

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider
the Adoption of a General Order and
Procedures to Implement the Digital
Infrastructure and Video Competition Act
of 2006.

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ORDER INSTITUTING RULEMAKING

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I. Summary

The California Public Utilities Commission (Commission) initiates this proceeding to adopt a general order and establish procedures for implementing the Digital Infrastructure and Video Competition Act of 2006 (DIVCA), Assembly Bill (AB) 2987 (Ch. 700, Stats. 2006) (Attachment A to the OIR).¹ We seek comments on this draft general order and on our tentative proposals for implementing duties assigned to this Commission by AB 2987.

II. Legislative Background

In AB 2987, the Legislature found and declared that “increasing competition for video and broadband services is a matter of statewide concern.”² The Legislature noted that video providers offer “numerous benefits to all Californians including access to a variety of news, public information, education, and entertainment programming.”³ According to the Legislature, “competition for video service should increase opportunities for programming that appeals to California’s diverse population and many cultural communities.”⁴ The Legislature added that increased video service competition “lowers prices,

¹ In this OIR, all further references to Public Utilities Code sections adopted or amended in AB 2987 track the statutory language effected by AB 2987.

² CAL. PUB. UTIL. CODE § 5810(a)(1).

³ Id. at § 5810(a)(1)(A).

⁴ Id. at § 5810(a)(1)(D).

speeds the deployment of new communication and broadband technologies, creates jobs, and benefits the California economy.”⁵

To promote video service competition in California, the Legislature created a new state video franchising process in AB 2987.⁶ This process was effected by additions to the Public Utilities Code (Division 2.5, commencing with § 5800, and Article 4, commencing with § 440, to Chapter 2.5 of Part 1, Division 1), as well as by amendments to Public Utilities Code § 401 and Revenue and Taxation Code § 107.7.

The Legislature directed the Commission to issue state franchises for the provision of video services in the state. It declared that the state video franchising process should achieve the following objectives:

- (A) Create a fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another.
- (B) Promote the widespread access to the most technologically advanced cable and video services to all California communities in a nondiscriminatory manner regardless of socioeconomic status.
- (C) Protect local government revenues and their control of public rights of way rights-of-way.
- (D) Require market participants to comply with all applicable consumer protection laws.
- (E) Complement efforts to increase investment in broadband infrastructure and close the digital divide.

⁵ Id. at § 5810(a)(1)(B).

⁶ Id. at § 5810(a)(1)(C).

- (F) Continue access to and maintenance of the public, education, and government (PEG) channels.
- (G) Maintain all existing authority of the California Public Utilities Commission as established in state and federal statutes.⁷

The Legislature further observed that the public interest is best served when the Commission is appropriately funded and staffed, and thereby able to give timely and full consideration to these and other related issues brought before it.⁸

III. Preliminary Scoping Memo

The general scope of this proceeding is to develop procedures, rules, and orders necessary to fulfilling the duties and responsibilities assigned to the Commission by AB 2987. To fulfill these obligations, we have identified four major issue areas that we will address in this proceeding. First, we will delineate the scope and limits of the authority delegated to the Commission under AB 2987. Second, we will adopt a general order that outlines our state video franchise rules and processes. The general order will set forth, among other items, who can apply; when they can apply; the process for applying and issuing a state video franchise; the rights granted by the state video franchise to the state video franchise holder; the responsibilities of the state video franchise holder, including reporting requirements; and the procedures for amending the state video franchise. Third, we will develop processes for addressing complaints by local entities against state video franchise holders and/or addressing investigations and enforcement actions initiated by the Commission. Finally, we

⁷ Id. at § 5810(2).

⁸ Id. at § 5810(3).

will specify an exact methodology and a process for calculating the user fee that the state video franchise holders must pay to the Commission, in order to reimburse us for expenses incurred in administering this DIVCA program.

In the sections that follow, we discuss these issues in greater detail, and based on our reasoning and legal analysis, we reach tentative conclusions regarding policies and processes of the state video franchising program. We also propose questions for commenters that will assist us in refining our franchising process and adopting a final order in this proceeding.

A. Scope of Commission Authority Pertaining to Video Franchising

This section of the OIR examines the scope of the authority granted to the Commission by AB 2987. We present our analysis of this authority, and we invite comments on our interpretation of the statute.

AB 2987 provides that the Commission is the “sole franchising authority” for issuing state video franchises.⁹ The statute, however, limits this authority. The Commission’s authority over the state video franchise application process may not exceed the provisions set forth in Public Utilities Code § 5840.¹⁰ The Legislature also made it clear that it intended for the Commission only to perform those duties described in the provisions on franchising (§ 5840), anti-discrimination (§ 5890), reporting (§§ 5920 and 5960), cross-subsidization prohibitions (§§ 5940 and 5950), and regulatory fees (§ 401, §§ 440-444, § 5840).

⁹ Id. at § 5840(a).

¹⁰ Id. at § 5840(b).

We intend to adhere to the Legislature’s clear restrictions. The Commission will not require a state video franchise holder to obtain a separate franchise or otherwise impose any requirement on a state video franchise holder except as expressly provided in AB 2987.¹¹ In particular, the Commission will not regulate the rates, terms, and conditions of video services, except as explicitly set forth in AB 2987.¹² We recognize that the “holder of a state franchise shall not be deemed a public utility as a result of providing video service. . . .”¹³

Under AB 2987, 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 will not exercise our authority in a manner that diminishes these responsibilities afforded to localities.

Finally, while we decline to reach any tentative conclusions on this point, we invite parties to comment on whether we should permit intervenor compensation for participation in Commission proceedings arising directly out of our authority under AB 2987.¹⁴ We seek to determine whether we can

¹¹ Id. at § 5840(a).

¹² Id. at § 5820(c).

¹³ Id.

¹⁴ See id. §§ 1801 et seq. (Intervenor’s Fees and Expenses).

compensate those who intervene in this rulemaking; in an application or renewal; in a complaint; or in an investigation brought pursuant to AB 2987.

B. General Order Establishing State Video Franchise Rules and Processes

The proposed General Order (Attachment 2 to the OIR) and the draft application form for a new or amended state video franchise (Appendix A to the General Order) set forth an application process and other rules necessary for complying with policies and requirements of AB 2987. In creating these documents, we sought to organize and describe statutory requirements in a manner that is both logical and clear. We divided the proposed General Order into seven sections, which we review and invite comments on below. We also invite comments on the overall comprehensiveness of the proposed General Order, as well as any comments relevant to the adoption and implementation of the application process via the proposed General Order.

1. Section II: Purpose of the General Order

Section II introduces the proposed General Order. This section identifies our overarching purpose in creating the General Order: to promulgate the rules necessary to implement AB 2987. It also lists enumerated statutory objectives that we will use to guide us in our implementation of AB 2987.

We invite comments concerning the purpose of this General Order. Specifically, we invite comments on whether Section II of the proposed General Order faithfully and comprehensively reflects the intent of AB 2987. We also invite parties to propose alternative language, if they believe it better reflects the purpose of the legislation.

2. Section III: When Applicants Can/Must Apply for a State Video Franchise

Section III addresses questions pertaining to when parties can and/or must apply for a state video franchise. We tentatively conclude that statutory language dictates that the answers to these questions depend on two primary factors: (i) the date on which an applicant is seeking a state franchise, and (ii) whether the applicant already holds a franchise in a particular area.

AB 2987 especially encourages the entry of new service providers into the video market. New video service providers may seek state video franchises for new service territories as soon as the Commission's rules are effective.¹⁵ In contrast, incumbent video service providers that are operating under local franchises can seek state video franchises only if one of three conditions is fulfilled: (i) the incumbent's local franchise has expired, (ii) the incumbent and the local franchising authority reached an agreement to terminate the local franchise, or (iii) a new video service provider has given notice of its intent to enter into the area served by the incumbent under its local franchise.¹⁶ Furthermore, a state video franchise awarded to an incumbent cable company cannot go into effect prior to January 2, 2008, even if the company meets one of the three conditions for seeking the state video franchise prior to that date.¹⁷

¹⁵ See CAL. PUB. UTIL. CODE §§ 5840(g) ("The commission shall commence accepting applications for a state franchise no later than April 1, 2007."). The Commission seeks to accelerate the application acceptance date to a date closer to the effective date of the AB 2987 on January 1, 2007.

¹⁶ *Id.* at § 5840(o).

¹⁷ *Id.* at § 5930(b).

AB 2987 states that local franchising entities may extend the franchise of an incumbent cable provider to January 2, 2008 if the franchise expires prior to that date.¹⁸ Consistent with the Legislature's explicit intent to create a "fair and level playing field for all market competitors that does not disadvantage or advantage one service provider or technology over another[,]" the Commission tentatively concludes that incumbent cable providers whose local franchises expire prior to January 2, 2008 shall have the option of renewing their local franchises or seeking a state video franchise, and that incumbent cable providers opting to seek a state franchise shall have their existing local franchises extended until January 2, 2008.

We invite comments on whether Section III of the proposed General Order faithfully and comprehensively reflects relevant language contained in AB 2987. We seek input on whether parties find the wording and structure clear and understandable. Also as with the prior section, we invite parties to submit preferred alternative language and any other comments concerning this section.

3. Section IV: Application Process for a State Video Franchise

Section IV sets forth a five-step application process that an applicant must complete before receiving a state video franchise. A key element discussed in Section IV is the application form (Appendix A to the General Order). This section delegates authority to the Executive Director to act on behalf of the Commission in processing these state video franchise applications, because of the tight statutory deadlines for review and issuance of the state video franchise.

¹⁸ Id. at § 5930 (b).

The application steps that we propose are closely linked to provisions of AB 2987, which contains substantial detail on the content of the application and required deadlines for Commission review. Most of the application process and application form are tightly circumscribed by the legislation.

Nevertheless some application requirements warrant further description. First, pursuant to our authority under § 5840(e)(9), we tentatively require each applicant to either post a bond valued at \$100,000 or produce a financial statement that demonstrates that the applicant possesses a minimum of \$100,000 of unencumbered cash that is reasonably liquid and readily available to meet expenses.¹⁹ Second, we tentatively set our application fee at \$2,000, the amount we expect it will cost the Commission to process an individual application pursuant to AB 2987 requirements.²⁰ Third, we give applicants tentative clarification on what socioeconomic status data will be required pursuant to § 5840(e). Fourth, we tentatively flush out details regarding the circumstances under which the Commission will deem an application complete.²¹

¹⁹ Id. at § 5840(e)(9).

²⁰ We estimate that that an application review will require approximately 40 hours of an employee whose compensation, including benefits, will cost the state approximately \$100,000 per year.

²¹ Section III specifies that if the Commission fails to notify an applicant of an application's completeness or incompleteness before the forty-fourth calendar day after receipt of the application (pursuant to Public Utilities Code § 5840(h)(4)), then the Commission will issue the actual certificate of franchise before the fourteenth calendar day after the forty-fourth day. We also tentatively interpret § 5840(h) to mean that a California state video franchise is not deemed granted because of Commission failure to act if the applicant is statutorily ineligible for franchise pursuant to the requirements of §§ 5840(d), 5840(c), 5840(d), 5840(o), 5930(a), 5930(b), or 5930(c).

We also tentatively conclude that no person or entity may file a protest to a state video franchise application. Given that the Commission is the sole state video franchising authority²² and the application process and authority granted to us shall not exceed provisions set forth in Public Utilities Code § 5840,²³ we tentatively find that Public Utilities Code § 5840 does not provide for any protest to the Commission's issuance of a state video franchise, and thus none should be allowed.

We invite comments on the substance of Section IV. These comments may address, but are not limited to, whether Section IV faithfully and comprehensively reflects the application process described in AB 2987, the clarity of the process detailed, and the reasonableness of the elements proposed. We further request input on whether the wording and structure of Section IV is clear and understandable. We invite parties to submit alternative formulations of this section of the proposed General Order and any other comments that parties want to offer concerning this section.

We would appreciate additional comments concerning the design and language of the application. In particular, we seek suggestions and proposals regarding the application form's design and clarity of instructions.

²² See CAL. PUB. UTIL. CODE § 5840(a) (stating that "the commission is the sole franchising authority for a state franchise to provide video service under this division").

²³ See *Id.* at § 5840(b) (declaring that "the application process described in this section and the authority granted to the commission under this section shall not exceed the provisions set forth in this section").

4. Section V: The State Video Franchise Holder

Pursuant to the authority granted to us in § 5840(f), the Commission tentatively concludes that it will prohibit the holding of multiple franchises through separate subsidiaries or affiliates of a single enterprise.²⁴ We tentatively hold that any company with subsidiaries or affiliates may only receive a single state video franchise.

In addition, we tentatively conclude that we will issue a state video franchise in the name of a successful applicant's parent company, or if none, in the name of the applicant.²⁵ Accordingly, we tentatively conclude that statutory obligations imposed on a "holder" will apply not only to a successful applicant, but also to its parent company (if any), and any and all subsidiaries or affiliates of the applicant or its parent company that are offering services in California that are implicated by AB 2987 requirements.²⁶

We make this tentative conclusion to issue and enforce state video franchises in this manner, because we believe it is necessary for effective implementation of AB 2987. It otherwise would be difficult, if not impossible, for

²⁴ See id. at § 5840(f) ("The commission may . . . prohibit the holding of multiple franchises through separate subsidiaries or affiliates."). See also id. at § 5840(f) ("The commission may require that a corporation with wholly owned subsidiaries or affiliates is eligible only for a single state-issued franchise. . . .").

²⁵ AB 2987 recognizes that the Commission needs information on the applicant's parent company. Public Utilities Code § 5840(e)(D)(5) requires an applicant to submit information on the applicant's parent company, if any exists.

²⁶ This tentative conclusion follows from how we propose to issue state video franchises. See CAL. PUB. UTIL. CODE § 5830(i) ("'Holder' means a person or group of persons that has been issued a state franchise from the commission pursuant to this division.").

the Commission to monitor and enforce statutory provisions when a single company has multiple subsidiaries or affiliates. A company offering a variety of communication services could evade important statutory provisions – such as those applying to build-out,²⁷ reporting,²⁸ and cross-subsidization²⁹ – if we only awarded a state video franchise to a company’s video affiliate or its affiliates representing individual service areas.

Pursuant to Public Utilities Code § 5840(d), we also tentatively conclude that no person or corporation shall be eligible for a state video franchise if that person or company is in violation of any final nonappealable order relating to either the Cable Television and Video Providers Customer Service and

²⁷ “[H]olders *or* their affiliates with more than 1,000,000 telephone customers in California” are required to meet stringent build-out requirements for provision of video service. *Id.* at § 5890(b) (emphasis added). Yet a company with video and telephone customers could avoid these statutory obligations if it were able to attain a separate franchise for each region where it offered communication services (thereby ensuring no single entity ever had more than 1,000,000 telephone customers), or if it were able to use a video affiliate, separate from its telephone business, to acquire a state franchise (thereby ensuring that no one entity would have *both* telephone and video customers, the combination required applicability of § 5890(b) build-out requirements).

²⁸ A state video franchise holder is required to report information regarding broadband access and usage, to the extent that the “holder makes broadband available in the state.” *Id.* at § 5960(b)(1). A company, however, could avoid the broadband reporting requirements if it assigned all its broadband customers to an affiliate separate and distinct from a video affiliate, which attained the state video franchise.

²⁹ Public Utilities Code § 5940 prohibits cross-subsidization of video rates by a “holder of a state franchise . . . who also provides stand-alone, residential, primary line, basic telephone service. . . .” A company offering both telecommunications and video services, however, could avoid this prohibition by dividing its telecommunications and video operations into two different affiliates and seeking to obtain a state franchise in the name of its video affiliate only.

Information Act³⁰ or the Video Customer Service Act.^{31,32} This conclusion applies to franchises sought through renewal or transfer of an existing state video franchise.³³

We invite comments on whether our interpretation of the statute and the restrictions we propose to impose on the state video franchise holder are necessary and reasonable. In particular, we seek input on our determination of which entity may hold a state video franchise and which entities are subject to obligations imposed upon the state video franchise holder. We further invite comments on whether this section faithfully and comprehensively reflects the relevant language contained in AB 2987. We ask for comments on whether parties find the wording and structure clear and understandable. Finally, as with the previous section, we invite parties to submit alternative formulations of this section of the proposed General Order and any further comments that parties wish to offer concerning Section V.

5. Section VI: The State Video Franchise – Authorization to Offer Service, Obligations, Amendment, Renewal, Transfer, Voluntary Termination, and Miscellaneous Changes

Section VI of the proposed General Order contains a description of the state video franchise, as well as procedures for amending, renewing, transferring, voluntarily terminating, and making other miscellaneous changes to

³⁰ CAL. GOVT. CODE §§ 53054 et seq.

³¹ CAL. GOVT. CODE §§ 53088 et seq.

³² CAL. PUB. UTIL. CODE § 5840(d).

³³ Id.

the state video franchise. This section of the proposed General Order is closely tied to the requirements of AB 2987. The statute gives the Commission authority to establish procedures for state video franchise amendments, and in order to remain faithful to the Legislature's vision of an efficient process, our proposed amendment procedures track the requirements for new state video franchise applications.³⁴ Similarly, our proposed procedures for renewing, transferring, terminating, or making miscellaneous changes to a state video franchise reflect the balance struck by the Legislature in its treatment of new state video franchise applications. Our proposed procedures would ensure adequate notice is given to the Commission and local entities, but would not impose a barrier to entry or burdensome administrative obligations on video service providers.

We invite comments on whether Section VI of the proposed General Order faithfully and comprehensively reflects the conditions contained in AB 2987. We seek input on whether parties find the wording and structure clear and understandable. We also invite parties to submit alternative formulations and any comments that parties wish to offer concerning Section VI.

6. Section VII: Reporting Requirements

Section VII contains ongoing reporting requirements imposed by the proposed General Order. It addresses four different types of reporting requirements. First, it reviews reports used for the collection of the user fee. Second, it covers annual employment reports ordered by Public Utilities Code § 5920. Third, it clarifies provisions relating to annual broadband and video service reports mandated by Public Utilities Code § 5960. This subsection seeks

³⁴ CAL. PUB. UTIL. CODE § 5840(f).

to implement the all these reporting requirements contained in AB 2987 and to provide a reasonable interpretation of the statutory language pertaining to the deployment of these technologies in different California communities. We note that since broadband service and video service are commonly rendered by different subsidiaries of a holding company, the reporting requirements of Public Utilities Code § 5960 will be effective only if we deem that the holder of the state video franchise is the parent company, and that the video subsidiary operates under the authority granted in that single state video franchise. Finally, we prescribe reporting requirements for pertaining to service provided to community service centers.³⁵ This section seeks to implement reporting requirements in a straightforward and reasonable way that is not unduly burdensome on the state video franchise holder.

We invite comments on whether Section VII of the proposed General Order faithfully and comprehensively reflects the conditions contained in AB 2987. We seek input on whether parties find the wording and structure clear and understandable. Finally, as with the previous section, we invite parties to submit alternative formulations of this section of the proposed General Order and any comments that parties wish to offer concerning this section.

³⁵ These reporting requirements ensure effective enforcement of Public Utilities Code § 5890(b)(3), which requires state video franchise holders to provide free service to community centers in underserved areas at a ratio of one community center for every 10,000 video customers.

C. Process for Addressing Complaints by Local Entities and/or Conducting Investigations by this Commission

Public Utilities Code § 5890(g) affords the Commission authority over complaints from local entities and gives the Commission the ability to conduct investigations on its own motion:

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.

We interpret this provision to mean that local governments may bring complaints to the Commission if they allege that a state video franchise holder has failed to provide service as required by the provisions of § 5890.

Subject to constraints on our authority described in Part III.A of this OIR, we tentatively conclude that Public Utilities Code § 5890(g) further grants the Commission the authority to institute an investigation concerning the compliance of the state video franchise holder with provisions contained in Public Utilities Code Division 2.5. The statutory provision relating to public hearings requires that we hold public hearings before issuing a decision regarding an investigation we initiate pursuant to Public Utilities Code § 5890(g).

Public Utilities Code § 5890(h) gives the Commission the ability to impose fines on a state video franchise holder if it is in violation of a requirement

enumerated in Public Utilities Code § 5890.³⁶ In addition, Public Utilities Code § 5890(g) affords the Commission the authority to suspend or revoke a state video franchise if the state video franchise holder fails to comply with a provision of Division 2.5 of the Public Utilities Code. The Commission's enforcement authority under this provision is limited by statutory constraints discussed above in Part III.A of this OIR.

In addressing complaints by local entities and conducting investigations initiated by this Commission, we tentatively conclude that we will follow our current Rules of Practice and Procedure to the extent that doing so is consistent with the authority granted to this Commission by the Legislature.³⁷ The Commission will decide matters brought before it by making findings that are "supported by substantial evidence in light of the whole record."³⁸

D. Calculation and Submission of User Fees

This section of the OIR discusses our proposed procedure and methodology for developing and assessing user fees.

³⁶ This fine may not "exceed 1 percent of the holder's total monthly gross revenue received from provision of video service in the state each month from the date of the decision until the date that compliance is achieved." CAL. PUB. UTIL. CODE at § 5890(h).

³⁷ We may, however, make an exception for the sections on intervenor compensation.

³⁸ CAL. CIV. PROC. CODE § 1094.5. In cases other than those "in which the court is authorized by law to exercise its independent judgment on the evidence, . . . abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record." *Id.* at § 1094.5(b). AB 2987 does not authorize an independent review of the evidence, so this formulation of the abuse of discretion standard governs our review issues arising under the statute.

1. Policy and Procedures for Assessing User Fees

AB 2987 envisions that the Commission will determine annually a user fee to be paid by a state video franchise holder pursuant to Public Utilities Code Division 2.5 (commencing with § 5800).³⁹ This user fee must be established in a manner that it produces a total amount of funding equal to the “amount established in the authorized commission budget for the same year, including adjustments for increases in employee compensation, other increases appropriated by the Legislature, and an appropriate reserve to carry out the provisions of Division 2.5 (commencing with Section 5800), less the amount to be paid from reimbursements, federal funds, and any other revenues, and the amount of unencumbered funds from the preceding year.”⁴⁰

³⁹ CAL. PUB. UTIL. CODE § 441.

⁴⁰ Id. See also id. at § 401(b) (stating that it is the Legislature’s intent that Commission fees levied and collected are set at a level that shall produce “enough, and only enough, revenues to fund the commission with (1) its authorized expenditures for each fiscal year to regulate . . . applicants and holders of a state franchise to be a video service provider, less the amount to be paid from special accounts except those established by this article, reimbursements, federal funds, and the unencumbered balance from the preceding year; (2) an appropriate reserve; and (3) and adjustment appropriated by the Legislature”).

The Legislature stipulates that this fee shall be determined and imposed consistent with Section 542 of the federal Communications Act.⁴¹ Section 542 establishes the terms under which a cable operator may be required to pay a “franchise fee,” as defined for the purposes of Section 542.⁴²

AB 2987 further requires that the Commission “specify the amount of its budget to be financed by the fee in its annual budget request.”⁴³ The fee will be established only after approval by the Department of Finance (DOF).⁴⁴

⁴¹ Id. at § 442(b).

⁴² A franchise fee, for the purposes of Section 542 of Title 47, is “any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such.” 47 U.S.C. 542(g)(1). Section 542(g)(2) declares that this definition of “franchise fee” does not include many government-imposed charges, including the following:

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers); . . .

(C) in the case of any franchise granted after such date of enactment [enacted Oct. 30, 1984], capital costs which are required by the franchise to be incurred by the cable operator for public, educational, or governmental access facilities;

(D) requirements or charges incidental to the awarding or enforcing of the franchise, including payments for bonds, security funds, letters of credit, insurance, indemnification, penalties, or liquidated damages; or

(E) any fee imposed under title 17, United States Code.

⁴³ CAL. PUB. UTIL. CODE § 442(a).

⁴⁴ Id.

For the first year of operations, the Commission's budget change proposal anticipates that Commission implementation of AB 2987 will require approximately \$1 million dollars. The fee for this initial year will be adopting following approval of this budget change proposal, and will be assessed pursuant to the methodology developed below.

2. Procedures for Calculating and Collecting Payment of Fees

This section describes our proposed procedures for payment of user fees. We provide guidance on both timing and amount of fees assessed.

Pursuant to our authority in Public Utilities Code § 443(a) (described in Part III.B.6 above), all state video franchise holders, on the tenth day of the first month of the quarter, shall provide the Commission the number of video subscribers within the state video franchise holder's state video franchise service area as of the last day of the previous quarter. State video franchise holders shall provide this information beginning on October 10, 2007 for the July 1 - September 30 (Quarter 1, 2007) and shall continue to provide this information for all subsequent quarters.⁴⁵ The Commission's intent is to use this information only to enable it to accurately determine each state video franchise holder's user fee, as determined on a pro rata subscriber basis.

⁴⁵ The schedule for providing this information is as follows: October 10 for the July 1 - September 30 quarter (Quarter 1); January 10 for the October 1 - December 31 quarter (Quarter 2); April 10 for the January 1 - March 31 quarter (Quarter 3); and July 10 for the April 1 - June 30 quarter (Quarter 4).

State video franchise holders shall transmit their user fees in quarterly installments to the Commission.⁴⁶ The Commission will notify each state video franchise holder of the amount due for the current quarter by the first day of the second month of the following quarter.⁴⁷ The payment for the current quarter then shall be due on the fifteenth of the third month of following quarter.⁴⁸ All state video franchise holders as of September 15, 2007 will transmit their first quarterly installments, for the period July 1 – September 30, to the Commission on December 15, 2007.

A state video franchise holder will begin paying the user fee for the quarter in which its state video franchise becomes effective. If a state video franchise holder's franchise becomes effective 15 days or less from the first day of the next quarter, then the state video franchise holder will pay the first quarterly portion of its user fee for the quarter following the one in which its franchise becomes effective.

⁴⁶ Public Utilities Code § 442(c) states that the "fees collected by the Commission pursuant to this section shall be transmitted to the Treasurer at least quarterly." For the Commission to meet this requirement it must also collect user fees from the state video franchise holders quarterly.

⁴⁷ This Commission notification schedule is as follows: November 1 for the July 1 – September 30 quarter (Quarter 1); February 1 for the October 1 – December 31 quarter (Quarter 2); May 1 for the January 1 – March 31 quarter (Quarter 3); and August 1 for the April 1 – June 30 quarter (Quarter 4).

⁴⁸ This payment schedule is as follows: December 15 for the July 1 – September 30 quarter (Quarter 1); March 15 for the October 1 – December 31 quarter (Quarter 2); June 15 for the January 1 – March 31 quarter (Quarter 3); and September 15 for the April 1 – June 30 quarter (Quarter 4).

The Commission recognizes that state video franchise holders may not have retail video customers during the first full fiscal year of implementation of our state video franchise program (i.e., July 1, 2007 – June 30, 2008).⁴⁹ If a state video franchise holder does not yet have retail video customers, we cannot assess a user fee on the holder by basing the fee on the state video franchise holder's number of customers or gross revenue. We, therefore, instead plan to set each state video franchise holder's quarterly installment during the first fiscal year of the program at amount equal to the fee approved by the Department of Finance divided by the total number of state video franchise holders in that quarter.

Beginning in the 2008-2009 fiscal year (July 1, 2008 – June 30, 2009) and in all subsequent years, absent Commission determination of an alternate methodology, each state video franchise holder's user fee, paid in quarterly installments, will be determined on a pro rata subscriber basis, which relies upon subscriber information submitted for each quarter. For each quarter of the fiscal year, the Commission will determine the user fee due by multiplying one-fourth of total amount of annual user fees by the ratio of each state video franchise holder's total number of subscribers to the total number of subscribers for all state video franchise holders.

A state video franchise holder may file a request for an extension of 31 days or more for payment of a fee.⁵⁰ Such a request must be made in writing to the Office of the Executive Director no less than 15 days prior to the payment of

⁴⁹ State video franchise holders may still be engaged deploying facilities, as opposed to providing service to retail customers.

⁵⁰ CAL. PUB. UTIL. CODE § 444(b).

the fee. The Executive Director, pursuant to authority delegated by the Commission, shall grant the request if it (i) clearly states why the extension is necessary and (ii) specifies a reasonable extension due date, no more than 90 days past the original quarterly due date.⁵¹

If a state video franchise holder fails to pay the user fee or furnish related information needed, the Commission may “estimate from all available information the appropriate fee and may add to the amount of that estimated fee, a penalty not to exceed 25 percent of the amount, on account of the failure, refusal, or neglect to prepare and submit” the reports or quarterly payment of the user fee.⁵² The state video franchise holder “shall be estopped to complain of the amount of the commission’s estimate” of the appropriate fee.⁵³ “Upon payment of the fee so estimated and penalty, if applicable, the state franchise of the video service provider suspended in accordance with [Public Utilities Code § 444] shall be reinstated or the order to cease and desist revoked.”⁵⁴

If a state video franchise holder fails to pay fees required by the Commission for a period of 30 days or more, then the Commission also “may suspend or revoke the state franchise . . . or order the video service provider to cease and desist from conducting all operations subject to the franchising

⁵¹ See id. at § 444(b) (providing that the “Commission may grant a reasonable extension of the 30-day period”).

⁵² Id. at § 444(a).

⁵³ Id.

⁵⁴ Id. at § 444(b).

authority of the commission.”⁵⁵ Upon either of these actions, “all fees in default shall become due and payable immediately.”⁵⁶ In addition, “the commission may bring an action, in its own name or in the name of the people of the state, in any court of competent jurisdiction, for the collection of delinquent fees estimated under this article, or for an amount due, owing, and unpaid to it, as shown by report filed by the commission, together with a penalty of 25 percent for the delinquency.”⁵⁷

If any provider remits more than its required user fee, due to error by the Commission, then the Commission “shall authorize refunds” in the amount paid by the state video franchise holder over its user fee.⁵⁸ The Commission shall refund the amount no later than three months after discovering the error.

3. Questions for Commenters

The calculation of fees and payment schedule proposed above closely track procedures already in place at this Commission. We, therefore, are reasonably confident in their practicality and clarity. Nevertheless, we invite parties in this proceeding to submit comments on the proposed methodology for assessing and collecting the user fee. In particular, we seek input on whether a per subscriber fee, a revenue-based fee, or some other fee would offer the most appropriate method for assessing fees; whether the methodology proposed is clear, understandable, and consistent with the authority delegated to the Commission;

⁵⁵ Id. at § 444(a).

⁵⁶ Id. at § 444(c).

⁵⁷ Id. at § 444(d).

⁵⁸ Id. at § 442(e).

and whether the payment schedule is clear and practical. Finally, we invite comments relevant to our determination of the reasonableness, lawfulness, and practicality of our proposals concerning the user fee.

IV. Category of Proceeding

This rulemaking is determined to be quasi-legislative, as that term is defined in Rule 1.3(d) of the Commission's Rules of Practice and Procedure. We do not anticipate that hearings will be required and do not expect to hold a pre-hearing conference or issue a subsequent scoping memo. Any person filing a response to this OIR may object to this approach in its response. Because we do not anticipate a subsequent scoping memo, our determination of the category for this proceeding shall be subject to appeal under Rule 7.6.

V. Parties and Service List

We will serve a notice of availability of the OIR on R.05-04-005, a list of California cable television companies forwarded by the California Cable Television Association, the California Cable Television Association, the California League of Cities, the California State Association of Counties, and a list of city attorneys for each California city that was provided by the California League of Cities.

Within 15 days from the date of mailing of this OIR, any person or representative of an entity interested in monitoring or participating in this rulemaking shall send a request to be placed on the service list to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California 94102 or ALJ_Process@cpuc.ca.gov. Each request shall refer to the proceeding number for this OIR and identify the name, address, e-mail address, and party on whose behalf the request is submitted. The Process Office thereafter will

create a service list and post it on the Commission's web site (www.cpuc.ca.gov) as soon as is practicable.

VI. Schedule

Respondents shall, and interested parties may, file and serve comments on the issues delineated herein no later than 20 days from the effective date of this OIR. Respondents and interested parties may file reply comments 7 days after the filing of comments. After reviewing the comments and reply comments, we intend to reach a final determination on the policies and procedures needed to implement this legislation.

In their comments and reply comments, respondents and interested parties, in addition to addressing the issues proposed in this OIR, should also indicate whether they believe that evidentiary hearings are necessary and identify any material issues of factual dispute that should be addressed at such hearings.

In an effort to implement this legislation consistent with its January 1, 2007 effective date, we propose the following timeline for this proceeding:

Timeline

<u>Date</u>	<u>Event</u>
10/05/06	OIR approved at Commission meeting
10/25/06	Opening comments due
11/01/06	Reply comments due
11/14/06	Draft decision mails
12/04/06	Opening comments on draft decision
12/11/06	Reply comments on draft decision
12/14/06	Commission Meeting where proposal can be first considered
01/02/07	Applications accepted

02/14/07 First state video franchise may be granted if it is filed on January 2, 2007 and deemed complete by the Commission

Consistent with Rule 6.2, we expect that this proceeding will be concluded within 18 months.

VII. Public Advisor

Any party interested in participating in this rulemaking and who is unfamiliar with the Commission's procedures should contact the Commission's Public Advisor's Office in San Francisco at (415) 703-2074, (866) 836-7875 (TTY-toll free) or (415) 703-5282 (TYY), or in Los Angeles at (213) 649-4782, or send an e-mail to public.advisor@cpuc.ca.gov.

VIII. Ex Parte Communications

This proceeding is subject to Article 8 of the Rules of Practice and Procedure, which specifies standards for engaging in ex parte communications and the reporting of such communications. Pursuant to Rule 8.2(a), ex parte communications will be allowed in this proceeding without any restrictions or reporting requirements unless and until the Commission modifies this determination pursuant to Rule 7.6.

Therefore, **IT IS ORDERED** that:

1. A rulemaking is instituted on the Commission's own motion to Consider the Adoption of a General Order and Procedures to Implement the Digital Infrastructure and Video Competition Act of 2006.

2. The Executive Director shall cause this OIR to be served on R.05-04-005, a list of California cable television companies forwarded by the California Cable Television Association, the California Cable Television Association, the California League of Cities, the California State Association of Counties, and a

list of city attorneys for each California city that was provided by the California League of Cities.

3. Within 10 days from the date of mailing of this OIR, any person or representative of an entity interested in monitoring or participating in this rulemaking shall send a request to be placed on the service list to the Commission's Process Office, 505 Van Ness Avenue, San Francisco, California 94102 or ALJ_Process@cpuc.ca.gov.

4. The category of this rulemaking is preliminarily determined to be quasi-legislative, as that term is defined in Rule 1.3(d) of the Commission's Rules of Practice and Procedure.

5. Respondents shall, and interested parties may, file and serve comments on the issues delineated herein no later than 20 days from the effective date of this OIR.

6. Respondents and interested parties may file reply comments seven days after the filing of comments.

This order is effective today.

Dated October 5, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners