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RESPONSE TO RFRP PART II

Response to Tucson RFRP Part II

Cox has attached to the RFRP response as Exhibit D a proposed license agreement (the "Cox Proposal"). The Cox Proposal is based on the existing license and incorporates changes necessary to comply with federal and state law and the ascertained cable-related needs and interests of the Tucson community. In addition to the Cox Proposal, Cox has included as Exhibit E a redlined version of the current license, which reflects the differences between the current license and the Cox Proposal. The following summary describes the individual elements of the Cox Proposal upon which the RFRP specifically requests elaboration.

1. License Term: Cox proposes to enter into a ten (10) year cable license agreement with the City of Tucson commencing September 1, 2007. *See* Cox Proposal, § 2(a). The RFRP confirms that the City would be willing to accept a proposal for up to a ten (10) year term, "[i]f Cox's proposal for renewal satisfies the identified needs and interests of the community." City Findings at 17. Because the Cox Proposal satisfies each of the City's lawful identified community interests, Cox's Proposal is consistent with the needs and interests of the Tucson community. A ten (10) year term therefore should be acceptable to the City.
2. System Design and Capabilities – first three years of license term: Cox proposes to maintain its current system design and capabilities for no longer than the first three years of the proposed license agreement, during which time Cox will be upgrading the system to an 860 MHz capacity. The current 750 MHz system uses fiber to the node architecture with no more than 1500 customers being served per fiber node. The current system, among other things, is two-way capable and equipped with back-up power supplies. Cox will maintain or exceed its current level of cable service offerings using its current 750 MHz system until Cox completes the system upgrade. *See* Cox Proposal, § 16.
3. System Design and Capabilities - proposal with respect to future upgrades of system: To accommodate the City's ascertained community need, Cox proposes to upgrade the company's Cable System from 750 to 860 MHz no later than three (3) years from the effective date of the Cox Proposal. The proposed 860 MHz system will use fiber to the node architecture, will serve no more than 1000 households per fiber node, and will be two-way capable and equipped with back-up power supplies.

The proposed system upgrade provisions generally track the upgrade provisions in the current license agreement. The Cox Proposal, however, eliminates impractical terms regarding inspections of Cox's cable plant and customer drop lines. Inasmuch as Cox already has begun the system upgrade project, the City's inspection and approval of Cox's upgrade plans are unnecessary. The Cox Proposal also eliminates an outdated timetable for the system upgrade included in the current license agreement. *See* Cox Proposal, § 14.

4. Line Extension Policies for Residential Subscribers, MDUs, Commercial Subscribers and New Subdivisions: Section 13(d) of the Cox Proposal includes Cox's standard line extension language for residential, new subdivision, and MDU customers. The Proposal generally requires Cox to provide service to all City residents who live in a part of the City where the household density is at least 40 homes per mile. The Proposal also includes language that would require prospective subscribers who live in less densely populated areas of the City (or less densely populated areas that are annexed to the City in the future) to bear a portion of the expense of extending Cox's cable plant to provide service. Line extensions for commercial accounts are negotiated individually to meet the needs of each commercial customer.

5. Proposal with Respect to Categories of Services to be Provided: Cox proposes to provide broad categories of cable service responsive to the needs and interests of the Tucson community. These categories will include news, weather, sports, local, state and national politics, lifestyle, arts and culture, science, documentary, foreign-language, educational, children and family-oriented, and faith-based programming, as well as general entertainment and premium motion picture and pay-per-view channel offerings. *See* Cox Proposal, § 13(a). This proposal conforms to the maximum commitment permitted by federal law. *See* 47 U.S.C. § 544(b)(2)(B).

The City has identified a community need for and interest in receiving entertainment on demand. Cox expects to begin offering entertainment on demand services during the term of the license agreement. As fully explained in Section II.C.2 of the Legal Memorandum, however, federal law prohibits the City from requiring that Cox provide programming in this manner. *See* 47 U.S.C. § 544(e). Therefore, a guarantee of entertainment on demand is inappropriate for a license agreement and is not included in the Cox Proposal.

6. Customer Service Standards: Cox proposes to adhere to the customer service standards established by the Federal Communications Commission. The Cox Proposal, however, incorporates a minor amendment to those standards that the City has previously accepted. Pursuant to this previous agreement between Cox and the City, the final sentence of 47 C.F.R. § 76.903(c)(1)(ii) is modified in the Cox Proposal to require that: "These standards shall be met no less than eighty percent (80%) of the time under normal operating conditions, measured on a quarterly basis." *See* Cox Proposal, § 13(b).

7. Proposal with Respect to Public, Educational and Government (PEG) Use of the System, Including Institutional Networks: Cox proposes the maximum amount of PEG channel capacity and support permitted by Arizona law. *See* A.R.S. § 9-506(D)(1). The Cox Proposal would provide the City two (2) PEG channels on Cox's basic service tier and two (2) channels of noncommercial governmental programming on its digital service tier. *See* Cox Proposal, § 15. Cox also proposes to include contract language that would permit Cox and the City to conclude separate agreements for the carriage of additional PEG programming, so long as the fair market value of providing that service are offset against Cox's license fee payments in accordance with Arizona law. *See* Cox Proposal, § 15(b)(7); *see also* A.R.S. § 9-506(E).

The Cox Proposal eliminates all provisions regarding capital or support payments for PEG channels. Although the City claims to have ascertained a community need for such payments, Cox disputes the validity of that claim, and Arizona law prohibits the City from requiring PEG capital or support payments beyond the five percent (5%) of Gross Revenues fee the City may require as a condition of the license. *See* Ascertainment Analysis, attached to this response as Exhibit A; A.R.S. § 9-506(C)(3). The Cox Proposal assumes the City would prefer simply to collect its maximum permissible license fee payment and direct the funds collected according to the City's needs. If the City wishes to commit in a renewal license agreement that it will allocate a certain amount of the license fees it collects to PEG support purposes, Cox will agree to any allocation the City devises, so long as the total payments do not exceed five percent (5%) of Gross Revenues as defined by Arizona law.

The Cox Proposal includes no support for the City's existing I-Net or commitments for any construction of a new I-Net for Tucson's schools. As explained in Sections II.A and II.C.3 of the Legal Memorandum, Arizona law prohibits the City from requiring that Cox provide such services or support, and specifically bans all requirements for "in-kind services or . . . payments" other than the channel capacity specified therein. *See* A.R.S. § 9-506(D). Under Arizona law, the City may collect no more than five percent (5%) of Cox's Gross Revenues under the license. If the City desires an I-Net for its public schools or support for the municipal I-Net, it may devote a portion of the license fees it collects from Cox to that purpose. Moreover, as explained in the Legal Memorandum, federal law also prohibits the City from requiring Cox to construct an I-Net. *See* Legal Memorandum at 20-21 (citing 47 U.S.C. §§ 531(b), 541(b)(3)(D); *Dallas v. FCC*, 165 F.3d 341, 351 (5th Cir. 1999)).

8. **Rate Guarantees:** The Cox Proposal includes no guarantees regarding Cox's future rates. As Cox explains further in response to Section III, Question 5 and in Section II.C.5 of the Legal Memorandum, federal law prohibits the City from regulating Cox's rates because the FCC has determined that Cox is subject to effective competition in the Tucson license area. Cox's rates are constrained by the market price for comparable multichannel video services.

The City should note, however, that the Cox Proposal incorporates provisions of Arizona law that will pass through to customers any reduction in costs associated with the new limitation on the collection of certain PEG-related fees. *See* A.R.S. § 9-506(C)(4). The Cox Proposal therefore provides definite rate benefits to customers by limiting Cox's need to surcharge customers for the costs associated with supporting the eight (8) PEG channels Cox has been required to provide under the current license.

9. **License Fee:** Cox proposes to pay the City a license fee of five percent (5%) of its Gross Revenues. *See* Cox Proposal, § 5. This is the maximum percentage permitted by federal law. The Cox Proposal incorporates the definition of Gross Revenues that is now required by Arizona law, *see* A.R.S. § 9-505(6), and includes appropriate language in the sections dealing with PEG channels to ensure that all PEG benefits are properly

accounted for when calculating the amount of license fees due to the City. *See* A.R.S. § 9-505(D). *See also* Cox Proposal, §§ 1(h), 15.

Because the proposed license agreement would take effect before January 1, 2008, the Cox Proposal also expressly incorporates the license fee phase-in terms of A.R.S. § 9-506(H). This guarantees that the City will at all times receive the maximum license fee permissible under Arizona and federal law. *See* Cox Proposal, § 5(g).

10. Remedies for past performance deficiencies identified by the City: As demonstrated elsewhere in Cox's RFRP response, in the attached Legal Memorandum, and in the License Fee Audit Analysis attached to this response as Exhibit C, Cox's performance at all times has equaled or exceeded the requirements of its current license, and the alleged deficiencies identified by the City are either specious or simply erroneous. Cox therefore offers no specific proposal regarding past performance deficiencies. Nevertheless, Section 2(h) of the Cox Proposal addresses the viability of claims that Cox's performance under the current license has been deficient. Specifically, the Cox Proposal would permit the City to recover "all amounts lawfully owed City and subscribers under its prior license for which claims are made within any applicable statute of limitations." The Cox Proposal also would indemnify the City for any liability stemming from any deficient performance by Cox under the current license agreement. *See* Cox Proposal, § 2(h).

11. Miscellaneous: Cox used the current Tucson license agreement as the foundation for the Cox Proposal. To enhance readability, understanding, and identification of amended provisions, Cox offers the proposed license agreement in its entirety for consideration and approval by the City along with a redlined document that highlights the changes between Cox's existing License and the Cox Proposal.

The Cox Proposal amends or eliminates several provisions for which the City has not ascertained a community need or interest. These provisions include those related to: the City's level playing field guarantee (former Sections 2(e)(4)-(5)); renegotiation rights associated with changes in law (portions of former Section 3(a)); sale or transfer of the license (former Section 4); indemnification rights (former Section 7(a)(2)); security fund and letter of credit requirements (former Sections 8(a)-(e)); procedures for recovering liquidated damages (former Section 9(b)(1)-(5)); rate regulation (former Sections 12(a)-(c)); City inspection of Cox's upgraded cable plant (portions of former Section 14); certain bookkeeping requirements (former Section 18); and the City's right to purchase Cox's Cable System (former Section 21). Given the absence of any expressed need for these provisions, among other things, no reason exists to include them in a renewed license agreement.