

**INFORMATION AGE ECONOMICS, INC.**

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Ms Ann Strine,  
Director, Information Technology/CIO,  
City of Tucson,  
481 West Paseo Redondo,  
Tucson,  
AZ 85701.

March 1, 2007.

Dear Ms. Strine:

I was asked to review the new "level playing field" clause that Cox Communications of Tucson is requiring the City to include as Section 2(e) in Cox' proposed renewal license, and to opine as to whether that clause is reasonable.

The proposed clause is of great significance. It is anticompetitive and patently unreasonable. While I have had limited time to review the clause, I believe that if anything, the analysis that follows understates the problems with the clause.

There is a "level playing field" clause of sorts under the existing license, but it has very limited reach. The existing clause does not reach an operator serving areas that had been annexed into the City (and who, as a result, might serve a very small portion of the City with most of the its system lying outside the City). The existing clause does not reach organizations like the University of Arizona. The existing clause only reaches cable systems and cable operators providing cable services, and then only applies to the extent that the cable operator and system are subject to the same licensing rules as Cox. Even then, the clause, at most, permits Cox to ask a court to enjoin the issuance of a new license, which presumably provides it the opportunity to argue to a court that the terms of a second license are so unfair as to prevent it from competing in the marketplace. While the inclusion of this provision may not have been wise, it had at least some limits on its impact.

By contrast, the insertion of the so-called "level playing" clause that Cox demands in a cable TV license agreement between the City of Tucson, Arizona, and Cox Communications would have the effect of freezing the status quo, perpetuating the incumbent's monopoly position, and denying or significantly hindering the opportunity for the introduction of new technologies and services to segments of the Tucson community.

That is because the new clause, unlike the existing clause

- Applies to anyone placing a facility in the street to provide video programming, not just to cable systems and cable operators. In light of new technologies, this is significant.
- It applies to non-profits like the University of Arizona.
- It applies even where the City has no licensing authority under state or federal law.



- It does not limit the company to seeking a court hearing as to whether a second entrant may provide service. The company can reduce its own obligations to the City, and potentially seek other contractual remedies.

As an incumbent, Cox has several competitive advantages, including:

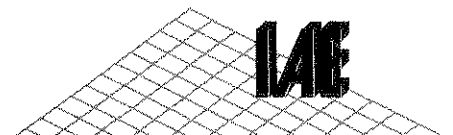
- It is a large broadcasting, cable TV, programming, and publishing conglomerate with deep financial pockets.
- It has the strength of incumbency in the Tucson market, e.g., a broadband network offering a wide array of entertainment, information, and telecommunications services, along with a huge customer base.
- It has minimal competition.
- It has long and well established relationships with program and content providers which serve Cox's nationwide cable TV systems.

To require the City to apply the same license terms and conditions to, for example, a cable TV and broadband system serving a university campus, or other nonprofit entities and institutions, would have the effect of preventing their entry in the first place, and/or significantly handicapping their ability to offer new and imaginative services based on existing and yet to be developed technologies.

Alternatively, in the event that these new potential entrants were given what Cox describes as "less burdensome" and "more favorable" conditions, and, as Cox requests, it then has the right to the same terms and conditions, then Cox's monopolistic and market power is intensified, and competition significantly reduced and/or eliminated.

In addition, accepting the condition would allow Cox to avoid obligations that it would otherwise have under federal or state law. Federal law as it now stands envisions that video programming can be provided in at least three ways via wireline facilities in the rights of way. Common carriers can provide video programming services on a common carrier basis, and are not subject to local franchising. Companies, including Cox, can choose to operate as open video systems, in which case the companies are subject to reduced regulation at the local and state level, but must agree to lease a significant portion of their total capacity to competitors. Finally, entities can obtain a cable franchise, subject to the full plethora of federal cable requirements. If, for example, an open video system provider were to enter the market, Cox could either force the City to block its entry altogether, or take advantage of the reduced regulation provided for under federal law, without assuming any of the *federal* obligations imposed on open video systems. Similarly, to require the City to impose cable obligations on cell phone providers, or to relieve Cox of its own obligations, is both anticompetitive and in an economic sense, distorts the balance of benefits and burdens established under federal regulatory schemes.

To put it most simply, this level playing field clause places a contractual obligation on the City to tilt competition in Cox' favor. By any standard, that is unreasonable.



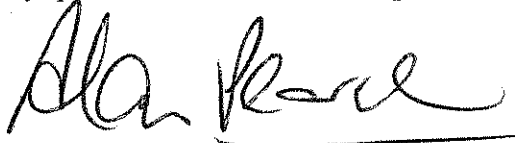
These larger economic effects are in addition to other significant effects that affect the value of the license to the City and its citizens. If the licensee can force the City to reduce its obligations, or pay damages under the sorts of circumstances outlined above, then the promises it is making to the City are potentially illusory. That could leave the City with a long-term contract with little or no public benefit. That also seems unreasonable.

The sweep of the Cox demand should be emphasized. Cox strikes the licensing exemption for the University of Arizona, even though the University may not be subject to federal or state license requirements. To provide video programming to its students, the University would presumably be forced to take a license for the entire City, or Cox might be relieved of its obligations to serve. The Cox language is broad enough to reach wireless providers who may make limited use of the rights of way for placement of antennas. Almost all major cell phone providers deliver video programming to subscribers. Such entities have never been treated as being subject to the Cable Act's licensing requirements. Nonetheless, the Cox proposal seems to force the City to either license them, or relieve Cox of obligations, or provide other relief.

My knowledge of the development of Cable Television goes back to the early 1970s when I was the Chief Economist at the Federal Communications reporting directly to the Chairman, Dean Burch, and his successor, Richard E. Wiley. In that capacity, I helped organize the cable TV hearings at the FCC and was Chairman Burch's representative on the Cable TV task force that developed the cable TV rules of the early 1970s, see Cable Television Report and Order, 36 F.C.C.2d 143, 262 (1972). I then moved to Capitol Hill where I served as the Chief Economist of the House Telecommunications Subcommittee and helped draft the first Congressional Report on Cable TV, "Cable Television: Promise Versus Regulatory Performance," Committee Print, 1976. Since leaving the government in 1978, I have published widely in the telecommunications-information-entertainment industry, and have performed research and consulting services for cable TV companies, program production companies, telecommunications companies, broadcasting companies, equipment manufacturers, and local and national Governments.

If you have any questions about the above, please feel free to contact me via email or telephone.

Sincerely,



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