



December 7, 2006

Via Hand Delivery



Honorable Bob Walkup and City Council Members
City of Tucson
255 West Alameda
Tucson, Arizona 85701

Re: Cox Communications License Renewal Negotiations and City Council Motion of
October 3, 2006

Dear Mayor Walkup and Members of the City Council:

I am writing to address the on-going informal cable television license renewal negotiations and the City of Tucson's Council motion, dated October 3, 2006, that authorizes the City's staff to commence a formal renewal proceeding for our cable television license.

We've made progress in our negotiations. And, from our legal perspective, shifting to a formal renewal would be a backward step that removes the flexibility both the City and Cox currently enjoy under the informal renewal process. Our legal position, which we outlined in the informal negotiations, is based on an interpretation of governing federal and state laws that we believe is correct and will stand up in future tests. Despite these prevailing legal restrictions, Cox's informal renewal offer goes to significant lengths to accommodate the City's expressed needs, balance the impact on our customers, and remain within the bounds of all governing laws.

Given our concern over the City Motion, which was not alleviated at the November 9 and subsequent meetings that the City renewal team requested, we felt the need to clarify our legal position regarding the license renewal negotiations. To that end, I am providing the attached Position Statement and Explanation to ensure that Cox's position on the renewal is clear to each of you.

Our position is straightforward:

- Federal law explicitly authorizes the state to regulate the terms and conditions of cable television licenses and local government authority over them.
- Arizona and federal law are consistent and complementary regarding the terms and conditions for cable television licenses.
- Arizona law applies to the renewal of Cox's cable television license.
- Completing a formal renewal proceeding under federal law before June 30, 2007 will not stop Arizona law from governing the provisions of cable television licenses.

Mayor Walkup and Honorable Members of the City Council
December 7, 2006
Page 2

Cox's existing proposal offers generous benefits to the City and seeks to reach an informal renewal agreement before the limitations of the new state law apply in full. Injecting the formal renewal under federal law into our informal negotiations would significantly erode those benefits to the City by ensuring that the term of any extension or renewal of Cox's license will begin after June 30, 2007. At that point, we'd have no discretion about the mandatory provisions of Arizona law and could not continue to hold open our offer made in the informal license renewal. In contrast, the informal process and Cox's informal license renewal offer provide the City with its best opportunity to address community needs while avoiding a legal dispute.

The formal process referenced in the City's Motion would be costly and time consuming for the City and its taxpayers as well as for Cox and ultimately our customers. It would also prevent the City from realizing the generous benefits it would receive under Cox's informal license renewal offer.

All of us at Cox look forward to a mutually agreeable conclusion to our license negotiations and to continuing to serve our customers in Tucson with the best in cable television for many years to come.

Please contact me if you have any questions regarding these issues or the specific terms of any proposed license agreement between us.

Sincerely,



Anne Doris
Vice President, Southern Arizona

Attachment

cc: Mr. Ivan Johnson
LeVoyd Carter, Esquire
Lawrence Hecker, Esquire
Gary S. Lutzker, Esquire
Randall Nelson, Esquire

TUCSON, ARIZONA CABLE TELEVISION LICENSE RENEWAL NEGOTIATIONS

COX COMMUNICATIONS POSITION STATEMENT AND EXPLANATION

Background

This Position Statement addresses the applicability of Arizona law governing certain provisions of cable television license renewal agreements and its relationship to federal law regarding the renewal of cable television franchises such as the Cable Communications License Agreement (the "License") between Cox Communications and the City of Tucson. Briefly put, Cox firmly believes that Sections 9-505 and 9-506 of the Arizona Revised Statutes, ARIZ. REV. STAT. §§ 9-505, 9-506 (2006) (the "Arizona Statute") — which govern the powers of local Arizona governments with regard to license fees; Public, Educational, and Governmental ("PEG") channel capacity; and PEG support that local governments may require from cable operators — are applicable by their terms to Cox's License renewal.

The City has suggested that if Cox declines to accept renewal terms that are prohibited by the Arizona Statute, it will initiate a formal renewal proceeding pursuant to Section 626 of the federal Communications Act, 47 U.S.C. § 546 (2000) (the "Act"), the outcome of which the City already has concluded will support its position. In fact, the City Council recently adopted a motion, dated October 3, 2006 (the "Motion"), that addresses the on-going informal cable television license renewal negotiations with Cox and that authorizes the City's staff to commence a formal renewal proceeding with regard to Cox's cable television license. The City believes that it can complete the formal proceeding before the Arizona Statute takes effect on July 1, 2007.

Cox, for its part, despite what it considers to be the self-evident requirements of the Arizona Statute, has suggested a number of good-faith and creative alternatives designed to address the City's concerns regarding the Arizona Statute. As Cox has explained to the City, and as demonstrated below, however, any renewal of Cox's License pursuant to the formal procedures of the Act (in contrast to the informal procedures in which Cox and the City currently are engaged) necessarily will be governed strictly by the Arizona Statute. Cox's generous informal proposal offers the City its best, and in fact its only realistic, opportunity to temporarily postpone the inevitable application of the Arizona Statute while allowing Cox to serve its customers' needs and interests in the best and most efficient manner possible. A brief review of the Arizona Statute confirms this reality.

Any Renewal of Cox's License Will be Subject to the Requirements of Arizona Law.

Under Section 9-506(H) of the Arizona Statute, a current license that "is later extended or renewed for a term that begins after June 30, 2007" is subject to the Arizona Statute "effective on the first day of the renewal or extension term." Cox's current License is effective through August 31, 2007 pursuant to Section 2(a) of the License, and any renewal or extension of it necessarily will have a term that begins after June 30, 2007. This is equally true for any *de facto* extension of the License under Section 7A-25 of the Tucson Code that might occur due to a failure to renew. Given these facts, any renewal or extension of the current License between the City and Cox undoubtedly will be subject to the explicit and unambiguous requirements of the Arizona Statute. Moreover, Cox's existing License is subject by its terms to federal and state laws and regulations, including "laws now in effect, as the same may be amended from time to time, and new laws." Cable Communications License Agreement § 1; *see also, id.* at §§ 2.g., 3.a., and 3.b. The License, therefore, explicitly provides that it will be governed by changes in state law, such as the Arizona Statute. Given the plain language of both the Arizona Statute and Cox's License Agreement, therefore, any formal renewal or extension of Cox's existing License

will be subject to the franchise fee, PEG fee, and PEG capacity provisions reflected in the Arizona Statute and will preclude the flexibility reflected in Cox's generous informal proposals.

The City, however, has suggested it is not restricted by the Arizona Statute for two reasons. First, the City has asserted that so long as either a formal or informal license renewal proceeding is concluded before June 30, 2007, the resulting agreement will avoid the Arizona Statute's requirements. This assertion cannot be reconciled with the Arizona Statute or the License for the obvious reason that regardless of when the renewal proceeding is concluded, "the first day of the renewal or extension term" under the Arizona Statute will begin on September 1, 2007 following the natural expiration of the current License by its terms on August 31, 2007. In other words, even if the City and Cox agreed today on the provisions of a formally renewed License agreement, the renewal term of that License would not begin until after June 30, 2007 and the provisions of the renewal License consequently would be governed by the Arizona Statute (more realistically, the likelihood that a formal renewal proceeding could be completed before July 2007 is exceedingly low).¹ Thus, the first proffered rationale to avoid complying with Arizona law is unsupported under the unambiguous provisions of Section 9-506(H) of the Arizona Statute.

The Arizona Statute is Consistent with and Complementary to Federal Law.

The second rationale the City consultants have suggested for avoiding the Arizona Statute is a claim that the statute is preempted by federal law. The argument, as stated to Cox in the informal License renewal negotiations in which the City and Cox have been recently engaged, proceeds as follows: Section 626 of the Act requires the City to conduct a public proceeding for the purpose of identifying future cable-related community needs and interests, 47 U.S.C. § 546(a)(1), and requires that any denial of a formal license renewal proposal be based on a negative determination regarding one or more of four factors, which include whether any formal renewal proposal that Cox may provide in the future is "reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests," 47 U.S.C. § 546(c)(2)(D). According to the preemption argument, therefore, any need or interest identified in the yet to be concluded public ascertainment proceeding that the Arizona Statute limits or circumscribes is preempted by federal law. This claim, while novel, also is legally deficient and unsupported.

The plain language of the Act and the Arizona Statute, various judicial decisions, and the facts in this case demonstrate that the license and PEG fee and PEG capacity limitations of the Arizona Statute are fully consistent with the Act and the well-established practices of other states. In this regard, Cox notes that while the City's Motion concedes that it has yet to conclude its "community needs and interests" ascertainment proceeding, the City nevertheless claims that Cox's informal License proposal "does not appear to meet the City's cable related needs." Cox is in daily and continuous contact with its customers, and believes that, in many ways, it naturally is in a better position to understand and identify their needs and interests than is the City.

¹ Of course, if the City accepts Cox's informal license offer, Cox may agree to enter into a license renewal whose term begins before June 30, 2007.

Moreover, to the extent the City's demands exceed the license fee and PEG limitations of the Arizona Statute, even if those demands may subsequently find support in the City's as yet incomplete ascertainment proceeding, the State of Arizona already has concluded that such demands generally are unreasonable "taking into account the cost of meeting" them under federal law. The Arizona Statute, however, also provides a mechanism under which the City may provide additional PEG support that Arizona law otherwise would prohibit. *See* ARIZ. REV. STAT. § 9-506(E). State legislators, as the directly elected representatives of Tucson citizens and citizens throughout the State, therefore have completed their ascertainment of cable-related community needs and interests and the cost of meeting them, and their balancing of those needs and costs is reflected in the Arizona Statute. That balancing explicitly includes a mechanism by which the City may provide additional PEG support if the City determines such additional support is justified by its own ascertainment of cable-related community needs and interests. If the City disagrees with the policy determinations of the Arizona Legislature, the proper forum to address those issues is with the Legislature itself. As demonstrated below, however, the Legislature's determinations are entirely consistent with federal law, and any preemption argument is legally unsupportable.

Federal Law Explicitly Permits the State to Regulate the Terms and Conditions of Cable Television Licenses and Local Government Authority Over Them.

The Act expressly provides that nothing in its cable television section (Title VI) "shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title." 47 U.S.C. § 556(b). The relevant provisions of the Arizona Statute, therefore, only would be preempted to the extent they are inconsistent or conflict with the Act. Because the Arizona Statute is entirely consistent with the Act's requirements, it is not preempted by federal law.

Section 622 of the Act, 47 U.S.C. § 542, provides that annual cable operator license fees "shall not exceed 5 percent of such cable operator's gross revenues derived in such period from the operation of the cable system to provide cable services." 47 U.S.C. § 542(b). Section 622 further provides that no *federal* agency may "regulate the amount of the franchise fees paid by a cable operator, or regulate the use of funds derived from such fees, except as provided in this section." 47 U.S.C. § 542(i). Section 622 effectively sets a federal five percent cap on license fees but otherwise leaves the regulation of the amount of such fees to local franchising authorities (*i.e.*, state or local governments). Therefore, although a state or local government is prohibited from collecting fees exceeding five percent of the operator's annual gross revenues, the Act explicitly permits state or local governments to require lower license fee caps.² As the United States Court of Appeals for the Seventh Circuit recently found, for example:

the Federal Communications Act leaves to state law most questions about the regulation and taxation of cable TV franchises. Section 542(a) does not purport to override state law, let alone to deny states all power in the field. So if, for example, [State] law

² Indeed, because Section 622 does not *mandate* a five percent fee, some local franchising authorities around the country have set franchise fees at less than five percent of the operator's gross revenues, and some do not require the payment of any franchise fee on the cable operator so that subscriber bills can be lower.

capped fees at 3%, [the City] could not rely on § 542(a) to charge 5%.

City of Chicago v. Comcast Cable Holdings, 384 F.3d 901, 905 (7th Cir. 2004).

Section 611 of the Act, 47 U.S.C. § 531, also specifically permits franchising authorities to require that cable operators designate channel capacity on their systems for PEG use. Section 611, however, does not mandate the provision of PEG capacity and does not set any minimum or maximum number of PEG channels or PEG support that may be required; nor does it prohibit state authorities from establishing such requirements. In this regard, the Act's deference to State authority is confirmed by the many State laws that limit the number of PEG channels or PEG support that local governments are permitted to require from cable operators. *See, e.g.*, 2006 Kan. Sess. Laws, S.B. NO. 449 § 3(h) (amending KAN. STAT. ANN. 2005 Supp. 17-1902) (no more than two PEG channels); S.C. CODE ANN. § 58-12-370 (no more than three PEG channels); N.C. GEN. STAT. § 66-357(d) (no more than seven PEG channels); VA. CODE ANN. § 15.2-2108.22 (generally no more than seven PEG channels). The Arizona Statute's limitations regarding the number of PEG channels and PEG support that local Arizona governments may require, therefore, also are consistent with Section 611 of the Act and the laws of other States.

Under the Act, the decision to grant a cable license and to determine the terms and conditions of such cable licenses generally is reserved for the "local franchising authority" which is defined as "any governmental entity empowered by Federal, State, or local law to grant a franchise." 47 U.S.C. § 522(10). The authority to license cable operators at the state or local level is dependent on the requirements of state law. Although the power to authorize the use of public rights-of-way in a state and to establish the terms and conditions of such use generally resides in the state legislature, that power may be, and often is, delegated to local municipalities. *McQuillin Mun. Corp.* §§ 34.10, 34.13 (3rd Ed. 1995); *see also Mesa v. Salt River Project Agr. Improvement & Power District*, 373 P.2d 722, 730 (Ariz. 1962). A local municipality's authority, however, "is limited to that conferred upon it expressly or by implication by the state constitution or the legislature." *McQuillin Mun. Corp.* §§ 34.14.

In the absence of state constitutional provisions safeguarding it to them, municipalities have no inherent right of self-government which is beyond the legislative control of the state. A municipality is merely a department of the state, and the state may withhold, grant, or withdraw powers and privileges as it sees fit.

Town of Wickenburg v State, 115 Ariz. 465, 469, 565 P.2d 1326, 1330 (App. 1977) (internal quotation marks omitted, quoting *City of Trenton v. State of New Jersey*, 262 U.S. 182, 187 (1923)). Thus, absent a contrary state constitutional provision, the state legislature generally may limit or control the terms and conditions of cable television licenses issued by local franchising authorities as the Arizona Statute has in this case. Indeed, inasmuch as the state could eliminate the City's power to license cable television systems entirely (as the states of Connecticut, Nevada, Rhode Island, Vermont, Hawaii, and Alaska, among others, have done), it also may necessarily circumscribe the provisions of license agreements the City may be authorized to enter so long as those provisions are consistent with the Act. Extensive cable television franchising and regulatory requirements in the States of New York, Connecticut, New Jersey, Texas, Indiana, and Vermont, among others, demonstrate this point, as do the various State laws noted above (*e.g.*, Kansas, South Carolina, North Carolina, and Virginia) that limit the number of PEG channels that local governments may require.

This view is further supported by a recent decision of the United State Supreme Court, which, in a case arising under a different section of the Act, noted that municipalities “are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion.” *Nixon v. Missouri Municipal League*, 541 U.S. 125, 124 S. Ct. 1555, 1565 (2004). The Court stated its “working assumption [is] that federal legislation threatening to trench on the States’ arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State’s chosen disposition of its own power, in the absence of the plain statement *Gregory* requires.” *Id.*, referring to *Gregory v. Ashcroft*, 501 U.S. 452 (1991). That is, municipalities are creations of the state and exercise only the authority granted to them by the state. In accordance with *Gregory*, absent a “plain statement” from Congress to the contrary, federal legislation cannot disrupt or preempt this arrangement.

Nothing in the Act or its legislative history indicates that Congress intended to change or disrupt the traditional state-local relationship. The plain language of the Act, in fact, evidences a respect for the traditional arrangements of state and local power. The Act’s legislative history further underscores this point. The House Report, for example, states:

The Committee does not intend Title VI to upset the traditional relationship between state and local governments, under which a local government is a political subdivision of the state and derives its authority from the state. . . . If, under [the Cable Act] or any state law, a requirement imposed upon a cable operator must be reflected in a franchise, *the state may exercise its authority over cable either by establishing a state franchising authority or by placing conditions on a local government’s grant of a cable franchise.*

H. REP. NO. 98-934, at 94 (1984) (emphasis added). Congress, therefore, explicitly acknowledged that the Act would not disrupt or limit the States’ power to place conditions on a local government’s grant of a cable franchise, as the Arizona Statute has in this case. The plain language of the governing Act, Congress’s explicitly expressed intent regarding state authority over the terms of local cable franchises, and the interpretive decisions of federal and state courts, including the United States Supreme Court, conclusively demonstrate that any claims of federal preemption are legally unsupported.

The City has made clear during the informal negotiations, as mirrored in the language of its Motion, that the primary reason for its rejection of Cox’s informal renewal offer is that the offer does not provide the number of PEG channels and the amount of PEG support fees that the City desires (irrespective of the Arizona Statute). As explained above, however, shifting to a formal renewal process can only result in less, not more, for the City in these identified areas of concern. In light of these facts, the City apparently is stating its intent to initiate a formal renewal procedure (and, implicitly, the administrative hearings that would be necessitated by any preliminary denial of renewal under that process), for purposes inconsistent with those envisioned by the federal law, which are to provide for an orderly and fair renewal process and to protect cable operators from unfair denials. Cox strongly opposes any such misuse of the federal procedure for formal renewal.

Conclusion.

Cox hopes the foregoing explanations are helpful to the City in understanding Cox's position regarding the application of state and federal law to the license renewal process. Cox's very generous informal proposal offers the City its best opportunity to address the requirements of the Arizona Statute within the bounds of the law and in the most constructive possible manner. In contrast, any formal license renewal proceeding necessarily will be governed strictly by the fee and PEG limitations of Arizona law and will preclude the City from receiving the benefits reflected in Cox's informal renewal proposal.