** of (i) video programming, or (ii) other programming service, and **subscriber interaction**, if any, which is required for the selection or use of such video programming or other programming service.
- B. “other programming service” means information that a cable operator makes available to all subscribers generally

47 U.S.C. Sec. 522(6) and (14)

What is a Cable System?

a facility, consisting of a set of ***closed transmission paths*** and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community . . .

47 U.S.C. § 522 (7)

What is a Closed Transmission Path?

FCC has equated a “*Closed transmission path*”

“with control [of] the physical method of delivery”

See 2014 MVPD NOPR paragraph 22 and paragraphs 71-79.

My cable operator now says they are OTT

Confirm transmission path:

- Do you have to be a subscriber on their system to access their video content?
- Do you need their converter box (equipment) to access their video content?
- Can you access their video content right here, right now
 - (in this conference room) on your devices via the internet?

Fees on Streaming Providers

- **City of Chicago**

- Amusement tax = 9%
- City allowed to tax streaming services

- **Florida**

- Communications Service tax = 2.52%
- Proceeds are distributed to cities/counties

- **North Carolina**

- Tax on "certain digital property" = 4.75%
- It does not appear that proceeds are distributed to cities/counties

Fees on Streaming Providers

- **Pennsylvania**

- State sales and use tax = 6%
- Applied to purchases of tangible personal property delivered to a customer electronically, digitally or by streaming

- **Washington**

- Business and occupation tax = 1.5% - 1.75%
- Funds are contributed to the states' general fund
- Utility tax on cable and telephone providers

Fees on Streaming Providers

- **New York**

- 2023-24 assembly budget proposal = 4% state and 4% local sales tax
- Revenues raised from this proposal would be directed to transit systems across the state

- **Massachusetts**

- Proposed bill = 5%
- Proposal ties compensation to use of right-of-way



Should you enforce compliance with existing cable franchise?

- Why have a franchise (contract) if the landlord is not interested in enforcing compliance?
- What are the most important issue to address in franchise renewal in a changing market?

Franchise Compliance

- **What's in your Franchise?**
 - Read your franchise
 - Read parts of the Federal Cable Act
 - Make spreadsheets to track keys dates and compliance
- **Are you receiving the fees your franchise requires?**
 - Conduct franchise fee and PEG fee audits/reviews
- **What does your franchise allow in the ROW?**
 - Careful what is placed in ROW
- **Are you receiving the reports your franchise requires?**
 - Customer Service Reports
 - Franchise fee and PEG fee payment reports

Grant of Authority

- **What does your new cable franchise authorize the operator to do in your ROW?**
- **Did you grant authority solely for cable services?**
 - Title VI of the Cable Act
 - Was the grant broad to include any service the operator chooses to provide?
 - Broadband, telecommunications, wireless
- **Focus on authority being requested**
 - Do not waive right to regulate other services operator may seek to provide beyond cable services
- **Code provisions often not updated**
 - No longer just utilities using ROW
 - Different ROW rules for different users
 - Gas, electric, water, telecom, cable, wireless

Periodic Franchise Fee Audits

- **Are you collecting the correct amount of revenue?**
- **“Gross Revenue” definition**
 - Fee on Fee
 - Advertising, home shopping, non-subscriber revenue
 - Launch fees
 - Bundled rates
- **Annexation**

Bundling – Are You Losing \$\$

- **Subscriber selects triple-play**
 - Cable, telephone and broadband
- **Subscriber incurs late fee**
 - What portion of late fee is included in franchise fee calculation?
 - Should the late fee be split three ways?
 - Allocated based on revenue attributed to each service
- **Answer depends on franchise language**
 - Definition of gross revenues, related franchise provisions
 - Be careful about GAAP references in defined terms
 - Be very cautious when drafting new franchise revenue terms
 - Significant revenue at stake



PEG Fee Calculations

- **Percentage of “Gross Revenues”**
 - Calculated the same as franchise fee
 - Easiest to administer for local government
 - Many state statutes use this approach
 - Resolves CPI adjustment issue
- **PEG fee – charged per subscriber**
 - How applied to bulk MDUs?
 - “Equivalent billing unit”
 - Divide the total monthly bulk rate the MDU is charged for basic tier of service, by the standard monthly basic tier retail rate charged to a non-bulk billed subscriber in the City, however, in no event will the number of subscribers calculated for any such MDU be less than 90% of the actual number of dwelling units receiving basic service in the MDU.

PEG Fee

- **The term "franchise fee" does not include:**
 - *Capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities.*
47 U.S.C. § 542
- **What is a capital cost?**
 - Depreciable asset
 - Fixed, one-time expense
 - Land, buildings, construction, equipment
 - Total cost needed to bring a project to a commercially operable status
- **Is that what the Cable Act intended?**
- **What is a capital cost in the production of a television show or movie?**
 - Total cost of production – including labor, production and marketing

PEG Programming

- **How many channels are required under your franchise?**
 - Triggers
- **What level of capital funding?**
 - Timing of payments
 - Verification

Bonds, Letters of Credit and Security Funds

- **Does your franchise require these?**
 - Do you know where they are?
 - Have they expired?
 - Are the levels of coverage accurate?
- **Has anyone reviewed the terms?**
 - Notification
 - Statute of limitations
 - Waivers
- **Don't wait until you need to enforce franchise**

Customer Service

Simple path

- **Use FCC standards in franchise**
- **Look to both**
 - 47 C.F.R. § 76.309 and
 - §§ 76.1601 - 1604 (notices)
- **Reporting/enforcement - not in FCC regs**
 - Specify in franchise or city code

Aggressive path

- **Adopt separate Customer Service Ordinance**
 - Part of city code

Complimentary Cable Services

- **Cable Act (622(g)(2)(D)) exempts from franchise fees:**

“requirements or charges incidental to the awarding or enforcing of the franchise,” including payments for:

- Bonds
- Insurance
- Liquidated damages
- Security funds
- Indemnification
- Letters of credit
- Penalties

- **FCC 621 Order**

- 5% franchise fee cap applies to in-kind payments

- **Free or discounted cable services**

- To schools or public buildings
- Operators rely on FCC 621 Order to argue
 - Such in-kind services are subject to 5% cap



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Questions

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