

PRACTICE TIPS

DAVID S. JOHNSON
Assistant City Attorney,
Arlington, Texas

Square PEG in a Round Hole: Limits on Municipal Use of Public, Education, and Government Fees

Balancing a local government's budget to ensure funding for important services can be a difficult task. Some types of revenue and funding sources carry no restrictions regarding how they may be spent and are designated for the general fund to be used anywhere needed. The use of other funds, however, is restricted; this includes public, education, and government ("PEG") fees paid by cable operators under the federal Cable Communications Policy Act of 1984 (the "Act") to support local government PEG channels. If you are a cable customer, you may have even noticed PEG fees as a separate line item on your cable bill.¹

Although trying to fit PEG fees into a local government budget may be challenging at times, Federal Communications Commission ("FCC") orders and court cases provide guidance on the purposes for which local governments may and may not use PEG fees. This article contains a series of PEG "FAQs" to assist municipal lawyers in advising local government clients about the legal restrictions on the use of PEG fees.

Question 1

What costs may local governments pay for with PEG fees?

Answer

PEG fees may only be spent on capital costs for facilities and equipment for PEG channel capacity. PEG fees may not be used for operating costs.

The Act requires cable operators

to pay franchising authorities, such as local governments, a maximum of 5% of their gross revenues in franchise fees.² The Act also provides that franchising authorities *may* require cable operators to provide channel capacity for PEG use as well as facilities or *financial support*.³ Some states, including Texas, California, and Illinois, require cable operators to provide PEG financial support to local governments in the form of PEG fees, often calculated as a small percentage of gross revenues, e.g., 1%.⁴ While the Act imposes no restrictions on the use of franchise fees, PEG fees may only be used for limited purposes, in particular, *capital costs*. See Question 2.

Notably, PEG financial support does not count against but is *in addition to* the 5% franchise fee cap if used for PEG capital costs required under the franchise to be incurred by

the cable operator for PEG facilities.⁵ Under the Act, PEG facilities are: channel capacity designated for PEG use; and *facilities and equipment* for the use of such channel capacity.⁶

Local governments also incur *operating costs* to run the business of the PEG channel, but the Act restricts PEG fees from being used for those costs. See Question 3. It is important to note that PEG fees improperly spent on operating costs count as franchise fees, and cable operators may offset future franchise fee payments by deducting the value of those earlier PEG fees used to pay for operating costs. See Question 4.

Question 2

What are PEG capital costs?

Answer

PEG capital costs are costs incurred in acquiring or improving capital assets for PEG access facilities,⁷ in particular, long-term assets⁸ with useful lives of more than one year.⁹ The FCC has found that capital costs include both construction-related and non-construction-related capital costs contributed to PEG access facilities.¹⁰

The following list provides examples of PEG access facility capital assets. PEG fees may be used for the costs incurred to acquire or improve these capital assets as long as they have useful lives of more than one year:

- Studios¹¹
- Vans¹²
- Cameras¹³
- Studio equipment¹⁴
- Portable production equipment, editing equipment, program playback equipment¹⁵
- Other equipment needed to produce PEG access programming or relating to the use of PEG channel capacity¹⁶
- Installation of PEG transport facilities¹⁷

Question 3

What are PEG operating costs?

Answer

PEG operating costs are expenses incurred in running the business of the PEG channel and producing output,¹⁸ specifically, the costs of operating and using PEG facilities.

The FCC distinguishes operating costs, which are incurred in *using* PEG facilities, from capital costs, which are incurred in *building* PEG facilities.¹⁹ PEG fees may not be spent on operating costs, or the cable provider may offset future franchise fee payments. *See* Question 4. The following list provides examples of PEG operating costs:

- Salaries of employees²⁰
- Training and travel expenses²¹
- Rent²² (*see* Question 6)
- Some maintenance expenses,²³ including the ongoing costs associated with the maintenance or operation of PEG transport facilities²⁴

Question 4

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

Answer

When PEG fees are improperly spent on operating costs, cable operators may offset future franchise fee payments by deducting the value of those earlier PEG fees.

The FCC has found that “payments made to support the operation of PEG access facilities,” i.e., operating costs, are subject to the 5% franchise fee cap and must be offset from the cable operator’s future franchise fee payments.²⁵ Thus, if a local government improperly uses PEG fees to pay for operating costs, cable operators may reduce future franchise fee payments by the corresponding amount. Additionally, the FCC

acknowledged that the Act does not preclude a cable operator from auditing a local government’s use of PEG fees and that the Act even allows a court to order such an audit in an appropriate situation.²⁶

Question 5

May PEG fees be used to pay for the costs of an audiovisual company to run the broadcast of meetings of the city council and other city boards?

Answer

No. Costs to hire an audiovisual company are operating costs, as opposed to capital costs, and may not be paid for with PEG fees.

A local government’s PEG channel programming may include broadcasting meetings of the city council and other city boards. Instead of handling the broadcast of such meetings “in-house,” a local government may choose to hire an outside audiovisual company. These types of costs associated with running the business of the PEG facility and producing output are operating costs as opposed to capital costs paid to acquire or improve a specific capital asset of the local government. *See* Question 3. If a local government does not hire an audiovisual company, this broadcasting work would likely be performed by local government employees whose salaries may not be paid for with PEG fees. *See* Question 3. Thus, a local government may not use PEG fees to pay for the broadcasting services of an audiovisual company.

Question 6

May PEG fees be used for rental payments to lease PEG studio space?

Answer

No. Rental payments made to lease studio space are operating costs,

not capital costs, and may not be paid for with PEG fees.

If a local government does not own a PEG studio, it may consider leasing studio space. In most lease situations, the local government will not end up owning the studio,²⁷ so it is not an asset,²⁸ let alone a *capital* asset, of the local government. *See* Question 2. Rental payments made to lease studio space are not costs incurred in acquiring or improving a capital asset for PEG access facilities *owned* by the local government, and thus are not capital costs. Instead, rental payments to lease studio space are operating costs to run the business of the PEG facility, and PEG fees may not be used to pay for them. *See* Question 3.

Conclusion

Although the use of PEG fees is restricted under federal law and cannot resolve every budgetary challenge, PEG fees can still be a useful tool to fund facilities and equipment for a local government’s PEG channel, delivering valuable programming and content to the community. **ML**

Notes

1. 47 U.S.C. § 542(c)(2) (2022).
2. 47 U.S.C. § 542(b) (2022).
3. 47 U.S.C. §§ 531(b) & 541(a)(4) (B) (2022).
4. *See e.g.*, Tex. Util. Code § 66.006(b)–(c) (West 2021); Cal. Pub. Util. Code § 5870(n) (West 2022); & 220 Ill. Comp. Stat. 5/21-801(d)(1) (2022).
5. 47 U.S.C. § 542(b) & -(g)(2)(C) (2022).
6. 47 U.S.C. § 522(16) (2022).
7. Third Report and Order on Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, (“Third Report and Order”) 34 FCC Rcd. 6844 (2019), at ¶ 33; *see also* ¶¶ 27 & 38 (Review

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Granted in Part, Denied in Part by City of Eugene, Ore. v. F.C.C., 998 F.3d 701 (6th Cir. 2021)).

8. *Id.* at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) & Merriam-Webster ("capital asset").

9. *See* Third Report and Order at ¶ 37 & n. 158 (finding that certain types of PEG equipment "often have useful lives of *several years*") (*emphasis* added) & ¶ 36 (finding that capital expenditures "benefit *several accounting periods*" and that capital assets are "*long-term assets*") (*emphasis* added). *See also* Governmental Accounting Standards Boards (GASB) Statement No. 34 (June 1999), at ¶ 19 (finding that capital assets include "land, improvements to land, easements, buildings, building improvements, vehicles, machinery, equipment, works of art and historical treasures, infrastructure, and all other tangible or intangible assets that are used in operations and that have *initial useful lives extending beyond a single reporting period.*" (*emphasis* added).

10. Third Report and Order at ¶¶ 27, 32–33, & 38–39.

11. Third Report and Order at ¶ 39 & Alliance for Cmty. Media v. F.C.C., 529 F.3d 763, 784–785 (6th Cir. 2008), *citing* H.R. Rep. No. 98-934, 98th Cong., 2nd Sess. 1984 at 45 (legislative history of the Act).

12. *Id.*

13. *Id.*

14. Third Report and Order at ¶¶ 37 & 39.

15. *Id.* at ¶ 35 & n. 146.

16. *Id.* at ¶ 39 & Alliance for Cmty. Media, 529 F.3d at 784–785, *citing* H.R. Rep. No. 98-934 at 45.

17. Third Report and Order at ¶¶ 27 & 49.

18. Third Report and Order at ¶ 36, *citing* Black's Law Dictionary (10th ed. 2014) ("operating expense").

19. *Id.* at ¶ 36.

20. Third Report and Order at ¶ 41,

n. 170; & Congressional Research Service Report, Public, Educational and Governmental (PEG) Access Cable Television Channels: Issues for Congress ("PEG CRS Report"), No. R42044, at 16, (Jan. 4, 2013), Charles B. Goldfarb, <https://www.everycrsreport.com/reports/R42044.html> (accessed Jan. 31, 2021). *See also* City of Glendale v. Marcus Cable Associates, LLC, 231 Cal. App. 4th 1359, 1362, 1373, & 1388 (2014) (finding that the city improperly and contrary to law used PEG fees to pay for the salaries of employees to record and edit programs to produce the PEG channel's film library).

21. Third Report and Order at ¶ 41, n. 170 & PEG CRS Report at 16.

22. PEG CRS Report at 16.

23. *Id.*

24. Third Report and Order, at ¶¶ 27 & 49.

25. Second Report and Order on Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984, 22 FCC Rcd. 19633 (2007) at ¶¶ 11 & 13 (Review Granted in Part, Denied in Part by Montgomery County v. F.C.C., 863 F.3d 485 (6th Cir. 2017)).

26. Third Report and Order, at ¶ 40 & n. 166, *citing* 47 U.S.C. § 555(b) (2022).

27. In some situations, depending on the facts, rental payments for a studio under a "capital lease", or "lease-purchase agreement," may qualify as capital costs because this arrangement is a rent-to-own purchase plan, which is usually treated as an installment sale, in which the buyer ultimately takes possession and *ownership* of the property, thus making the "rental" payments essentially installment payments toward a final purchase. Black's Law Dictionary (11th ed. 2019) ("capital lease" & "lease-purchase agreement").

28. Black's Law Dictionary (11th ed. 2019) (defining "asset" as "an item that is *owned* and has value") (*emphasis* added).