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RESPONSE TO RFRP PART III

III. SUPPORT FOR PROPOSAL/MANDATORY QUESTIONS

1. Does the company believe the proposal reasonably meets the cable-related needs and interests of the community identified in the needs assessment?

Yes. As fully described in the Legal Memorandum and as summarized below, Cox's Proposal reasonably meets each of the City's ascertained needs and interests consistent with the limits of federal, state, and local law.

2. If the answer to the foregoing is yes, please explain why, with respect to each element of the proposal. If the answer is no, please explain why the company nonetheless believes its license should be renewed. Any statements should be supported by a person who would be competent to testify if this matter were to proceed to a formal administrative hearing.

The Cox Proposal is designed to fulfill the City's ascertained needs and interests without violating federal, state, or local law, and without burdening Cox subscribers with unreasonable costs. If Cox guarantees the City the maximum benefits that it may require under applicable law, then Cox's Proposal on that point "reasonably meets the cable-related needs and interests of the community." In other words, if the City has identified a need or interest that exceeds the limitations of federal or state law, then that need or interest is unreasonable and the City cannot lawfully require Cox to fulfill it or deny Cox's renewal proposal on that basis.

The City unfortunately conducted its ascertainment without regard for the limitations state and federal law place on what that the City may demand, or, in many cases, on what Cox may lawfully provide. Therefore, the City may not require Cox to provide *any* funds or support for a number of the City's ascertained needs and interests as a condition of renewing Cox's license. These include four (4) requests that are barred by federal law:

- ***Construction of Institutional Network ("I-Net") Facilities for Public Schools. See Findings on Cable-Related Needs and Interests and Past Performance at 18 (Sec. B.6(c)) ("Findings").*** As noted in Part II, Question 7, and as fully explained in Section II.C.3 of the Legal Memorandum, the City is prohibited by federal law from requiring Cox to construct an I-Net for the City or its schools. *See* 47 U.S.C. §§ 531(b), 541(b)(3)(D); *Dallas v. FCC*, 165 F.3d 341, 351 (5th Cir. 1999).
- ***Entertainment On-Demand ("EOD") for PEG and Entertainment Programming. See Findings at 15 (Sec. B.1.b.), 16 (Sec. B.2.e.)*** As noted in response to Part II, Question 5, and as fully explained in Section II.C.2 of the Legal Memorandum, federal law prohibits the City from requiring Cox to provide EOD services, regardless of whether the requirement involves entertainment or PEG services. *See* 47 U.S.C. § 544(e). Cox plans to provide entertainment programming on demand because it believes that its Tucson customers will value such services, which therefore will be commercially

successful. Any commitment to provide the transmission technologies or subscriber equipment necessary to implement such services, however, cannot lawfully be required in the license agreement.

- ***High Speed Internet to Schools and Public Buildings and “Basic City Communications” Services.*** *See Findings at 18 (Sec. 6.c., d.).* As explained in Section II.C.4 of the Legal Memorandum, federal law prohibits the City from conditioning the renewal of Cox’s franchise on the provision of telecommunications services, information services, or other non-cable related services. The high speed Internet and basic communications services the City requests cannot therefore be a part of the renewal agreement.
- ***Rate Guarantees.*** *See Findings at 1.* As explained in Cox’s response to Question 5 below and in Section II.C.5 of the Legal Memorandum, federal law prohibits the City from regulating Cox’s rates. The City’s requests that Cox commit through its license agreement to a rate freeze constitute unlawful rate regulation and would be preempted and unenforceable even if agreed to. Cox’s rates are governed by the highly effective competitive market for multichannel video services in Tucson, and the FCC therefore revoked the City’s rate regulation authority in 2005. The City cannot interfere with the functioning of that market by forcing Cox’s rates below market levels.

The Cox Proposal therefore, does not include the above items.

The City’s ascertainment also includes a number of requests for PEG capital and support payments that Arizona law prohibits the City from imposing on Cox and its customers. These include:

- **Continuing Current Levels of Capital and Support Funding for PEG,** *see Findings at 17, 18 (Sec. B.3.a.; B.6.e.);*
- **Purchasing, Upgrading, and Replacing PEG Equipment,** *see Findings at 17, 18 (Secs. B.3.b., e; B.6.e.);*
- **Maintaining and Upgrading PEG Facilities,** *see Findings at 17 (Sec. B.3.c);*
- **Providing Operational Support for K-12 Educational Access,** *see Findings at 17 (Sec. B.3.d.);*
- **Providing Additional Capital and Support for Expansion of the Existing City I-Net,** *see Findings at 18 (sec. B.6.c., d.).*

As Cox explains in Section II.A of the attached Legal Memorandum, Arizona law prohibits the City from requiring Cox to provide any of these items in the form of earmarked capital or support funding unless those funds are deducted from the license fees Cox is required to

pay. Under the Cox Proposal, Cox will pay the City five percent (5%) of its Gross Revenues (as defined by Arizona law), which is the maximum payment permitted by federal and state law. The City may devote whatever portion of the permitted license fees it collects as it deems appropriate to the PEG needs and interests it has identified. The City cannot, however, force Cox and its customers to provide such funding, over and above the five percent (5%) license fee cap, as a condition of renewing Cox's license.

The City also has identified a community need and interest in having Cox provide seven (7) or eight (8) PEG channels, and has requested that this allotment be reexamined periodically to adjust the allocation "up or down" based on usage. *See Findings at 1, 15 (Sec. B.2.a.), 18 (Sec. 5.c.).* The Cox Proposal offers the maximum number of PEG channels the City may require under Arizona law. In addition, under the Cox Proposal, the City could negotiate separate agreements with Cox for additional channel capacity, although Arizona law requires the fair market value of that additional capacity to be less than and set off against the license fees Cox and its customers may be required to pay. Cox's Proposal reasonably satisfies the City's ascertained need by offering the maximum PEG channel capacity the City may lawfully require. If the City believes additional PEG capacity is desirable, then it must negotiate for access to additional capacity outside the formal renewal framework. The City also could fulfill its perceived need for additional PEG channel capacity by seeking to lease channels using the procedures established by the Federal Communications Commission. *See 47 C.F.R. § 76.701.*

By offering to provide the maximum number of PEG channels permitted under state law, Cox also satisfies the City's ascertained need and interest in ensuring that PEG channels are available to all subscribers of Cox video services. *See Findings at 16 (Sec. B.2.b.).* State law permits the City to require that Cox provide two (2) PEG channels on the basic service tier, *see A.R.S. § 9-506(D)(1)*, and Cox's Proposal ensures that it will provide those two channels. *See Cox Proposal at § 15(b)(1).* Cox's Proposal also offers the maximum additional two (2) digital PEG channels permitted by state law. *Compare A.R.S. § 9-506(D)(1) with Cox Proposal, § 15(b)(2).* At such time as Cox's Cable System ceases providing analog service, all PEG channels offered by Cox will be provided to all subscribers to the system. *See Cox Proposal, § 15(b)(2).*

The Cox Proposal fully incorporates most of the City's ascertained needs and interests that are not plainly prohibited under federal or state law.

- First, Cox proposes contract language to ensure that PEG channels are appropriately publicized, including language requiring the placement of PEG channels on program menus and sub-menus. *Compare Findings at 16 (Sec. B.2.d.) with Cox Proposal, § 15(f)(1).*
- Second, the Cox Proposal ensures that PEG signals will be transmitted to customers with the same level of care and quality as commercial channels. *Compare Findings at 16 (Sec. B.2.c.) with Cox Proposal, § 15(d)(2), (d)(4)(C).*
- Third, Cox proposes to satisfy the City's interest in maintaining the current

license fee revenues by continuing to provide the maximum license fee percentage permitted under federal and state law, five percent (5%) of Gross Revenues, as defined by Arizona law. *Compare Findings at 17 (Sec. B.4.) with Cox Proposal, §§ 1(h), 5.*

- **Fourth, the Cox Proposal is for a ten (10) year license term, which the City indicated would satisfy community needs and interests if Cox's Proposal satisfies the City's other ascertained needs and interests. *Compare Findings at 17 (Sec. B.5.a.) with Cox Proposal, § 2(a).* Because Cox's Proposal generally satisfies the City's ascertained needs and interests to the extent required and permitted by state and federal law, a ten (10) year term should be acceptable to the City.**
- **Fifth, the Cox Proposal ensures that changes to Cox's Cable System will not adversely affect PEG offerings. *See Findings at 18 (Sec. 5.b.).* The Proposal specifically outlines Cox's responsibility to provide the City with the maximum number of PEG channels permitted under state law, and it provides for the continued carriage of those channels through the only relevant foreseeable change to Cox's Cable System, the conversion to an all digital transmission mode. *See Cox Proposal, § 15(b).***
- **Sixth, the Cox Proposal includes language that satisfies the City's request for Cox to refrain from entering into exclusive agreements with PEG programming suppliers that would foreclose such programming from distribution through media other than Cox's Cable System. *Compare Findings at 18 (Sec. 6.b.) with Cox Proposal, § 15(c)(2).***
- **Seventh, Cox proposes changes to what the City describes as "provisions . . . that . . . the City believes it can impose unilaterally." *See Findings at 18 (Sec. 6.a.).* Although the City does not identify precisely what provisions it is describing, and although Cox does not concede that the City may impose these provisions "unilaterally," Cox foresees no major issues left to be resolved among the issues not specifically addressed by the RFRP. The changes that Cox proposes to the license agreement are included in Exhibits D and E.**

Cox's Proposal also adequately addresses the City's request that it upgrade the Cable System to 860 MHz by January 2009. Cox already had begun planning and preparations for upgrading the Cable System prior to receiving the RFRP. The Cox Proposal ensures that Cox's Cable System will be upgraded to 860 MHz within three (3) years after the effective date of the license agreement. Presuming the Cox Proposal goes into effect on September 1, 2007, following the expiration of its existing license, Cox plans to complete the upgrade by August 31, 2010. *Compare Findings at 15 (Sec. B.1.a.) with Cox Proposal, § 14(a)(2).* This proposal is sufficient to meet the City's ascertained need because it provides a reasonable timetable for upgrading the system. Upgrading the Cable System is an extremely complex and involved process, and the City's January 2009 timeframe for

completion simply is impractical because it would likely result in unnecessary service disruptions and inconvenience for Cox's Tucson customers. Cox's experience in upgrading the Cable System just a few years ago confirms that the longer timeframe will give Cox sufficient time to procure all necessary materials and allow it to complete the upgrade properly, conform to the high standards its Tucson customers deserve, and minimize the impact on the Cable System and customers. The City's timetable, on the other hand, likely would be physically impossible to meet due to the time needed to procure materials and secure the services of contractors and equipment installers. Even if that schedule could be met, the unnecessary rush would place unreasonable stresses on the Cable System and likely would lead to disruptions in service and great inconvenience to Cox's customers. For these reasons, Cox's Proposal reasonably meets the identified needs of the City.

Finally, the Cox Proposal reasonably satisfies the City's ascertained need and interest in receiving free cable service drops to public schools and buildings that will enable students and workers to receive PEG programming. *See Findings at 16 (Sec. B.2.f).* The Cox Proposal also includes free cable service to public buildings. Cox Proposal, § 15(f)(3). Although the Cox Proposal, like the current license agreement, does not specifically include free cable service to schools, Cox currently provides those services and has no plans to discontinue them. If, however, the City wishes to formalize the arrangement under which Cox provides those services, Cox would prefer such negotiations take place outside the formal renewal process.

3. If Cox contends that it cannot satisfy needs and interests in light of the "cost thereof" as referenced at 47 U.C.C. [*sic*] § 546(c), Cox should explain the basis for that contention, and provide the financial analysis on which it relies for the contention. Any statements should be supported by a person who would be competent to testify if this matter were to proceed to a formal administrative hearing. Cox should also provide:

a. A complete and detailed statement of sources and uses of funds for operation within the City of Tucson for the last five years, and a complete and detailed statement of sources and uses of funds projected for the next ten years. Major assumptions should be identified. Where sources and uses of funds cannot be specifically provided for the City of Tucson (because records maintained are not Tucson specific), the company should provide the information for the lowest corporate level for which the records are maintained; identify the level; and allocate the funds to City of Tucson operation, explaining the basis for the allocation. Where funds are used in a way that is used or useful in the provision of non-cable services, please (1) explain how expenses were allocated among cable services and non-cable services and (2) identify all non-cable services.

b. A balance sheet for the City of Tucson system as of year end for the last five years, and a pro forma balance sheet projected for the next ten years. Where the balance sheet is based upon an allocation, the company should provide the allocation information. Identify the value of the franchise included in the balance sheets.

c. Monthly revenue for the City of Tucson system detail identifying cable service revenue by type, the rate for the specific service and the number of subscribers taking the service

for the last five years consistent with the dates of information provided in a. and b. above.

d. A listing of all debt associated with the City of Tucson system and the repayment schedule for the last five years and projected financing needs for the next ten years consistent with the response to a. above.

Cox does not contend it is unable to satisfy the City's cable-related needs and interests because they are too expensive. Instead, the City's demands that are not reflected in the Cox Proposal generally are those that violate applicable law or place unreasonable burdens (other than cost) on Cox and its Tucson customers. In most cases where Cox's Proposal does not conform to the City's request, Cox offers to provide the City with the maximum benefit allowed by applicable law or with an alternative that is sufficient to meet the City's underlying need. For example, Cox proposes to provide the City with the maximum four (4) PEG channel capacity permitted by law to satisfy the City's expressed need for seven (7) or eight (8) PEG channels. The Cable System upgrade Cox has proposed similarly does not conform exactly to the City's January 2009 timetable. In Cox's experience, completion of the upgrade cannot physically or properly be completed by that date. Cox therefore has proposed upgrading the Cable System to 860 MHz as the City has requested, but proposes to complete the upgrade within three (3) years of the effective date of the renewed license to ensure the maximum level of service reliability and convenience for Cox customers.

Although Cox does not argue that it is unable to meet the City's demands due to their cost, Cox is providing cost estimates for many of the City's claimed needs. The City should be aware that many of its requests would place an unreasonable financial burden on cable subscribers, whose rates inevitably would rise due to the excessive and unlawful costs the City is seeking to impose on Cox and its customers. Cox estimates the costs of only those portions of the City's demands that are illegal under governing federal or state law at \$76,585,278 over the proposed ten-year term of Cox's renewal license (*i.e.*, a \$6.05 monthly assessment on each of Cox's 105,488 customers for 120 months). Over a ten (10) year license renewal term, these illegal costs include:

- **\$28,900,960 to satisfy the City's demand that Cox ignore the state-mandated reduction in PEG channels and associated PEG support;**
- **\$5,356,924 to satisfy the City's unlawful demand that Cox guarantee in its proposed license agreement to provide EOD;**

- **\$11,300,000 to satisfy the City's request for separate I-Net capital and use support contrary to Arizona law;¹ and**
- **\$34, 651,343 to satisfy the City's request that license fees and PEG support paid through surcharges on customer bills remain at current levels despite prohibitions in Arizona law.**

The costs imposed by the City's unlawful demands are in addition to the substantial costs Cox will incur by performing its lawful obligations under the renewal license. For example, Cox estimates it will be investing an additional \$36,337,557 to upgrade its cable plant to 860 MHz. This may not be an unreasonable cost in itself, but added to the other costs the City's renewal demands would place on Cox and its subscribers, Cox believes the costs are unreasonable. Indeed, Cox estimates that the raw cost of compliance with all the City's demands (*i.e.*, labor and materials only) would require Cox to spend \$114,442,533, or \$9.04 per customer per month for the ten (10) year term of the renewal. Cox, therefore, does not argue herein that the City's demands are unreasonable in light of these costs under Section 626(c) of the Act. Cox nevertheless reserves the right to raise this issue in any administrative hearing should the City reject the Cox Proposal.

Because Cox is not arguing that the City's demands are unreasonable in light of the cost, the City has determined that Cox is not required to provide the financial documents requested by subsections (a)-(d) of this question. *See* Letter from Joseph Van Eaton, attorney for the City, to David B. Rosenbaum, attorney for Cox, dated January 30, 2007 ("The financial data . . . is only required if Cox believes it cannot meet the identified needs and interests of the community in light of the cost of meeting those needs and interests.").

Nonetheless, to the extent the City's consideration of Cox's Proposal would be facilitated by access to some of the requested financial data, Cox is willing to provide portions of the information requested in subsections (b) and (c). In particular, the City may have access to limited balance sheet and revenue data for the Tucson system for the past five years. Cox is willing to make this proprietary and highly commercially sensitive information available for the City's inspection at a Cox facility within the City pursuant to Section 7A-22(6)(a) of the Tucson Code. If the City desires access to this data it should contact Cox through its attorneys to determine a mutually agreeable time and manner for the City to view this information.

¹ As explained in the Legal Memorandum, the costs exclude the construction costs that the City's RFRP apparently would require Cox to expend. These costs cannot be calculated because the City has not explained the size or scope of the I-Net it envisions. *See* Legal Memorandum at 20. As explained in the Legal Memorandum, the costs exclude the construction costs that the City's RFRP apparently would require Cox to expend. These costs cannot be calculated because the City has not explained the size or scope of the I-Net it envisions. *See* Legal Memorandum at 20.

