



# **Square PEG in a Round Hole: Making Sense of Municipal Use of PEG Fees**

## **IMLA Webinar**

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March 23, 2023

# Public, Education, and Government (“PEG”) Fees Overview



Statutes and  
FCC Orders



Federal Law  
and State  
Franchises



PEG Fee  
FAQs



Case Study

# Statutes and FCC Orders

## Cable Communications Policy Act (“CCPA”) of 1984

- *codified at* 47 U.S.C. ch. 5, subch. V-A, §§ 521-573 (2023)

## Federal Communications Commission (“FCC”) Orders

- Third Report and Order on Implementation of Section 621(a)(1) of the CCPA, 34 FCC Rcd. 6844 (2019)
- Second Report and Order on Implementation of Section 621(a)(1) of the CCPA, 22 FCC Rcd. 19633 (2007)

## Compensation for Use of Right-of-Way / No Gifts of Public Funds

- ▶ *City of St. Louis v. Western Union Telegraph Co.*,  
148 U.S. 92 (1893)
- ▶ State Constitutions
  - ▶ *Example*: Texas Constitution  
Art. III § 52(a) & Art. XI § 3

# CCPA Definitions

(47 U.S.C. § 522)

- ▶ (5) **Cable Operator** - any person or group of persons
  - (A) who provides cable service over a cable system ..., or
  - (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system
  
- ▶ (10) **Franchising Authority** - any governmental entity empowered by Federal, State, or local law to grant a franchise

# CCPA Definitions

(47 U.S.C. § 522)

- ▶ (9) **Franchise** - an initial authorization, or renewal thereof ..., issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system
- ▶ (16) **Public, Educational, or Governmental access facilities** -
  - (A) channel capacity designated for public, educational, or governmental use; and
  - (B) facilities and equipment for the use of such channel capacity

# CCPA Franchise Fees and PEG Financial Support



Cable operators pay a maximum of 5% of gross revenues in franchise fees to franchising authorities. 47 U.S.C. § 542(a)-(b)



Franchising authorities may require cable operators to provide channel capacity for PEG use and facilities or financial support. 47 U.S.C. §§ 531(b) & 541(a)(4)(B)

## Federal Law and State Franchises

- ▶ 23 States have state cable franchises: Arkansas, California, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Nevada, New Jersey, North Carolina, Ohio, South Carolina, Tennessee, Texas, Vermont, Wisconsin.
- ▶ FCC orders apply to state franchising actions and regulations.

Third Report and Order ¶¶ 111 & 114 (n. 426)



# Example: State-Issued Cable Franchise in Texas (Texas Utilities Code Chapter 66)

Public Utility Commission of Texas is the franchise authority for cable franchises. §§ 66.001 & 66.003

Cable Service Providers pay 5% gross revenues as franchise fees to municipalities. § 66.005

Cable Service Providers must provide PEG channel capacity and pay 1% gross revenues as PEG fees to municipalities. § 66.006(b)-(c) & 66.009

# Example: Franchise Fees and PEG Fees in Texas

- 1 \$100,000 = cable operator's gross revenues in city
- 2 \$5,000 = franchise fees paid to city (5%)
- 3 \$1,000 = PEG fees paid to city (1%)

# State Legislation Impacting Right-of-Way Compensation

- ▶ Providers of telephone/internet service and cable service only pay the greater of access line fees or franchise fees.  
Tex. Loc. Gov't Code § 283.051(d)-(f) & Tex. Util. Code § 66.005(d)-(f) (West 2021), *as enacted by S.B. 1152* (2019)
- ▶ *City of McAllen, et al. v. State of Texas*, 03-22-00524-CV
- ▶ S.B. 1152 does not affect PEG fees.  
Tex. Util. Code § 66.006(b)-(c) (West 2021).

# PEG Fee FAQs

Costs that may be paid for  
with PEG fees

Capital Costs versus  
Operating Costs

Consequences of misusing  
PEG fees

# What costs may local governments pay for with PEG fees?

- ▶ Capital costs for facilities and equipment for PEG channel capacity, but not operating costs
- ▶ PEG financial support does not count against but is in addition to the 5% franchise fee cap if used for PEG capital costs for PEG facilities. 47 U.S.C. § 542(b) & -(g)(2)(C)

# What is the difference between PEG capital costs and operating costs?

## Capital Costs = *building* PEG facilities

- ▶ Incurred in acquiring or improving capital assets for PEG access facilities, i.e., long-term assets with useful lives of more than one year
- ▶ Include both construction-related and non-construction-related capital costs contributed to PEG access facilities

## Operating Costs = *using* PEG facilities

- ▶ Expenses incurred in running the business of the PEG channel and producing output, i.e., costs of operating and using PEG facilities

# Examples of PEG facility capital assets and PEG operating costs

## PEG Facility Capital Assets

- ▶ Studios, Vans, Cameras, Studio equipment
- ▶ Portable production equipment, editing equipment, program playback equipment
- ▶ Other equipment needed to produce PEG programming or relating to the use of PEG channel capacity
- ▶ Installation of PEG transport facilities

*Capital assets can be tangible or intangible*

## PEG Operating Costs

- ▶ Salaries of employees
- ▶ Training and travel expenses
- ▶ Rent
- ▶ Some maintenance expenses, including ongoing costs associated with the maintenance or operation of PEG transport facilities

Third Report and Order at ¶¶ 27, 35-37, 39, 41 (n. 170), & 49; & *Alliance for Cmty. Media v. F.C.C.*, 529 F.3d 763, 784-785 (6th Cir. 2008)

# What are the consequences for using PEG fees to pay for operating costs?



Cable operators may offset future franchise fee payments by deducting the value of those earlier PEG fees. Payments to support the operation of PEG facilities (operating costs) are subject to the 5% franchise fee cap. Second Report and Order at ¶¶ 11 & 13



Suits for injunctive relief and declaratory relief. 47 U.S.C. § 555a(a)



CCPA allows a court to award a cable operator the right to audit. Third Report and Order at ¶ 40 (n. 166) & 47 U.S.C. § 555(b)





# A Case Study

*City of Glendale v.  
Marcus Cable Associates, LLC*

231 Cal. App. 4th 1359 (2014)

# The City and the “Related Party”

- ▶ City creates Glendale Financing Authority (“GFA”)
- ▶ GFA and City enter a “lease agreement”
- ▶ GFA’s operations

## City / GFA “Lease”

- ▶ City assigns PEG fees to GFA, and GFA makes “lease payments” to City for PEG facilities and equipment
- ▶ PEG fee accounting and transfer to the general fund
- ▶ Purpose of lease was for the City to use PEG fees for operating expenses
- ▶ GFA did not pay other expenses as required

# Reimbursements under the Lease

- ▶ City sought \$5.8 million in reimbursements from PEG fee revenue
- ▶ Past capital expenditures calculated at present value, not amount spent
- ▶ \$1.7 million = PEG channel's film library, estimated at amount of city employees' salaries

# Court Findings

- ▶ City did not use PEG fees for capital costs. City improperly and unlawfully spent PEG fees on operating costs.
- ▶ Calculation of past capital expenditures was flawed
- ▶ Notable Quotes from the Court:
  - ▶ “... the terms of the lease, or the ‘form of the transaction,’ were, in effect, divorced from reality.”
  - ▶ “... as a factual matter, the lease was a sham ...”



# Test Your Knowledge: PEG Fees

# Question 1

- ▶ City Communication Director Luke Skywalker is going to Tosche Station to buy new portable production equipment for the City's PEG channel, complete with power converters. The new equipment will replace the current 10-year-old equipment. The last of the Department's budget for this fiscal year was spent on overtime to PEG channel employees to complete a documentary about the Mos Eisley Spaceport. He asks you whether PEG fees can be used to purchase the new equipment.
- ▶ What do you recommend?

# Answer

- ▶ Yes, the City may use PEG fees to purchase new portable production equipment.
- ▶ They are capital costs for a capital asset.
- ▶ Third Report and Order, at ¶ 35 (n. 146)



## Question 2

- ▶ The City is widening Scarif Street, which fronts the City's PEG channel studio. This project requires the removal and relocation of various Imperial Cable facilities in the right-of-way. Once the cable facilities are relocated, new PEG transport facilities will need to be installed to connect to the cable system. City Public Works Director Jyn Erso asks you if there is another source of revenue, such as PEG fees, that could be used to cover the expense of installing new PEG transport facilities, instead of the Department's budget.
- ▶ What do you recommend?

# Answer

- ▶ Yes, the City may use PEG fees to pay for the installation of new PEG transport facilities.
- ▶ They are capital costs for capital assets.
- ▶ Third Report and Order, at ¶¶ 27 & 49

## Question 3

- ▶ City Manager Kylo Ren reports that the City's 30-year-old PEG studio building on Starkiller Street has fallen into disrepair. Instead of building a new studio, he would like to lease studio space at First Order Action News. He asks you if PEG fees may be used for the rental payments to lease studio space.
- ▶ What do you recommend?

# Answer

- ▶ No, the City may not use PEG fees for studio rental payments—they are operating costs.
- ▶ Third Report and Order at ¶¶ 36-40
- ▶ *See also* Congressional Research Service Report R42044, “PEG Access Cable Television Channels: Issues for Congress” at 16 (2013), <https://www.everycrsreport.com/reports/R42044.html>

## Question 3.1

- ▶ After hearing your expert advice, Mr. Ren asks about other options, including a “rent-to-own” agreement for an existing building to serve as the new PEG studio. Under the agreement, lease payments would go toward purchasing the building, which is currently owned by Snoke Industries. Mr. Ren wants to know if PEG fees can be used for these payments.
- ▶ What do you recommend?

# Answer

- ▶ Yes, the City may use PEG fees for these lease payments.
- ▶ They are capital costs, installment payments, for a capital asset under a capital lease.
- ▶ *See e.g., City of Glendale, 231 Cal.App.4th at 1373-75*
- ▶ *See also* Governmental Accounting Standards Board (“GASB”) Statement No. 34 (1999) § L20

## Question 3.2

- ▶ No longer interested in any type of lease agreement, Mr. Ren would now like to repurpose a vacant portion of City Hall into a new PEG studio. This area was formerly used by the Hyperspace Tracking Department. He asks you if the City can use PEG fees toward the renovation and construction of the new PEG studio.
- ▶ What do you recommend?

# Answer

- ▶ Yes, the City may use PEG fees to renovate and construct a new PEG studio at City Hall.
- ▶ They are capital costs for a capital asset.
- ▶ Third Report and Order, at ¶ 34 & *Alliance for Cmty. Media*, 529 F.3d at 784



## Question 4

- ▶ City Finance Director Leia Organa is trying to save costs in next fiscal year's budget. She proposes two measures that would outsource certain functions of the City's PEG channel:  
(A) hiring Alderaan Audiovisual Inc. to run the broadcast of city council meetings; and  
(B) paying freelance Wookiees as part-time workers to film and edit PEG programs.
- ▶ She asks you whether PEG fees may be used for the expenses associated with either (or both) of these measures.  
What do you recommend?

# Answer

- ▶ No, the City may not use PEG fees to pay for either of these outsourced staffing expenses—they are operating costs
- ▶ Third Report and Order at ¶ 41 (n. 170)

# Question 5

- ▶ City Communication Managing Editor Din Djarin would like to upgrade the PEG channel's 5-year-old video editing computer software to the latest version, Grogu 3.0. Historically, Mandalorian Technologies releases a new version of the software about every three years. He asks you whether PEG fees could be used to pay for the new software.
- ▶ What do you recommend?

# Answer

- ▶ Yes, the City can use PEG fees to pay for the new video editing software.
- ▶ They are capital costs for an intangible capital asset.
- ▶ Third Report and Order at ¶ 36
- ▶ *See also* GASB Statement No. 51 (2007) at ¶¶ 5, 69, & 78

## Question 6

- ▶ City Digital Media Editor Obi-Wan Kenobi is making a documentary on the Clone Wars for the City's PEG channel. Mr. Kenobi contacted the Jedi Archives asking to use its video footage of the Battle of Geonosis for the documentary. The Archives sends him a contract that will allow the City to use, edit, and incorporate the footage into the documentary for 10,000 credits. After completion of the documentary, the City must return the footage to the Archives. He asks if PEG fees can be used to pay for the costs associated with the footage.
- ▶ What do you recommend?

# Answer

- ▶ No, the City may not use PEG fees to pay for these expenses to use the archive footage—they are operating costs.
- ▶ Third Report and Order at ¶¶ 36-40

# Summary



DO spend PEG fees ONLY on capital costs to acquire or improve a capital asset of the PEG facility

See list of PEG capital assets from FCC orders and court cases

Capital assets must have a useful life of more than one year



DO NOT spend PEG fees on operating costs to run the business of the PEG facility



PEG fees improperly spent on operating costs can be offset against future franchise fee payments



# Questions

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