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Interoffice Memorandum

To: Michael Ortega, County Administrator
From: Adam Ambrose, Civil Deputy County Attorney
Date: March 29, 2013
Subject: Cox Communications cable television franchise renewal

Introduction

The cable franchise licensing agreement Cox Communications Arizona LLC expires August 2, 2014, and the franchisee has requested renewal, pursuant to terms contained in a proposed new Cable Television License Agreement, attached hereto. A summary of significant changes negotiated by the parties is included in the “Discussion” section, below.

Background

By this License Agreement the County renews the cable television franchise of Cox Communications Arizona, LLC, to serve County residents. The Agreement would take effect on August 3, 2014, the day after the current franchise agreement expires. It would extend for 15 years, through August 2, 2029, replacing the previous 15-year agreement, which took effect August 3, 1999. Cox is one of two County cable television franchisees, the other being Cable One Inc., with which the County also has a 15-year licensing agreement (entered into on August 10, 2004 and due to expire August 10, 2019).

Authority

The Telecommunications Act of 1996, 47 U.S.C. § 253, *et seq.*, grants state and local government agencies authority to regulate public safety and welfare aspects of cable television service, including terms governing quality of service and safeguards for consumers, provided that any such regulation is not over-burdensome and is not applied

in such a way as to discriminate among competitors seeking to provide such services to local jurisdictions. This means, *inter alia*, that the County may require cable franchisees to comply with local zoning laws and requirements for access to County rights of way. However, even within those parameters, if the County's regulations are too onerous they may be found to be pre-empted by federal law, which encourages free competition among service providers. *TCG New York, Inc. v. City of White Plains*, 305 F.3d 67 (2nd Cir. 2002), *cert. denied*, 538 U.S. 923 (2003) (local reporting and service requirements found to be too onerous).

Discussion

This proposed License Agreement is substantially the same in its terms as the current agreement with Cox, with some modifications to reflect changes in state law, discussed below, and a proposed increase in the basic franchise fee that the County charges the franchisee (from 2 percent of gross revenues to 3 percent of gross revenues). The franchise fee is the only source of revenue for the County from this Agreement. The cost of such fees is passed on to Cox customers in Cochise County, however, so in considering any fee increase the Board should be cognizant of the adverse economic impact it will have on its constituents, as well as the possibility that the amount of gross revenue to Cox could decline if it becomes less competitive and loses customers to satellite television providers, thereby reducing the amount the County receives.

Other changes (1) expand the definition of the "license area," also commonly referred to as the "service area"; (2) eliminate the right of the County to collect from Cox right of way permit fees in addition to the basic franchise fee; and (3) reduce "in-kind" services provided by Cox to government facilities, principally by eliminating free cable television service to schools. Most of these changes were precipitated by changes in state law enacted in 2006 by the Arizona State Legislature.

That legislation, codified in significant part at A.R.S. § 9-506, prohibits the County from charging separate fees "for the use of public streets, roads or alleys to provide cable service," A.R.S. § 9-506(C), or, if they do, they must offset against the franchise fee. A.R.S. § 9-506(E). Staff, in negotiating this contract, elected to go with the latter approach, requiring the franchisee to go through the normal right-of-way permit process, but entitling them to offset any such charges that they pay against the franchise fee. See Section 3.2 of the proposed Licensing Agreement).

In addition, that same legislation modified terms under which the County may demand "in-kind" services (i.e., basic cable television service to government installations). Local jurisdictions may still ask that "in kind" cable service be provided to their facilities, in

addition to the franchise fee, A.R.S. § 9-506(D)(3), but if they demand that in-kind services be provided to any other government entities which are not parties to the licensing agreement, then the value of that service may be offset against the franchise fee. A.R.S. § 9-506(E). Under the current agreement with Cox, at Section 3.11, the franchisee agrees to provide basic cable service to County offices, and to fire stations, police stations and public schools in the County. Cox has taken the position that, “as a part of our ongoing commitment to the communities that we serve,” Cox will continue to provide such service to other local government entities, but that it will offset the value of such service if it is included in the proposed Licensing Agreement renewing their franchise. Accordingly, rather than agreeing to offset the value of such in-kind programming service, the requirement to serve those local jurisdictions is eliminated from this Agreement. See Section 4.1.

Lastly, the “license area” that Cox is allowed to serve has been expanded from locations it currently serves to all “unincorporated areas of the County.” Section 1.13. This is consistent with the service area granted to Cable One in its franchise agreement, entered into in 2004. This is important because under the Telecommunications Act of 1996, at 47 U.S.C. §§ 253, and 541, local jurisdictions may not discriminate against one service provider in favor of another. Hence, if Cable One is entitled to serve all unincorporated areas of the County under its licensing agreement, then the county should grant the same privilege to the same extent to Cox. Fortunately, federal law does allow for new franchise agreements to be negotiated under current law without need to re-open and amend existing contracts with other carriers until those contracts expire. 47 U.S.C. § 557. So, although Cable One is entitled to the benefit of any contractual gain obtained by Cox, it has no right to such benefit until its contract is renewed in 2019. Also, as a general matter, competitors do not have to be treated identically by local licensing authorities, but should not be treated in a manner that is discriminatory in effect. *XO Missouri, Inc. v. City of Maryland Heights*, 256 F.Supp.2d 966 (.E.D. Mo. 2002).

AA:sml-b

Attach.