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Threats to PEG Channels and PEG Support Arising Out of Changes in the Video Marketplace and the Legal and Policy Landscape

Changes in technology, shifts in consumer preferences for video consumption, an evolving policy landscape and new legal challenges threaten existing PEG carriage, operations, and funding arrangements. This handout summarizes some of these developments and suggests how to respond.

Technology Changes and Evolving Video Consumption Options

- Over-the-Top "Cable Service" Substitutes
  - Major content aggregators, content providers and cable companies are aggressively promoting new streaming-based replacements for traditional cable or satellite TV bundles, giving consumers who no longer wish to, or have never, subscribed to cable packages, an appealing and more affordable alternative.
  - Cable/video service provider offerings include Comcast's Instant TV, CenturyLink's Stream, Spectrum Stream, and Verizon's OTT is in the works.
  - AT&T's DirecTV NOW service is a particularly notable example, having amassed more than 1.2 million subscribers in less than a year of operation.
  - Netflix, Amazon Prime, HBO Now, MLB.tv, NHL.tv, and other products offer consumers a limited slice of the traditional cable bundle, combining on-demand and live streaming.
- Other Non-Traditional "Cable Services"
  - Layer3TV markets itself as "the new cable" and delivers HD video to consumers over wireline networks (but apparently not over the public internet).
  - Layer3TV's service is delivered over an existing cable or fiber optic network, to a home set-top box. In other words, it functions in nearly all respects identically to traditional cable service.
  - While today its service is only offered in select markets, this model, if successful, could spread widely quickly, as it apparently requires little to no new infrastructure construction.
  - The company has a "public file" on its website (https://publicfile.layer3tv.com/) but most of the folders are empty including "state and local franchising materials".
- Next-Generation (5G) Wireless Video Delivery
  - 5G wireless technology offers 1000 times the bandwidth of 4G, permitting the real-time delivery of high-definition video content much more easily than current mobile networks allow. Think of 5G as the potential third "wire" into the home.
  - T-Mobile wants to "un-carrier your TV" and has acquired Layer3TV, representing a major investment in video delivery by a nationwide wireless provider.

Legal and Policy Landscape

- New Models Find Loopholes in Existing State Franchising Laws
  - Under ***DIVCA***: "***Video service***" means video programming services, cable service, or OVS service provided through facilities located at least in part in public rights-of-way without regard to delivery technology, including Internet protocol or other technology. ***This***

definition does not include* (1) *any video programming provided by a commercial mobile service provider defined in Section 322(d) of Title 47 of the United States Code, or **(2) *video programming*** provided as part of, and via, a service that enables users to access content, information, electronic mail, or other services ***offered over the public Internet***.

  - California's ***SB 1161***, enacted in 2012, excludes Internet Protocol-enabled services and Voice-over-Internet Protocol services from regulation by the state. "IP-enabled services" are "***any service, capability, functionality, or application*** using existing Internet Protocol, or any successor Internet Protocol, that enables an end user to send or receive a communication in existing Internet Protocol format, or any successor Internet Protocol format through a broadband connection, ***regardless of whether the communication is voice, data, or video.***" This law sunsets Jan. 1, 2020 but may be extended.
- Locally Negotiated Franchise Agreements Also Under Pressure
  - In states that still have local cable franchising, incumbents used to seek protection from new entrants by pushing for level playing field clauses in local franchises (new entrants having to have the same obligations as the incumbent) but the FCC disapproved of that approach in the *Franchising Orders*.[1]
  - Now cable providers aggressively push for competitive equity clauses with broad definitions of "competitors" that can trigger reductions in their own franchise obligations when a competitor enters the market.
- FCC Examination of ROW Use Compensation[2]
  - In the context of promoting broadband deployment, the FCC is considering whether and how to reform compensation for use of public rights-of-way toward a cost-based model.
  - The FCC's proposed approach will likely focus either on the actual cost to a locality in accommodating and administering a use of the rights-of-way, or on an estimate of the value of the encumbrance placed on the public property.
  - The FCC tentatively concluded that the presence of cable franchise fees "could be taken into account when determining whether other types of fees are excessive."

<u>How PEG Interests Can Respond</u>

- Monitoring relevant proceedings and participating to protect their interests.
- Monitoring legislation and considering actively pursuing changes in law to close loopholes.
- Exploring a broad array of funding sources and partnerships.
- Creating compelling content.

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[1] *See* Second Franchising Report & Order, 22 FCC Rcd at 19642-43 (2007); Reconsideration Order, 30 FCC Rcd at 813-14 (2015).

[2] *In the Matter of Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment,* WC Docket No. 17-84, *Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment* (rel. Apr. 21, 2017).