Chart 2 - Franchise Fees, PEG, and Permitting Issues

ACTION ITEMS FOLLOWING APPLICATION NOTICE NOT SPECIFICALLY ADDRESS IN CHONG DRAFT DECISION BUT MANDATED BY AB2987	GUIDANCE
PUC's order confirms local entities sole authority to regulate in the following six areas: 1. Franchise Fees; 2. PEG Channel Requirements; 3. Emergency Alert Systems; 4. Customer Service protection standards; 5. Right of Way Encroachment Permitting; and 6. CEQA reviews related to ROW construction.	Chong Draft Decision Page 10 and 11 - Under DIVCA, local entities, not the Commission, have sole authority to regulate pursuant to many other statutory provisions, including franchise fee provisions (§ 5860), PEG channel requirements (§ 5870), Emergency Alert System requirements imposed by the Federal Communications Commission (§ 5880), and, notably, federal and state customer service and protection standards (§ 5900). A local entity shall be the lead agency for any environmental review with respect to network construction, installation, and maintenance in public rights-of-way (§§ 5820 and 5885). We shall not exercise our authority in a manner that diminishes these responsibilities afforded to localities.
Cities may audit franchise fees once every year, but company not responsible for underpaid payments after 36 months.	§5860 (i) Not more than once annually, a local entity may examine the business records of a holder of a state franchise to the extent reasonably necessary to ensure compensation in accordance with subdivision (a). The holder shall keep all business records reflecting any gross revenues, even if there is a change in ownership, for at least four years after those revenues are recognized by the holder on its books and records. If the examination discloses that the holder has underpaid franchise fees by more than 5 percent during the examination period, the holder shall pay all of the reasonable and actual costs of the examination. If the examination discloses that the holder has not underpaid franchise fees, the local entity shall pay all of the reasonable and actual costs of the examination. In every other instance, each party shall bear its own costs of the examination. Any claims by a local entity that compensation is not in accordance with subdivision (a), and any claims for refunds or other corrections to the remittance of the holder of a state franchise, shall be made within three years and 45 days of the end of the quarter for which compensation is remitted, or three years from the date of the remittance, whichever is later. Either a local entity or the holder may, in the event of a dispute concerning compensation under this section, bring an action in a court of competent jurisdiction. (j) The holder of a state franchise may identify and collect the amount of the state franchise fee as a separate line item on the regular bill of each subscriber.
Identification of active PEG channels active as of January 1, 2007.	§5870 City shall designate the following: 1. Number of public, educational, and governmental access (PEG) channels, as are activated and provided by the incumbent cable operator within the City under the terms of any franchise in effect in the local entity as of January 1, 2007. A PEG channel is deemed activated if it is being utilized for PEG programming within the municipality for at least eight hours per day. The holder shall have three months from the date the local entity requests the PEG channels to designate the capacity. However, the three-month period shall be tolled by any period during which the designation or provision of PEG channel capacity is technically infeasible, including any failure or delay of the incumbent cable operator to make adequate interconnection available, as required by this section.
Make sure to require state franchise holder to carry PEG channels on the same channel designation as the incumbent cable company.	§5870 (b) To the extent feasible, the PEG channels shall not be separated numerically from other channels carried on the basic service tier and the channel numbers for the PEG channels shall be the same channel numbers used by the incumbent cable operator unless prohibited by federal law.
3-channel limit unless more than 3 channels existed on 1-1-2007	§5870 (c) (1) If less than three PEG channels are activated and provided within the local entity as of January 1, 2007, a local entity whose jurisdiction lies within the authorized service area of the holder of a state franchise may initially request the holder to designate not more than a total of three PEG channels.
All state franchisees must provide the same signal quality to that offered by commercial channels.	§5870 (g) (3) The PEG access capacity provided shall be of similar quality and functionality to that offered by commercial channels on the lowest cost tier of service unless the signal is provided to the holder at a lower quality or with less functionality.
Cost of upstream connects to be borne by state franchisee	§5870 (h) The cost of any interconnection shall be borne by the holder requesting the interconnection unless otherwise agreed to by the parties.

Chart 2 - Franchise Fees, PEG, and Permitting Issues

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Incumbent I-Net and PEG obligations remain until January 1, 2009	§5870 (k) All obligations to provide and support PEG channel facilities and institutional networks and to provide cable services to community buildings contained in a locally issued franchise existing on December 31, 2006, shall continue until the local franchise expires, until the term of the franchise would have expired if it had not been terminated pursuant to subdivision (o) of Section 5840, or until January 1, 2009, whichever is later.
Expect competing companies to share unsatisfied PEG obligations on a prorated per subscriber basis	§5870 (l) After January 1, 2007, and until the expiration of the incumbent cable operator's franchise, if the incumbent cable operator has existing unsatisfied obligations under the franchise to remit to the local entity any cash payments for the ongoing costs of public, educational, and government access channel facilities or institutional networks, the local entity shall divide those cash payments among all cable or video providers as provided in this section. The fee shall be the holder's pro rata per subscriber share of the cash payment required to be paid by the incumbent cable operator to the local entity for the costs of PEG channel facilities. All video service providers and the incumbent cable operator shall be subject to the same requirements for recurring payments for the support of PEG channel facilities and institutional networks, whether expressed as a percentage of gross revenue or as an amount per subscriber, per month, or otherwise.
Expect competing companies to share unsatisfied PEG obligations on a prorated per subscriber basis (Continued)	§5870 (m) In determining the fee on a pro rata per subscriber basis, all cable and video service providers shall report, for the period in question, to the local entity the total number of subscribers served within the local entity's jurisdiction, which shall be treated as confidential by the local entity and shall be used only to derive the per subscriber fee required by this section. The local entity shall then determine the payment due from each provider based on a per subscriber basis for the period by multiplying the unsatisfied cash payments for the ongoing capital costs of PEG channel facilities by a ratio of the reported subscribers of each provider to the total subscribers within the local entity as of the end of the period. The local entity shall notify the respective providers, in writing, of the resulting pro rata amount. After the notice, any fees required by this section shall be remitted to the applicable local entity quarterly, within 45 days after the end of the quarter for the preceding calendar quarter, and may only be used by the local entity as authorized under federal law.
Consider option to establish 1% PEG fee by ordinance (or equal to current incumbent PEG fee, if any, as of 12/31/06).	§5870 (n) A local entity may, by ordinance, establish a fee to support PEG channel facilities consistent with federal law that would become effective subsequent to the expiration of any fee imposed pursuant to paragraph (2) of subdivision (l). If no such fee exists, the local entity may establish the fee at any time. The fee shall not exceed 1 percent of the holder's gross revenues, as defined in Section 5860. Notwithstanding this limitation, if, on December 31, 2006, a local entity is imposing a separate fee to support PEG channel facilities that is in excess of 1 percent, that entity may, by ordinance, establish a fee no greater than that separate fee, and in no event greater than 3 percent, to support PEG activities. The ordinance shall expire, and may be reauthorized, upon the expiration of the state franchise.
Expect PEG fees to be itemized and passed through to cable subscribers	§5870 (o) The holder of a state franchise may recover the amount of any fee remitted to a local entity under this section by billing a recovery fee as a separate line item on the regular bill of each subscriber.
Emergency alert systems remain active until January 1, 2009	§5880 Holders of state franchises shall comply with the Emergency Alert System requirements of the Federal Communications Commission in order that emergency messages may be distributed over the holder's network. Any provision in a locally issued franchise authorizing local entities to provide local emergency notifications shall remain in effect, and shall apply to all holders of a state-issued franchise in the same local area, for the duration of the locally issued franchise, until the term of the franchise would have expired were the franchise not terminated pursuant to subdivision (m) of Section 5840, or until January 1, 2009, whichever is later.

Chart 2 - Franchise Fees, PEG, and Permitting Issues

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Enforcement of Customer Service Standards	§5900 (a) The holder of a state franchise shall comply with the provisions of Sections 53055, 53055.1, 53055.2, and 53088.2 of the Government Code, and any other customer service standards pertaining to the provision of video service established by federal law or regulation or adopted by subsequent enactment of the Legislature. All customer service and consumer protection standards under this section shall be interpreted and applied to accommodate newer or different technologies while meeting or exceeding the goals of the standards. (b) The holder of a state franchise shall comply with provisions of Section 637.5 of the Penal Code and the privacy standards contained in Section 631 of the federal Cable Act (47 U.S.C. Sec. 551 et. seq.). (c) The local entity shall enforce all of the customer service and protection standards of this section with respect to complaints received from residents within the local entity's jurisdiction, but it may not adopt or seek to enforce any additional or different customer service or other performance standards under Section 53055.3 or subdivision (q), (r), or (s) of Section 53088.2 of the Government Code, or any other authority or provision of law.
Enforcement of Customer Service Standards (Continued)	§5900 (d) The local entity shall, by ordinance or resolution, provide a schedule of penalties for any material breach by a holder of a state franchise of this section. No monetary penalties shall be assessed for a material breach if it is out of the reasonable control of the holder. Further, no monetary penalties may be imposed prior to January 1, 2007. Any schedule of monetary penalties adopted pursuant to this section shall in no event exceed five hundred dollars ($500) for each day of each material breach, not to exceed one thousand five hundred dollars ($1,500) for each occurrence of a material breach. However, if a material breach of this section has occurred, and the local entity has provided notice and a fine or penalty has been assessed, and if a subsequent material breach of the same nature occurs within 12 months, the penalties may be increased by the local entity to a maximum of one thousand dollars ($1,000) for each day of each material breach, not to exceed three thousand dollars ($3,000) for each occurrence of the material breach. If a third or further material breach of the same nature occurs within those same 12 months, and the local entity has provided notice and a fine or penalty has been assessed, the penalties may be increased to a maximum of two thousand five hundred dollars ($2,500) for each day of each material breach, not to exceed seven thousand five hundred dollars ($7,500) for each occurrence of the material breach. With respect to video providers subject to a franchise or license, any monetary penalties assessed under this section shall be reduced dollar-for-dollar to the extent any liquidated damage or penalty provision of a current cable television ordinance, franchise contract, or license agreement imposes a monetary obligation upon a video provider for the same customer service failures, and no other monetary damages may be assessed.
Enforcement of Customer Service Standards (Continued)	§5900 (e) The local entity shall give the video provider written notice of any alleged material breaches of the consumer service standards of this division and allow the video provider at least 30 days from receipt of the notice to remedy the specified material breach.

Chart 2 - Franchise Fees, PEG, and Permitting Issues

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Permitting Issues	§5885 (a) The local entity shall allow the holder of a state franchise under this division to install, construct, and maintain a network within public rights-of-way under the same time, place, and manner as the provisions governing telephone corporations under applicable state and federal law, including, but not limited to, the provisions of Section 7901.1. (b) Nothing in this division shall be construed to change existing law regarding the permitting process or compliance with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) for projects by a holder of a state franchise. (c) (1) For purposes of this section, an "encroachment permit" means any permit issued by a local entity relating to construction or operation of facilities pursuant to this division. (2) A local entity shall either approve or deny an application from a holder of a state franchise for an encroachment permit within 60 days of receiving a completed application. An application for an encroachment permit is complete when the applicant has complied with all statutory requirements, including the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).
Permitting Issues (Continued)	§5885 (3) If the local entity denies an application for an encroachment permit, it shall, at the time of notifying the applicant of the denial, furnish to the applicant a detailed explanation of the reason for the denial. (4) The local entity shall adopt regulations prescribing procedures for an applicant to appeal the denial of an encroachment permit application issued by a department of the local entity to the governing body of the local entity. (5) Nothing in this section precludes an applicant and a local entity from mutually agreeing to an extension of any time limit provided by this section. (d) A local entity may not enforce against the holder of a state franchise any rule, regulation, or ordinance that purports to allow the local entity to purchase or force the sale of a network. PUC draft decision order on page 72 states: "Local entities may require further security instruments as part of their oversight of local rights-of-way. DIVCA tasks local entities with governing “time, place, and manner” of a state video franchise holder’s use of the local rights-of-way. In overseeing time, place and manner of this use, local entities may issue rights-of-way permits, and these local permits may require further security instruments to ensure that a state video franchise holder fulfills locally regulated obligations. Locally required security instruments can best take into account size and scope of a state video franchise holder’s local construction and operations.
CEQA and Permit Processing	The Chong Draft Decision provides little guidance from the PUC on CEQA. The Chong Draft Decision as discussed in the previous chart, affirms a City's right to impose permitting processes on the applicant's location, manner, and timing of encroaching the rights of way. AT&T is likely to have a state franchise by late March or early April, so it probably won't have any facilities installed and operational in your cities before it has a state franchise. Redondo Beach, for example, has Verizon already active in part of the City. AB2987 stipulates a very short 60 day approval process for City governments to deny or approve a permit. This is not realistic in light of local entities lead responsibilities associated with CEQA (California Environmental Quality Act). Our consultant, John Risk, has shared his practical understanding regarding AT&T's permit requests for the large 52B video Digital Subscriber Line Access Multiplexer (DSLAM) in other cities. He does not believe that a City's processing of encroachment permits by AT&T it receives a statewide franchise is not as clear-cut as it might look.

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CEQA and Permit Processing (Continued)	We should be prepared to ask the City Attorney several questions regarding the CEQA process. Because the City is the lead agency under CEQA, staff must perform a complete environmental assessment on the overall project, which should encompass all the locations where the cable boxes will be placed whether they are considered locations with or without safety or visual impacts. I don't think that, under any scenario, this project would qualify for a categorical exemption; so assuming the project requires a negative declaration, that will take considerable time to prepare and notice and either the Planning Commission or ultimately the City Council must approve the negative declaration. I'm not sure a negative declaration can be processed in the 60 day timeframe that the State law apparently provides for the City to complete its review. Maybe I am oversimplifying this issue, but it does not appear CEQA process works with the timeframe for processing the application, unless the PUC will support the interpretation that a application for an encroachment permit is not complete until the CEQA review is complete
CEQA and Permit Processing (Continued)	Our consultant, John Risk, also consults with Arcadia and Pasadena on telecom matters. His understanding of CEQA requirements suggests that it is not possible for a City to approve a single permit without taking into account the entirety of the proposed construction project (e.g. the total effect of construction related to all permits being requested). In a small City like Arcadia, he knows that at least 51 permits are being requested. In Pasadena, the number will be well over 100. But AB 2987 (in Section 5885(c)(2)) specifically states that no application is deemed complete until CEQA review is finished. So the City does have time to do whatever level of CEQA review is necessary. Because the "project" at issue is all reasonably foreseeable facilities that are part of AT&T's plans, the City has to evaluate the overall effect of all cabinets, including cumulative impacts. Therefore, a local entity can't really do that until AT&T gives a City detailed information concerning where AT&T is going to be, because you have to evaluate environmental impacts, which will be different in commercial are impacts of the Edison power plant construction needed to power the AT&T cabinets should also be part of the CEQA review.
CEQA and Permit Processing (Continued)	Cities should be prepared to address issues regarding grafitti removal, public safety, traffic safety (blind spots), ADA (wheel chair accessiblity), and landscaping or screening, and maintenance. Given the size of the overall construction project, cities should consider assessing adequate permit deposits to account for the extra staff time and consultant time needed to review and approve permits in anticipation of being fully reimbursed later.
CEQA and Permit Processing (Continued)	Finally, with respect to timing of permit review, since AB 2987 requires the City to approve or deny encroachment permits within 60 days of the application being complete, AT&T can create chaos for you by flooding you with applications and insisting on 60-day review for each one. Staff should plan to get the company to agree to a conceptual schedule of processing 6 or so a month to enable a local entity to reasonable schedule inspections and other EIR reviews. One compromise might be to work on the processing while the CEQA review is underway, since the 60-day clock won't have started yet. The CEQA review will likely buy you a couple months at least, and much more if you conclude that an EIR is required. Please note, its been our experience that AT&T is contesting application of CEQA to their entire project, arguing that it should be applied on a box by box basis.

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Build-out	§5890 (e) For holders or their affiliates with more than 1,000,000 telephone customers in California, either of the following shall apply: (1) If the holder is predominantly deploying fiber optic facilities to the customer's premise, the holder shall provide access to its video service to a number of households at least equal to 25 percent of the customer households in the holder's telephone service area within two years after it begins providing video service under this division, and to a number at least equal to 40 percent of those households within five years. (2) If the holder is not predominantly deploying fiber optic facilities to the customer's premises, the holder shall provide access to its video service to a number of households at least equal to 35 percent of the households in the holder's telephone service area within three years after it begins providing video service under this division, and to a number at least equal to 50 percent of these households within five years. (3) A holder shall not be required to meet the 40-percent requirement in paragraph (1) or the 50-percent requirement in paragraph (2) until two years after at least 30 percent of the households with access to the holder's video service subscribe to it for six consecutive months.
Build-out (Continued)	§5890 (e) (4) If 30 percent of the households with access to the holder's video service have not subscribed to the holder's video service for six consecutive months within three years after it begins providing video service, the holder may submit validating documentation to the commission. If the commission finds that the documentation validates the holder's claim, then the commission shall permit a delay in meeting the 40-percent requirement in paragraph (1) or the 50-percent requirement in paragraph (2) until the time that the holder does provide service to 30 percent of the households for six consecutive months. (f) (1) After two years of providing service under this division, the holder may apply to the state franchising authority for an extension to meet the requirements of subdivision (b), (c), or (e). Notice of this application shall also be provided to the telephone customers of the holder, the Secretary of the Senate, and the Chief Clerk of the Assembly. (g) Local governments may bring complaints to the state franchising authority that a holder is not offering video service as required by this section, or the state franchising authority may open an investigation on its own motion. The state franchising authority shall hold public hearings before issuing a decision. The commission may suspend or revoke the franchise if the holder fails to comply with the provisions of this division.