

# EXHIBIT

## A

### ASCERTAINMENT ANALYSIS

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**A. The City’s “PEG Community Needs Assessment Report” Reflects Primarily the Self-Interested Views of PEG Access Administrators and Producers and Is Inconsistent with Independent Data Concerning PEG Usage and Interest and with the State of Arizona’s Limits on PEG Requirements.**

The City commissioned several surveys and a report on the extent of the need for PEG channels in the license area. The consultants who prepared these surveys and the City staff claim, among other things, that the City has a need to continue all existing video PEG channels except the channel currently used by the City for internal public safety communications.<sup>1</sup> Analysis of the data underlying these claims, however, reveals no support for this conclusion. Independent research also demonstrates that the PEG channels have almost no viewership and that cable customers in Tucson value both additional commercial channels and high definition programming more highly than PEG.

This analysis is significant because the City has an obligation to determine what is “reasonable to meet the future cable-related community needs and interests” under Section 626 of the federal Communications Act (the “Act”).<sup>2</sup> PEG requirements that go beyond what subscribers actually need, that are based on improperly-interpreted data, or that ignore decisionally significant evidence are not reasonable and therefore are not within the City’s power to demand. As shown below, even without considering current Arizona legal requirements, which eliminate the City’s authority to impose most of its PEG demands in any case,<sup>3</sup> no basis exists to maintain the current level of PEG programming in Tucson. Moreover, because all the Access Tucson programming is available online, the need for PEG channel capacity is greatly diminished.

**1. The Survey Purporting to Show Support for PEG Channels Contains Significant Flaws.**

One of the primary sources for the City’s conclusion that PEG channels are required to meet community needs is the Cox Communications Subscriber Satisfaction and Local Community Programming Viewership Study (the “FMR Study”), prepared for the City by FMR Associates, Inc. The FMR Study, however, was not designed in a way that would elicit relevant information about PEG channels, and its results directly contradict objective viewership data. In addition, the sample used in the FMR Study was not representative of cable users in Tucson, so undetected sample bias is likely.

The first, and most significant, problem is that the FMR Study simply failed to ask any questions that specifically addressed PEG channels. Each of the three questions that were intended to cover PEG issues actually asks about “local community programming channels” or “cable channels that feature programs about local schools, colleges, organizations and individuals.”<sup>4</sup> Such ambiguous questions potentially cover much more than just PEG channels — they could be interpreted as referring to local broadcast channels, local cable news or any of a

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<sup>1</sup> See, e.g., City of Tucson PEG Community Needs Assessment Report, Holly Hansen Consulting, Dec. 6, 2006 (the “PEG Report”) at 1.

<sup>2</sup> 47 U.S.C. § 546(c)(1)(D).

<sup>3</sup> See Cox Legal Memorandum at § II.A.-B.

<sup>4</sup> FMR Study at 12-13.

variety of other types of programming.<sup>5</sup> This overly broad interpretation is confirmed by the results of the survey commissioned by Cox, which showed that only 21.6 percent of respondents correctly identified the types of channels that fell under “community access,” even when that term was used in the survey question. In fact, the correct answer was only the third most popular response, with 38.5 percent saying they did not know what the term meant and 23.8 percent saying that it meant PBS programming.<sup>6</sup>

Therefore, the FMR Study’s conclusion that fully half of all subscribers had watched PEG channels at some time is entirely unreliable. In fact, given the more precise results of the Cox Survey, a substantial majority of those who said they had watched “local community programming channels” likely were thinking of either PBS stations or local commercial broadcast television stations rather than PEG channels.

This conclusion is confirmed by comparing to objective data the response to the next question in the FMR Study. The FMR Study asked those who said they had watched “local community programming channels” to say how often they watched those channels. More than one third said they watched at least weekly.<sup>7</sup> This contradicts objective Nielsen Media Research data for the current PEG channels, which demonstrates that in actuality five of the eight PEG channels had no viewers at all during prime time during seven distinct survey periods over two years, while the remaining three PEG channels had no viewers for at least five of the seven survey periods.<sup>8</sup> If the data from the FMR Study were correct, the objective Nielsen data would have confirmed rather than contradicted it.

A similar defect compromises the FMR Study’s question concerning the importance of community programming. That question does not ask about PEG channels at all, but refers only to “channels that feature programs about local schools, colleges, organizations and individuals.”<sup>9</sup> This description, of course, could cover local network affiliates, independent stations, cable coverage of local sports events, and myriad other types of programming that do not appear on PEG channels. Indeed, the PEG Report indicates that a substantial percentage of the programming that appears on the current PEG channels is not local and would not fall within this question.<sup>10</sup> The responses to this question consequently have no meaningful correlation to PEG channels and programming.

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<sup>5</sup> FMR responded to this criticism by arguing that the number of respondents who said they watched these channels on a daily or weekly basis would have been much greater if there had been any confusion about the meaning of these questions. Letter of Bruce Fohr to Ann Strine, July 31, 2006, at 4 (the “Fohr Letter”). This response assumes that every person who answered the questions would have understood “local community programming channels” in the same way. This assumption is baseless because that term is subject to multiple interpretations.

<sup>6</sup> Summary of Research Findings, Cox Community Survey, Marketing Intelligence and Zimmerman & Associates, Inc., Nov. 17, 2006 (“Cox Survey”) at 10.

<sup>7</sup> FMR Study at 12.

<sup>8</sup> Cox Survey at 11. The Nielsen data was compiled as part of regular surveys of television viewing on the Cox system rather than in response to the FMR Study. The Nielsen data therefore is inherently more reliable than the FMR Study data and does not suffer from the same biases.

<sup>9</sup> FMR Study at 13.

<sup>10</sup> PEG Report at 27, 29, 30, 32. Both the University of Arizona and the Tucson schools run substantially more non-local programming than local programming.

The FMR Study also failed to address the question of whether citizens believe that the current number of PEG channels should be maintained or changed. For example, respondents were not asked to say how many PEG channels they thought were needed, a basic question that would have directly indicated what the community thought would be an appropriate number. In effect, the FMR Study attempted to nibble around the edges of the issue without confronting it directly.

The FMR Study's other conclusions about PEG channels also are suspect. For instance, the FMR Study determines that low-income subscribers are more supportive of PEG than high-income subscribers.<sup>11</sup> However, Cox's data shows the opposite – support of PEG is correlated positively to income.<sup>12</sup> Again, this difference may well be the result of the imprecision of the questions asked in the FMR Study. The FMR Study also concludes that Cox's charges are a significant concern for some customers, but makes no attempt to separate Cox's programming charges from license fees and fees associated with PEG channels.<sup>13</sup> FMR also asks about the specific amount of the PEG fee, but without providing any context.<sup>14</sup> Cox's survey shows, however, that when customers are asked specifically about those fees, they are concerned that they pay more than customers in other jurisdictions.<sup>15</sup> The customer concern about the costs of government fees, including PEG fees, suggests strongly that the City should include that consideration in its analysis of PEG requirements.

Finally, the FMR Study suffers from potential sampling bias because of the way that FMR constructed its sample. As FMR described in its July 31, 2006 letter to Ann Strine, it designed its sample to match the population in four designated zones of the City. It did not consider the distribution of cable subscribers or even of multichannel video subscribers.<sup>16</sup> As Cox described in its July 21 letter to Ann Strine, a sample that does not account for the specific demographics of the target group is likely to be unrepresentative of that group's opinions, and therefore is untrustworthy.<sup>17</sup>

These flaws render the data obtained in the FMR Study unusable to support any conclusions about the use or retention of the current PEG channels. Moreover, nothing can be done to salvage usable data from the questions described above because they were designed incorrectly from the start. The City, therefore, cannot use the survey to justify retaining the current PEG arrangements.

## **2. The Online and Mail-in Surveys Are Unreliable.**

The City also conducted an online survey and a mail-in survey. As the City has acknowledged, these surveys are not statistically valid. In particular, surveys that allow participants to self-select are subject to obvious bias issues. Advocates for particular causes can

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<sup>11</sup> FMR Study at 13.

<sup>12</sup> See Declaration of Chris Baker.

<sup>13</sup> FMR Study at 14.

<sup>14</sup> *Id.* at 14. It is noteworthy that, in this case, FMR used the term "community programming" to describe PEG channels, a term it did not use in the other questions on the survey.

<sup>15</sup> Cox Survey at 16.

<sup>16</sup> Fohr Letter at 1.

<sup>17</sup> Letter of Michael A. DiMaria, Director of Government Relations, Cox, to Ann Strine, July 21, 2006.

rally supporters to answer such surveys and specific demographic groups often are over-represented.

These defects become evident when evaluating the portions of the surveys that address PEG issues. In the mail-in survey, for example, 318 respondents said they watch PEG channels while 129 said they do not. Based on the FMR Study and the actual viewing data compiled by Cox, this result is not even remotely representative of the Tucson viewing public. This evidence strongly suggests that advocates for PEG stuffed the ballot box to make their views known, which makes the survey results essentially useless. Thus, it is unreasonable for the City to rely on these surveys to provide an accurate picture of the need for PEG channels and PEG support.

In addition, the mail-in and online surveys cannot reasonably be considered as separate sources of data because the City has no way to know whether a respondent answered one survey or both. In fact, it is likely that people with strong points of view and commitments to specific causes did respond to both surveys, which means that the respondent pools almost certainly overlap to a very great extent.

Even if the City could rely on those surveys, however, they would not support the staff's conclusion that there is a need to maintain current PEG levels or overwhelming support for PEG. For instance, of the 49 people who responded to the mail-in survey and indicated that they were dissatisfied with specific areas of their cable service, seven – 14 percent – indicated that they wanted *fewer* PEG channels or that PEG channels were undesirable, and none expressed an interest in having additional PEG channels.<sup>18</sup> Only one comment was supportive of access channels, and that comment merely asked for them to be moved to lower positions in the channel line-up. Thus, to the extent the City considers the data from the online and mail-in surveys, that data does not demonstrate a need for extensive PEG offerings.

### **3. The City Cannot Rely on the Focus Groups to Demonstrate a Need for PEG Programming.**

The staff relies to a significant extent on the results of the focus group sessions conducted by Holly Hansen Consulting to justify retention of the current number of PEG channels. However, focus groups generally are not suited to such an analysis, these particular focus groups had a demonstrable bias toward the current PEG arrangements, and, even considering that bias, the actual results of the discussions do not support the conclusions reached in the PEG Report.

First, as a general matter, focus groups are not suited to the kinds of determinations necessary to deciding what specific needs a city has for PEG channels. A focus group cannot determine the number of hours of programming needed or what types of programming the community would want. If properly conducted, a focus group can, instead, help explain why a need is felt or provide explanations for low viewership. Thus, it is inappropriate to depend on a focus group to support the number of channels required for PEG or to determine how important PEG channels are to the community. These are questions better answered through quantitative analysis.

Second, the strength of the conclusions reached by any focus group is heavily dependent on the composition of the group. For instance, an assessment of the types of programming a community needs should be done using potential viewers of PEG programming, because they are the consumers. A focus group that consists of producers of programming will have a natural bias

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<sup>18</sup> Three respondents indicated they wanted fewer access channels, three indicated that access programs are “offensive and obscene” and one indicated that “access programs have deranged people.”

towards the programs they produce, which greatly reduces the utility of the information obtained from the session.

That sort of bias is a significant issue in the focus groups conducted for the PEG Report. A review of the PEG Report confirms that entities that produced programming or appeared on PEG programs were heavily overrepresented in the selection of focus group members. Most notably, more than half of the focus group members had provided PEG programming, something that it is likely few Tucson citizens actually have done over the past several years. In fact, the City provided no information on how individual focus group members were selected, which raises the question of whether the selection process was directed to find individuals with a high interest in PEG programming. Such a selection process is the equivalent of asking only Republicans if they approve of a Republican president.

Third, the focus group process suffers from some of the same flaws as the FMR Study. For instance, focus group members were asked how they “see local programming benefiting your organization and / or the community.”<sup>19</sup> While focus group members were less likely to be confused about the meaning of this question than the FMR Study respondents (because the focus groups were guided by a facilitator), the fundamental distinction between PEG channels and the broader concept of local programming still was not maintained.

Finally, the PEG Report essentially ignores any data from the focus group sessions that does not support maintaining current levels of PEG service. While the executive summary says “there is a significant need and interest in all of the analog PEG channels provided to subscribers,” the actual responses of the focus group members do not agree with this assessment.<sup>20</sup> For example, the PEG Report later notes that Pima Community College could operate effectively with one channel instead of two. Many comments also indicated that the number of channels required was less than the current number, with focus group members suggesting that four, five, or six channels would be sufficient.<sup>21</sup> Considering the composition of the focus groups, which consisted largely of PEG advocates, this support for fewer PEG channels significantly undermines the City’s claimed need for eight PEG channels.

The PEG Report also ignored repeated comments by participants in several of the focus groups indicating that PEG channels are an ineffective way to reach viewers because so few subscribers watch them.<sup>22</sup> These responses, which appear to have been unprompted because there were no questions about viewership, are significant for two reasons. First, they confirm the data obtained by Cox concerning the number of PEG channel viewers, as described above. Second, they undercut the City’s claims that PEG channels are needed; indeed, several participants in the focus groups indicated that they do not want to use PEG channels because they are not a good way to get their messages out to the public.<sup>23</sup>

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<sup>19</sup> See, e.g., PEG Report at 85.

<sup>20</sup> *Id.* at 1.

<sup>21</sup> See *id.* at 44 (“Let’s do four channels well instead of eight poorly.”); *id.* at 99 (“eight channels too many three too few. Should be five or six, and each should be justified. Video on demand is unnecessary.”). The latter comments are particularly significant because they came during an open discussion period.

<sup>22</sup> See, e.g., *id.* at 72 (“People don’t watch due to poor quality programming”); *id.* at 71 (“Doesn’t seem like a viable place to do marketing”).

<sup>23</sup> See, e.g., *id.* at 71 (“Not a large viewership of PEG channels; need to go where we can get the most exposure; why waste time?”); *id.* at 87 (don’t use PEG because of “bang for buck”).

This information confirms the conclusion that no community need or interest justifies maintaining the current number of PEG channels. Given the composition of the focus groups, which were heavily biased toward likely PEG supporters, their conclusions that the current lineup of PEG channels is too extensive and that few people watch PEG programming undermine rather than support the City's position. The City, therefore, cannot reasonably rely on the focus group data as support for maintaining existing PEG requirements.

**4. Properly Analyzed, the City's Data Would Support the Same Conclusions as the Data Compiled by Cox.**

Despite the significant flaws and errors in the analyses prepared for the City, some useful evidence can be obtained from the City's ascertainment process. In particular, the information compiled by the City provides additional support for two key conclusions of Cox's research: (1) interest in PEG channels is much less significant than interest in other programming; and (2) few people actually watch the current PEG programming.

First, Cox's analysis shows that respondents overwhelmingly preferred to add other new programming — even when they do not know what programming would be added — rather than maintaining the current level of PEG programming. When asked how many PEG channels they would prefer, without considering trade-offs for other programming, various groups of respondents indicated that something between 3.77 and 5.3 channels would be sufficient.<sup>24</sup> This information is consistent with the focus group conclusion that it is not necessary to maintain the current eight PEG channels, and the specific comments from focus group members supporting fewer PEG channels.<sup>25</sup>

The response to the open-ended question, however, did not fully capture the relative value that consumers place on PEG programming and other programming because it considers PEG channels only in the abstract, without reference to other programming that might be replaced by PEG programming.<sup>26</sup> When respondents were asked to choose between PEG programming and other programming, their interest in maintaining PEG programming dropped significantly. The most common response was that the customers would prefer to have two PEG channels, with a corresponding increase in digital channels or high definition channels. In fact, among both subscribers and non-subscribers, having three or four PEG channels was more popular than having eight, seven or six channels.<sup>27</sup> Moreover, this general pattern was consistent even among the subscribers who felt it was most important to have PEG channels.<sup>28</sup>

The Cox Survey results also are confirmed by responses to the FMR Study. When asked what they would like to change about Cox's service, only three respondents made comments that could be read as supportive of PEG programming, only one respondent mentioned it specifically

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<sup>24</sup> Cox Survey at 12.

<sup>25</sup> The need for PEG channel capacity is greatly diminished in any case because all the Access Tucson programming is available on the Internet.

<sup>26</sup> It is axiomatic that use of a channel for analog PEG precludes other potential uses of the channel. While it has been suggested that such a trade-off is unnecessary, there is no question that the actual capacity of any cable system is finite, and that using bandwidth for one purpose precludes using it for another.

<sup>27</sup> Cox Survey at 14. Having fewer than two PEG channels was nearly as popular a choice among current subscribers as maintaining eight channels.

<sup>28</sup> *Id.*

