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NATOA


Alternative PROW Compensation

Authority, Revenue & Digital Equity

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NATOIA 2024
PROW
Compensation
Garth Ashpaugh

History

- How we got here (fees percentage of revenues)
- Changes in service
 - coaxial
 - fiber
 - OTA to premiums to now
- Non-cable services
 - Internet
 - Voice
 - Security
 - Mobile

● Cable / video today (Part 1)

- Local franchising
- State franchising & rights
- State fees (FL & VA)

● Cable / video today (Part 2)

- Streaming
- Non-fee cable / video
 - Netflix, Hulu, AMC+, Peacock, Paramount+, etc.
 - Comcast (NOW.TV, Flex TV, Streaming TV)

● So???

- Need to define cable video to include streaming
- Need to get authority to franchise broadband

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Our Message



Cable Franchises Remain Valuable



Decreasing Cable Franchise Revenue



Broadband Franchising is the Future
State Legislation and FCC Advocacy
Needed

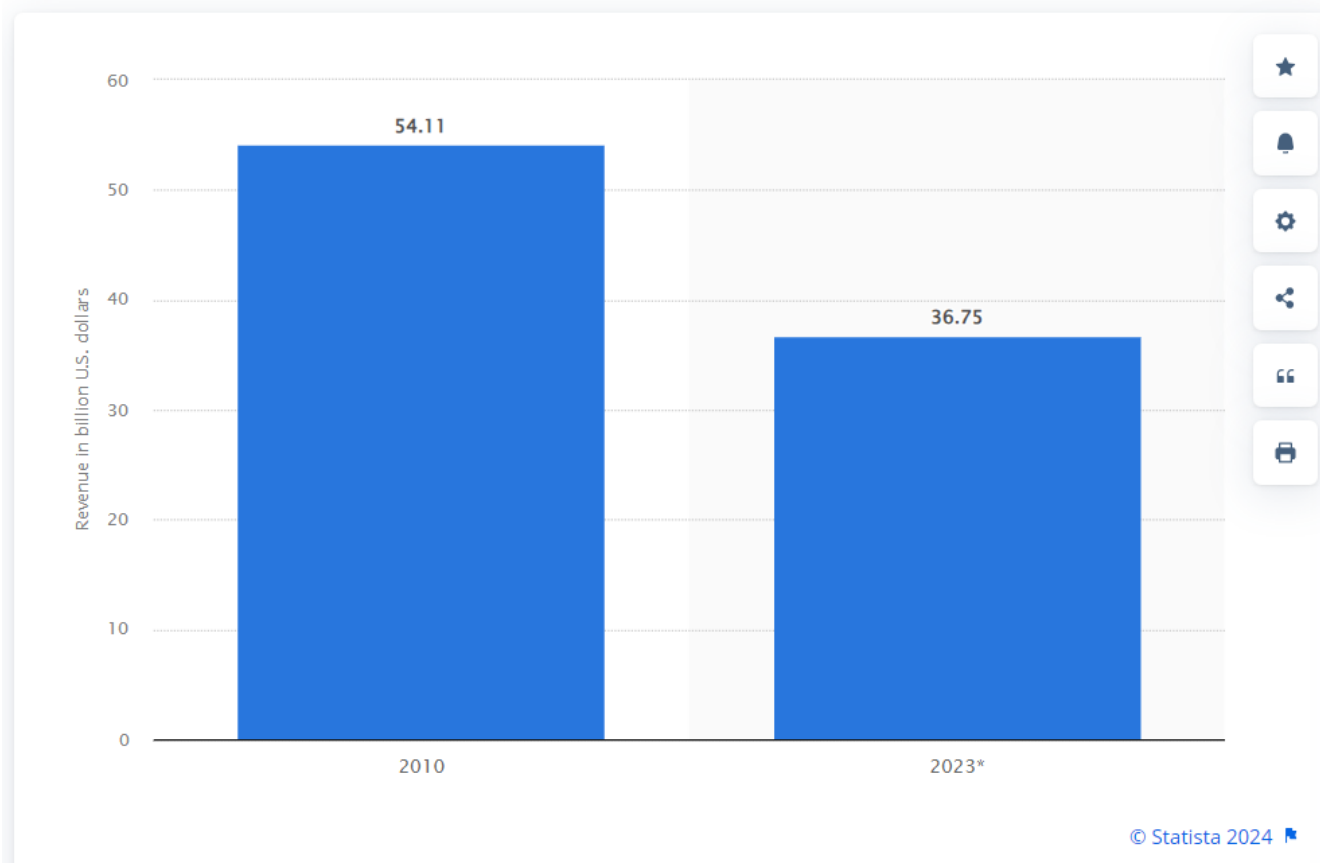


Franchising Role in Digital Equity

Cable Revenue Still Significant – But Declining

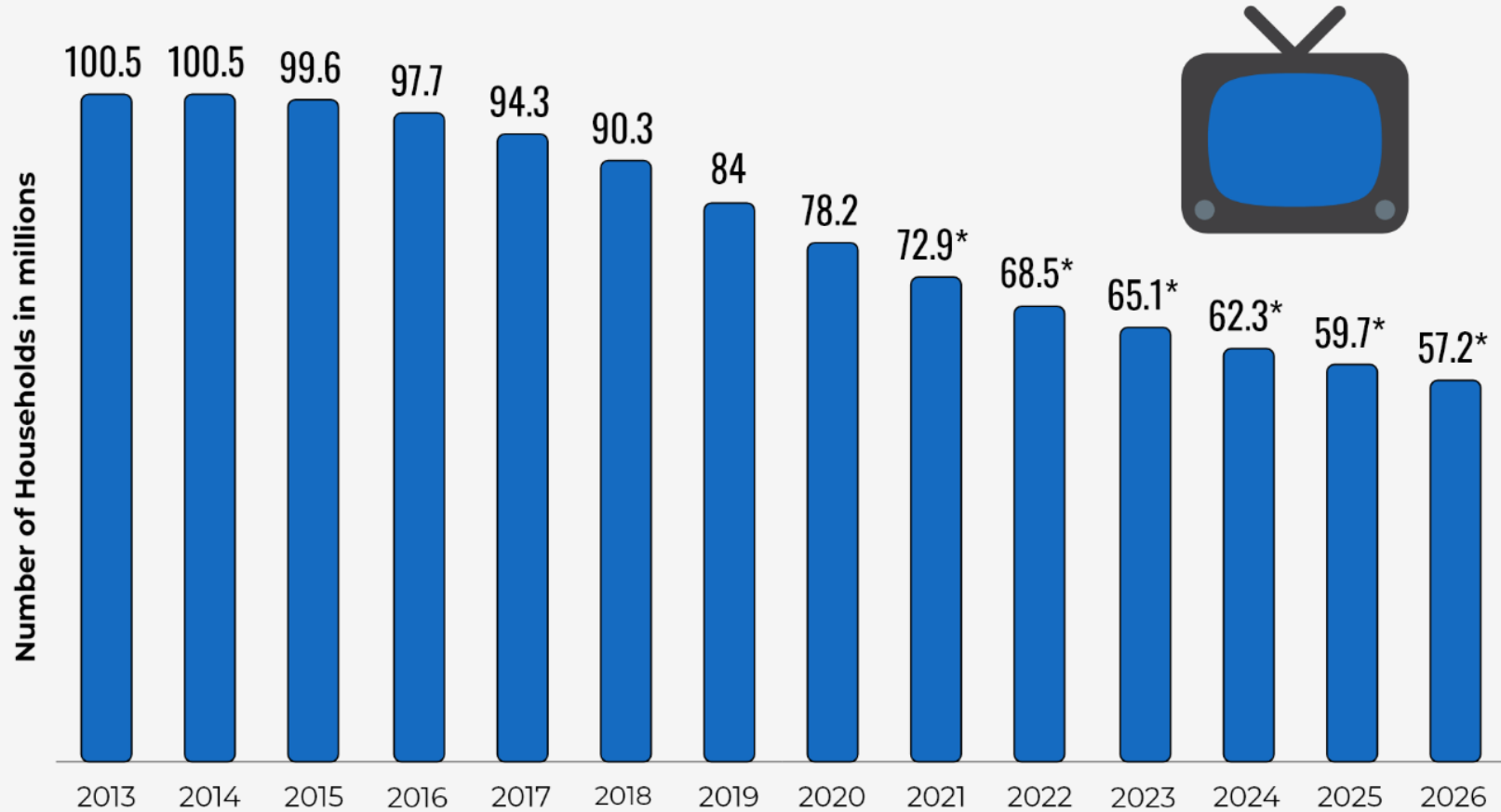
Cable TV revenue in the United States in 2010 and 2023

(in billion U.S. dollars)



Cable Subscriptions Still Significant – But Declining

Number of Pay TV Households in the U.S., 2013-2026



<https://www.cablecompare.com/blog/us-cable-subscriber-statistics>

Threats to Municipal Franchising

➤ Oppose H.R. 3557 - The American Broadband Act of 2023

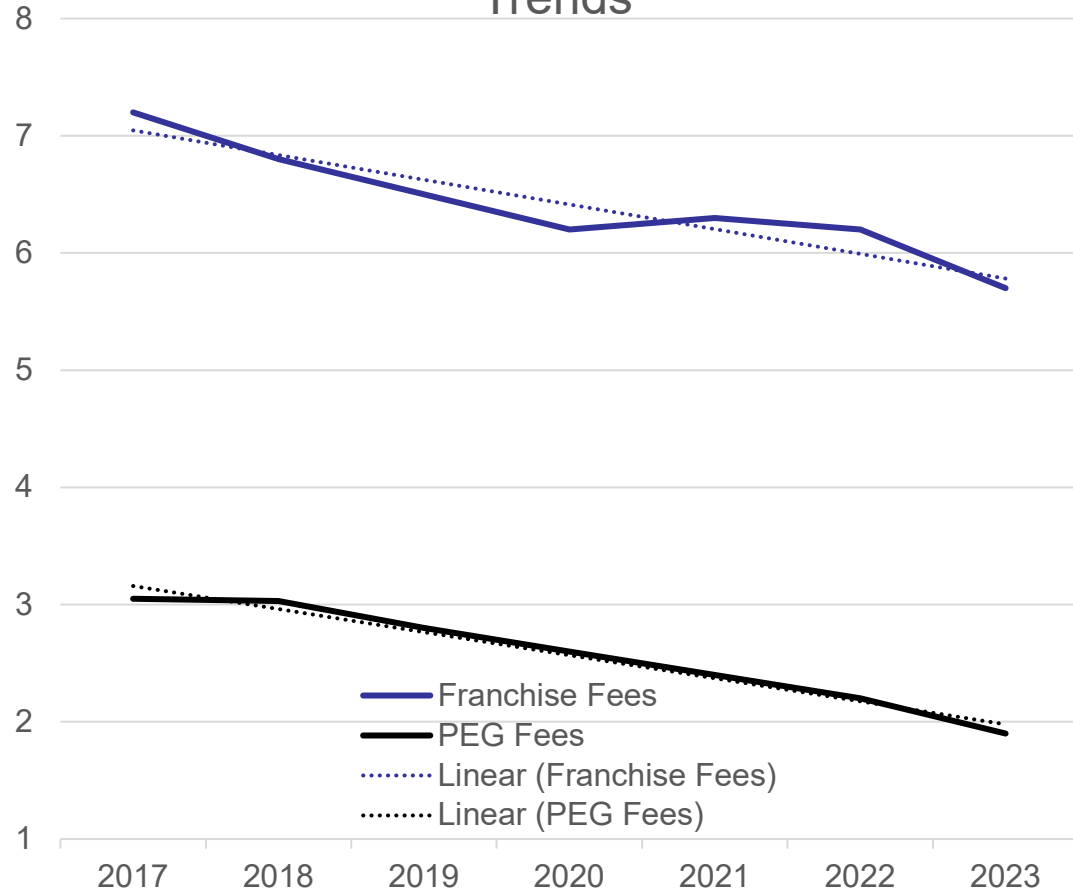
- H.R. 3557 would preempt local governments' rights-of-way compensation and management authority, zoning powers, cable franchising authority, and property rights
- U.S. Conference of Mayors – Priority – [Resolution No. 67](#) – June 23, 2024

Value of Franchising - Takeaways

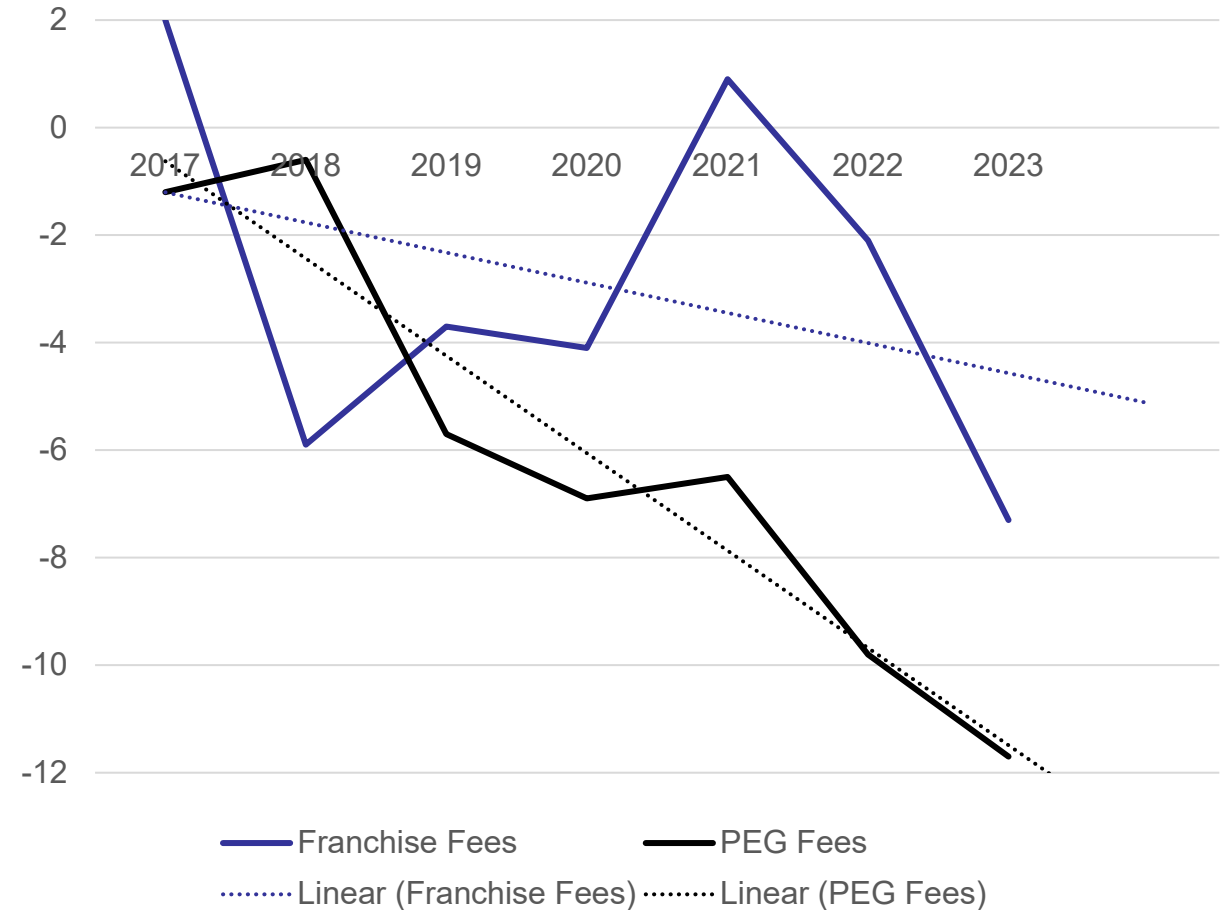
- A Franchise is a valuable privilege to every provider
 - Cable Subscriptions and Revenues are declining but still Significant
 - Franchises Remain Valuable to Municipalities
 - Revenue
 - Consumer protections
 - Build-out
 - Anti-Redlining
 - Public Benefits – E.g. Access Television
 - Take Action to Oppose HR 3557 – Major Threat to Local Governments
 - Participate at the FCC
-

Franchise Fee Revenue is Declining

Franchise Fee and PEG Funding Trends

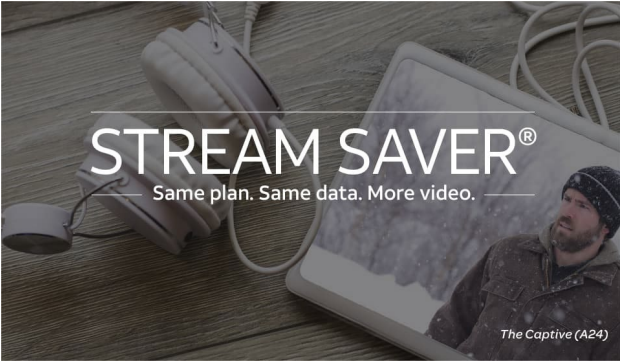


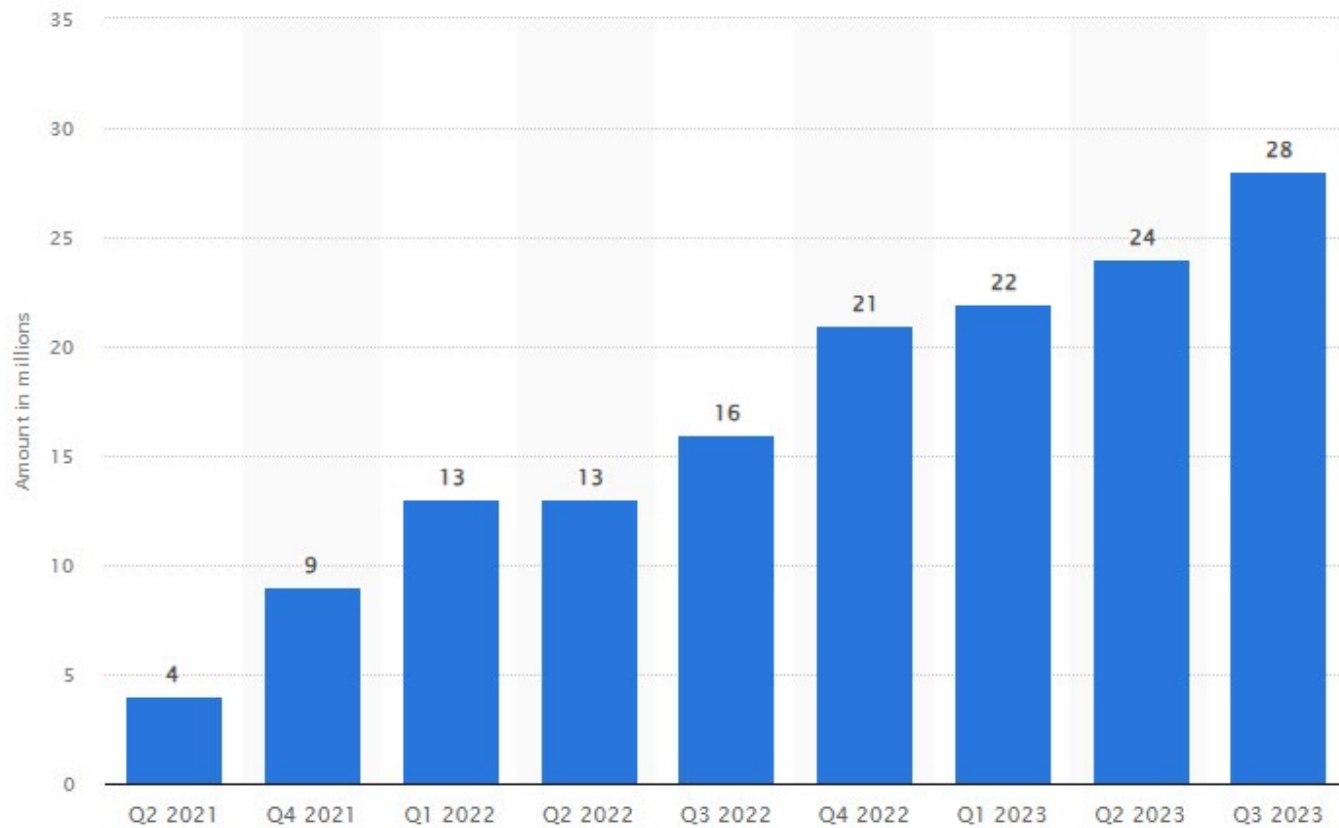
Change in Revenue % Year-to-Year



Per sub PEG Funding

New Video Programming – Different Technology





© Statista 2024

[Show source](#)

[Additional Information](#)

Number of Paid Subscribers of Peacock in the U.S. from 2Q 2021 to 3Q 2023

New Video Programming Revenue – Rising Sharply

*"In the short period of time since we launched in 2020, we've seen strong momentum, ending the year at **31 million paid subscribers** at a **\$10 ARPU**, supported by healthy trends in both engagement and churn, and I'm excited for 2024."*

- Comcast president Mike Cavanagh discussing Peacock subscribers and revenues
- <https://www.tvtechnology.com/news/peacock-subs-jump-nearly-50-yoy-to-31m>
- ARPU means Average Revenue Per Unit. Unit means subscriber.

Hypothetical Example of Revenue Loss

- Estimated Peacock Subscribers: 50,000
- ARPU - \$10
- Estimated Monthly Peacock Revenue: $50,000 * \$10 = \$500,000$
- Estimated Annual Peacock Revenue: $\$500,000 * 12 = \$6,000,000$
- Est. withheld Franchise Fees on Peacock: $\$6M * .05 = \$300,000$

Video Programming Delivered by Streaming by a Cable Op is a Cable Service

- “Streaming Service” means ...
- “Cable Service” means—
 - (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.
 - 47 U.S.C. § Sec. 522(6).
- “Video Programming” means
 - programming provided by, or generally considered comparable to programming provided by, a television broadcast station.
 - 47 U.S.C. § 522(20).
- “Other Programming Service” means
 - information that a cable operator makes available to all subscribers generally.
 - 47 U.S.C. § 522(14).

Cable Service is Technology Neutral

- Definition of **Cable Service** Technology Neutral
 - Never Mentions Channels
 - Only Video Programming or Other Programming
 - Streaming is arguably both
 - Is it one-way
 - Accessible in the same way as other video programming such as channels and Video-on-Demand
 - Subscriber interaction
 - All accessible via a Cable Operator's Equipment

- There is No Exclusion for Streaming in the Cable Service Definition

- The provision of cable service via internet technology over the cable system is not the provision of internet (information) services.

Streaming Video Programming **by Cable Operators**

➤ Recent Streaming Cases

- Whether a streaming provider – not a cable operator - must obtain a cable franchise under various state laws
 - *E.g. East St. Louis v. Netflix*, 83 F. 4th 1066 (7th Cir. 2023)
- Did Not Address - **Whether streaming video programming provided by a Cable Operator over its Cable System is a Cable Service** under federal law
 - Subtle but Massive difference in these issues

Revenue Takeaways

➤ Franchise Fees are being underpaid

- Operators are not paying Franchise Fees on all Cable Services
 - i.e. Video Programming via streaming
- Cities have been harmed by the underpayment
- **Regional Cost-Sharing – Develop Strategy and Action Items**
- National Coordination – NATOA and other National Organizations

➤ Franchise Negotiations

- Do not allow exclusions for streaming revenues
- Insist on language broadly construing gross revenues
- Draft the grant of authority narrowly – limited to the delivery of Cable Service
- Beware of “Competitive Equity” language

Future of Franchising - Broadband

➤ Examine Existing Franchise Authority

- State Constitution
- City Charter
- State Statute
- Current Franchises

➤ FCC Regulation

- Reclassification of Broadband – Title II Telecommunications Service
- Does not preempt all state and local franchising

➤ Seek Authority – if necessary



Minnesota – Equal Access to Broadband Act

- The Equal Access to Broadband Bill, [HF 4182/SF 4262](#)
 - The bill authorizes cities to franchise broadband providers,
 - Allow cities to ensure all its residents will receive the same broadband quality of service resulting in all residents having equal access to broadband.
 - Franchising will also allow cities to receive other public benefits such as access TV and efforts to promote digital equity.
 - Capped fees at 5% plus 3% for access television
 - Multiple hearings in the House
 - Added to the House Commerce Policy Omnibus Bill, [HF 4077](#) (Article 4, Sections 1-11), which **passed out of committee to the House floor** where it received its Second Reading on April 4, 2024.
 - On April 5, 2024, the bill was heard by the State and Local Government Committee in the House and laid over for possible inclusion in the State and Local Government Omnibus Bill.
 - Widespread support
 - League of Minnesota Cities, MACTA, NATOA, ACM, the League of Women’s Voters, and others, but was opposed by the cable and phone associations and some of the Chambers of Commerce.
-

Broadband Franchising Takeaways

➤ National

- Provide Model or Sample Legislation
- Lessons Learned from other States
- Talking Points
- Oppose The American Broadband Act
- FCC – Repeal Mixed Use – cost share

➤ Regional

- Authority - State-specific Solutions
- Advocate/Educate
- Cost Share

Addressing Out of Date FCC Rules In-Kind and Mixed Use Rules

➤ Bradley Werner Attorneys Ask For Immediate Repeal Of FCC's Mixed Use Rule And Modification Of Its In-Kind Rule Adopted In Third Report And Order

- In December and January a large municipal and access organization consortium in met with Commission staff and [filed a letter](#) urging the FCC to repeal the mixed-use rule and amend the in-kind rule as required by *City of Eugene v. FCC*.
 - The consortium included the Cities of Philadelphia, Seattle, Oklahoma City, and Minneapolis and includes entities from Vermont to Hawaii.
 - [January 27, 2024, article by Policyband \(available here\)](#)
 - In-Kind Rule – 47 CFR § 76.42
 - Mixed Use Rule – 47 CFR § 76.43
 - *City of Eugene v. FCC*, 998 F.3d 701 (6th Cir. 2021)
- U.S. Conference of Mayors – Priority – [Resolution No. 66](#) – June 23, 2024

FCC Advocacy Takeaways

- Mixed Use Rule must be repealed
- In-Kind Rule must be amended
- **Participate** in FCC proceedings
- National/Regional **Cost Sharing** to Participate

Modern Franchising – Alternative ROW Consideration

- Cable Franchises Remain Valuable and Relevant
 - Good Story to Tell
 - Participate at the FCC
 - Oppose The American Broadband Act – HR 3557
 - Revenue
 - Franchise Fees – Don't be Underpaid
 - Protect Revenue in Cable Franchises
 - Broadband Franchises
 - Future of Franchising
 - Examine Franchising Authority
 - FCC Advocacy – The Mixed Use Rule and In-Kind Rules
 - Proven Effective – Equal Access to Services
 - Public Benefits
-
- Long Term Protections for BEAD Funding

Thank You!



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**NATOA
PRESENTATION
CHARLESTON S. CAROLINA**

AUGUST 28, 2024

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PROTEC
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HISTORY

- \$3BILLION IN CABLE/VIDEO REVENUE NATIONALLY
- FRANCHISE FEES FALLING – 25-30%
- WHY?
- CORD CUTTING/ISP/CABLE MODEM BASED STREAMING IP VIDEO

SOLUTIONS

- **ENGAGE:**
 - WE WIN AT LEAST SOMETHING WHEN WE FIGHT
 - WE LOSE 100% WHEN WE DON'T.
- **PLUG THE LEAK**
- **CAPTURE STREAMERS/OTT VIA:**
 - AUDIT
 - LEGISLATION
 - LITIGATION

LEGISLATION

- OMNIBUS COMMUNICATIONS/ENTERTAINMENT TAX/ROW USE FEE
 - CANADA
 - FLORIDA – NETFLIX IS PAYING IT
 - CHICAGO
 - OTHER STATES
- PRESERVE PEG AS AN IMPORTANT COMPONENT OF LOCAL PROGRAMMING
- PRESERVE LOCAL CONTROL IN STATE OR FEDERAL LEGISLATION

LITIGATION

- MISSOURI MUNICIPAL CLASS ACTION

- These slides are heavy redacted due to current dispute and potential litigation. Details available to clients only.

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Attorneys & Counselors

PARTNERS/ALLIES

- BROADCASTERS
 - FCC FILINGS TO TREAT STREAMING LIKE CABLE RE MUST CARRY
 - <https://www.nab.org/advocacy/issue.asp?id=6760&issueid=1081>
- PRINT PRESS
 - GOOGLE TO UNDERWRITE Ca.PRESS
 - <https://apnews.com/article/california-journalism-google-tax-pay-b3d1ca996202366f41b6dcfc340ad965>
 - <https://apnews.com/article/california-google-news-funding-87d423a8a8bfe2730b27ee3e59f4f454>
- OTHERS?

CHALLENGES

- NO SHORTAGE HERE
- NOVEMBER 5? (FED AND STATE)
- FCC INTERNET ORDER?
 - US 6TH CIR STAY?
- US SUPREMES GUTTING FCC?
 - MAJOR Q (W.Va v EPA)
 - CHEVRON REVERSAL (LOPER BRIGHT)
- ITFA
- POWERFUL INDUSTRY



Michael J. Watza Biography

Martindale Hubbell AV Rating/Super Lawyer Designation/Detroit Business Top Lawyer

Michael J. Watza is Chair of the Governmental Regulatory Practice Group at Kitch, a full service Law firm based in Detroit, with offices in Lansing, Mt. Clemens, Chicago, Ill. and Toledo, OH

Mr. Watza's practice provides litigated, legislative and regulatory solutions on behalf of municipal, health care and private sector clients, concerning Legislation, Complex Litigation, Governance Issues, Telecommunications including Cable and Cell Towers, Pipelines, Energy, Insurance and Gaming. He is a Michigan registered lobbyist.

Michael also serves as Outside General Counsel to PROTEC, a consortium of over 100 Michigan Municipalities. He is also Outside General Counsel to Merit Network, a Michigan University Affiliate engaged in developing the Internet and hi-speed low cost access to it since 1966. He also Chairs the Novi EDC, Michigan Attorney Grievance Commission Grievance Panel #9, and the International Municipal Lawyers Telecommunications Committee.

He was twice appointed by Governor Granholm and Snyder, to the Michigan Gaming Control Board, serving there for 8 years.

Mike has also served as Special Projects Counsel to the Michigan Municipal Risk Management Authority.

Michael has served as an adjunct faculty member at Michigan State University College of Law teaching Communications Law & Policy and Ethics and the Practice of Law and the Michigan State University Institute for Public Utilities.

In 2008, Michael successfully opposed Comcast's effort to move PEG channels to the 900 digital channel range resulting in, among other things, an apology by Comcast to Congress.

In 2013 he lawyered the 1st Michigan Municipal Broadband Network in Sebawaing, Mi and has assisted on many subsequent projects since then.

He is presently leading PROTEC's effort to take back local public ROW by a series of legislative initiatives before the new 2023/24 Michigan Legislature.

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