



October 8, 2013

**Via Overnight Delivery**

Susan Duncan Lee, Deputy Attorney General  
State of California, Department of Justice  
455 Golden Gate Ave., Suite 11000  
San Francisco, CA 94102-7004

**Re: Opinion No. 13-403**

Dear Ms. Lee:

I am writing on behalf of the League of California Cities (League) in response to your solicitation for views of interested parties regarding Opinion 13-403. The request, from Lake County Counsel Anita Grant, posits a question regarding Proposition 26 and public, educational, and governmental access (PEG) fees.

The League is an association of 467 California cities dedicated to the protection and restoration of local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee (LAC), which is comprised of 24 city attorneys from all regions of the State. The LAC monitors litigation affecting municipalities as well as requests from the Attorney General for views on pending requests for legal opinions, and identifies issues of statewide or national significance. The LAC has identified this opinion request and the issues it presents as being of such significance. On behalf of the League, I hereby offer the following response.

The question presented is as follows:

Does Proposition 26 require voter approval before a County Board of Supervisors may enact an ordinance that would require a cable television company to pay to the County a PEG fee equal to one percent of the "holder's gross revenues" under the Digital Infrastructure and Video Competition Act (DIVCA)?

The League believes the answer to the question is “no.” A County Board of Supervisors can enact an ordinance requiring a cable television company to pay a PEG fee without voter approval.

Proposition 26 added a new definition of “tax” to the California Constitution that broadened the term’s definition. (See Cal. Const., art. XIII C, § 1, subd. (e).) This change is significant because “taxes” require voter approval. (See Cal. Const., art. XIII C, § 2.) The new definition provides that a tax “means any levy, charge, or exaction of any kind imposed by a local government” and then goes on to list a number of exceptions. (*Ibid.*) One such exception excludes from the definition a “charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property.” (See *id.*, art. XIII C, § 1, subd. (e)(4).) For the reasons explained below, the League believes that this exception applies to fees imposed on cable franchisees to fund PEG pursuant to DIVCA and therefore those fees are not subject to voter approval.

In 2006, the Legislature enacted DIVCA, which usurped local authority to issue and renew cable television franchises. Historically in California, cities and counties issued local franchises to cable providers. (See Gov. Code, § 53066, subd. (d).) The franchises typically required the companies to pay the city or county a franchise fee, limited to 5% of gross revenues by federal law (see 47 U.S.C. § 542, subd. (b)), and often required the payment of a fee for PEG access facilities. (See 47 U.S.C., § 542, subd. (g)(2)(B) [specifying that such costs are not subject to the 5% cap on franchise fees].) Under DIVCA’s regulatory scheme, video franchises are now issued by the California Public Utilities Commission.

DIVCA, however, was designed to be revenue neutral to former local franchisors. Thus, DIVCA ensures that local agencies (former local franchisors) continue to have the right to receive both franchise fees and PEG capital contributions from state franchisees serving their jurisdictions. Under DIVCA, local agencies receive the proceeds of a state franchise fee of 5% of gross revenues, “as rent or a toll for the use of the public rights-of-way by holders of the state franchise.” (Public Util. Code, § 5840, subd. (q)(1).) Indeed, DIVCA goes to great lengths to specify that franchise fees are imposed in exchange *for the use of local government property*.<sup>1</sup> (See Pub. Util. Code, § 5810, subd. (b).)

---

<sup>1</sup> Presumably, this statement was added to avoid the state franchise fee from being interpreted as a “local tax.” Section 24 of article XIII of the California Constitution prohibits the Legislature from imposing local taxes but permits it to authorize local agencies to impose them.

In addition to the state franchise fee, DIVCA provides that a local agency “may, by ordinance, establish a fee to support PEG channel facilities consistent with federal law.”<sup>2</sup> (See Pub. Util. Code, § 5870, subd. (n).) The amount of this fee is limited to 1% of the franchisee’s gross revenues. (*Ibid.*) The PEG fee ordinance expires, and must be reauthorized, once a state franchise expires. (*Ibid.*)

Given the statements in DIVCA that are quoted above, it is clear that the 5% state franchise fee comes within Proposition 26’s exception for charges “for entrance to or use of local government property.” DIVCA specifically indicates that the charge is imposed for the use of the local public rights of way. (See Public Util. Code, § 5840, subd. (q)(1).)

The League and its members view PEG fees as charges imposed for the use of local government property under subdivision (e)(4) of section 1 of article XIII C. The basis for all fees and costs that are imposed by government on cable television franchisees is the franchisee’s use of the locally owned public right of way. (See, e.g., Gov. Code, § 53066, subd. (d); *Cox Cable San Diego v. County of San Diego* (1986) 185 Cal. App. 3d 368, 384; 46 Ops.Cal.Atty.Gen 22.) Thus, under federal law, a cable franchise is “construed to authorize the construction of a cable system over public rights-of-way, and through easements, which is within the area to be served by the cable system and which have been dedicated to compatible uses. . . .” (47 U.S.C § 541(a)(2); see also 47 U.S.C. § 522, subd. (9) [defining “franchise” as an authorization to construct a “cable system”]; *id.*, § 522, subd. (7) [defining “cable system” to exclude systems that do not use the public right of way].) In exchange, federal law authorizes franchising agencies to require the payment of franchise fees and the payment of the costs of PEG facilities—but nothing more. (See 47 U.S.C., § 542, subds. (b), (g)(2)(B).) Subdivision (n) of section 5870 specifically references the limitations set out in federal law. The authority DIVCA grants under subdivision (n) of section 5870 should be viewed and interpreted in this historical and statutory context as an authorization to local agencies to establish a “fee to support PEG channel facilities” *in exchange for their right to use the agency’s right of way.*

Furthermore, nothing in Proposition 26 or the ballot materials that accompanied it suggests that the voters intended to require voter approval of PEG fees. Proposition 26’s text specifically indicates an intent to rein in regulatory fees. (See Proposition 26, § 1, subd. (e).) Similarly, the focus of the ballot pamphlet is on regulatory fees that would become subject to

---

<sup>2</sup> DIVCA also continued in existence certain PEG contributions and payments that franchisees were required to make under existing franchises. (See Pub. Util. Code, § 5870, subds. (l)–(m).) It also requires new state franchisees entering an existing franchisor’s territory to pay their pro rata share of those obligations. (*Ibid.*) The focus of the opinion request, though, is on the specific fee that subdivision (n) of Public Utilities Code section 5870 authorizes local entities to establish.

Susan Duncan Lee, Supervising Deputy Attorney General

Re: Opinion No. 13-403

October 8, 2013

Page 4

voter approval. (Ballot Pamp., General Elec. (November 2, 2010) analysis of Proposition 26 by Legislative Analyst; *id.*, p. 58, arguments for and against, p. 60.) Nothing in the ballot materials gives any indication to the voters that the proposition would result a voter approval requirement for fees imposed on cable television providers to fund PEG facilities.

For these reasons, the League believes that PEG fees are covered by the use-of-government-property exception. And, thus, such PEG fee ordinances can be adopted, renewed, and increased without voter approval, notwithstanding Proposition 26.

Sincerely,

A handwritten signature in black ink, appearing to read 'John Bakker', with a stylized flourish at the end.

John Bakker, Attorney at Law

On Behalf of the League of California Cities

2178352.1