

CITY OF BETHEL HEIGHTS, ARKANSAS

ORDINANCE NO. 307

AN ORDINANCE GRANTING THE CITY OF BETHEL HEIGHTS, ARKANSAS THE AUTHORIZATION TO ENTER INTO AN AGREEMENT WITH COXCOM, LLC A DELAWARE LIMITED LIABILITY COMPANY (“COX”) IN REGARDS TO VIDEO PROGRAMMING

WHEREAS, Under Ark. Code Ann. § 14-54-302, the City is empowered and authorized to sell, convey, lease, or let any real estate or personal property owned or controlled by the City; and

WHEREAS, Under Ark. Code Ann. § 14-200-101, the City is permitted to impose reasonable terms and conditions on the use and occupation of the City’s ROW and to collect a reasonable franchise fee for such use and occupation of its ROW; and

WHEREAS, the City is authorized by the federal Cable Act (47 U.S.C. § 521, *et seq.*) to grant non-exclusive franchises to cable operators for the construction, operation, and maintenance of a cable system to provide cable service.

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF DIRECTORS OF THE CITY OF BETHEL HEIGHTS, ARKANSAS that the City and COXCOM, INC. hereby agree as follows:

1. Requirements. For the reasons set forth herein, the parties agree to enter into this agreement for the exclusive and limited purpose of addressing the provision by COX of wire-line video service within the City.

1.2. COX shall comply with the lawful application of all applicable provisions of the Code of Ordinances of the City, state and federal law with respect to the location of COX’s Cable System in the ROW, including generally applicable permitting requirements that may be required under the Ordinances of the City, as it now exists or as it may be amended from time to time.

2. Term. The term of this Agreement shall be from the Effective Date of this Agreement through December 31, 2016. The term may be extended upon mutual agreement of the Parties in writing.

3. Compensation to City.

3.1. During the term of this Agreement, COX shall pay to City a fee equal to two percent (2%) of the Gross Revenues derived from the provision of COX’s Cable Service which fee shall be paid annually (“Cable Service Provider Fee”). COX will remit the Cable Service Provider Fee pursuant to this Agreement irrespective of the classification of this service under the Federal Communications Act. Such fees shall be paid to the City within forty-five 45 days

after the end of the preceding quarter for which payment is made. The provider may designate that portion of the subscriber's bill attributable to any fees imposed pursuant to this Agreement and recover such amount from the subscriber as a separate line item of the bill. The Cable Service Provider Fee shall be in lieu of any permit fee or other fee that could otherwise lawfully be imposed by the City on COX in connection with work done in the public ROW; however, nothing in this Agreement shall restrict the right of the City to impose ad valorem taxes, or other taxes that are lawfully imposed on a majority of all other businesses by the City.

3.1.1 In the event, the City grants any other video service provider a percentage (%) rate for calculating the video fee that is different than the applicable Video Service Provider Fee percentage (%) under this Agreement, this Agreement shall, on 60-days written notice, adjust the applicable Video Service Provider Fee to the different percentage (%) rate given to the incumbent provider, provided that such different rate does not exceed the maximum permitted by 47 U. S. C. § 542 (b). Notwithstanding the provisions of this section, nothing herein shall change the definitions of those items included in gross revenues subject to the Video Service fee as defined in this Agreement.

3.2. Payment shall be accompanied by a report, in such form and containing sufficient detail to determine COX's compliance with this Section, not later than forty-five (45) days after the last day of each March, June, September, and December, throughout the term of this Agreement setting forth the Gross Revenue for the quarter ending on said last day. In the event that a Cable Service Provider Fee payment or other sum due is not received by the City on or before the date due, COX shall pay in addition to the payment, or sum due, interest from the due date at the maximum legal rate of interest set forth in State Law. The City shall have the right to audit any such payment for a period of Four (4) years, and no acceptance of any payment shall be deemed final until the period for audit shall have expired.

3.3. For purposes of this Agreement, Gross Revenues are limited to amounts billed to and collected from COX Cable Service product subscribers for the following:

- (a) recurring charges for Cable Service;
- (b) event-based charges for Cable Service, including but not limited to pay-per-view and video-on-demand charges;
- (c) rental of set top boxes and other Cable Service equipment;
- (d) service charges related to the provision of Cable Service, including, but not limited to, activation, installation, and repair;
- (e) administrative charges related to the provision of Cable Service, including, but not limited to service order and service termination charges;
- (f) Cable Service Provider Fees;
- (g) late payment fees; and
- (h) maintenance fees.

3.4. For purposes of this Agreement, Gross Revenues do not include:

- (a) uncollectible fees, provided that all or part of uncollectible fees which is written off as bad debt but subsequently collected fees, shall be included in Gross Revenues in the period collected;
- (b) discounts, refunds, and other price adjustments that reduce the amount of compensation received by COX

- (c) amounts billed to cable television subscribers to recover taxes, fees or surcharges imposed by any governmental authority on the transaction between COX and subscribers in connection with the provision of IP Video Services; and
- (d) revenue from the sale of capital assets or surplus equipment.

4. Equal Protection. The right to use and occupy the City's Public Ways for the purpose herein provided shall not be exclusive; provided, however, that no Person shall enter into the City's Public Ways for the purpose of constructing or operating a Cable System, or for the purpose of providing Cable Service or video programming service to any part of the Service Area, including by means of an "open video system" (as such term is defined in the Cable Act), without first obtaining a Franchise, permit, license, authorization or other agreement from the City. In the event the City authorizes or permits any Person other than the Grantee to enter into the City's Public Ways for the purpose of constructing or operating a Cable System, or for the purpose of providing Cable Service or video programming service to any part of the Service Area, including by means of an "open video system" (as such term is defined in the Cable Act), the material provisions thereof shall be reasonably comparable to those contained herein, and the obligations imposed on the grantee hereunder shall be no less burdensome nor more favorable than the obligations imposed upon the Grantee hereunder, in order that one operator not be granted an unfair competitive advantage over another, and to provide all parties equal protection under the law.

5. Emergency Message. COX shall carry all Federal, State and Local alerts provided over the "Emergency Alert System" through COX's Cable Services in the event of a public safety emergency, which at a minimum will include the concurrent rebroadcast of local broadcast channels.

6. Customer Service Standards. COX shall comply with the customer service requirements set forth in 47 C.F.R. Section 76.309(c), as such requirements may be amended from time to time. The requirements of 47 C.F.R. 76.309(c) are set forth in Attachment A to this Agreement, but are intended to be identical to the federal law and shall be deemed automatically amended should 47 C.F.R. 76.309(c) be amended.

7. Service Area. This Agreement shall apply to COX's service area within the municipal boundaries of Bethel Heights as they exist upon the date of execution of this Agreement and may hereafter be extended.

8. Removal. Upon abandonment, COX will, at the City's written request and within a reasonable amount of time, remove from the City ROW any visible equipment that COX used exclusively for its Cable Service.

9. Breach of Agreement. Should either Party claim that a breach of any part of this Agreement has occurred, that Party will provide prompt written notice to the other, specifying the nature of the breach; and upon receipt the other party shall cure such breach within sixty (60) days.

10. Dispute Resolution. Except as otherwise provided in this Agreement, the Parties shall, prior to any court action, make diligent good faith efforts to resolve all issues and disputes that arise in the administration of this Agreement through discussions between designated representatives of the Parties and use of a mediator when such discussions have failed.

11. Non-discrimination. COX shall not deny access to its Cable Service to any group of potential residential customers because of the income of the residents of the local area in which such group resides.

12. Certification of Self-Insurance and Indemnification Obligations.

12.1 COX is self-insured in an amount beyond which the City would normally require under any insurance policy, including for commercial general liability, automobile liability, and workers' compensation. Therefore, upon written request after the Effective Date of this Agreement, COX shall furnish a certificate(s) or statements of self-insurance to the City and shall inform the City if the level of self-insurance changes.

12.2 COX agrees to indemnify, defend, and hold harmless City, its officers, agents, and employees ("Indemnified Parties"), from and against any lawsuits, claims, causes or action, actions, liabilities, demands, damages, judgments, settlements, disability, losses, expenses (including reasonable attorney's fees and disbursements) and costs, that any of the Indemnified Parties may at any time suffer, sustain or incur arising out of, based upon or in any way connected with COX's negligent construction, operation, or maintenance of its Cable System, provided that City shall give COX written notice of its obligation to indemnify City within fifteen (15) days of receipt of a claim or action pursuant to this subsection. Notwithstanding the foregoing, COX shall not indemnify City for any damages, liability or claims resulting from the negligence or willful misconduct of City, its officers, agents, employees, attorneys, consultants, independent contractors or third parties or for any activity or function conducted by any person or entity other than COX in connection with PEG programming.

12.3 With respect to COX's indemnity obligations set forth above, COX shall provide the defense of any claims brought against City by selecting counsel of COX's choice to defend the claim, subject to the consent of City, which shall not be unreasonably withheld. Nothing herein shall be deemed to prevent City from cooperating with COX and participating in the defense of any litigation by its own counsel at its own cost and expense, provided, however, that after consultation with City, COX shall have the right to defend, settle or compromise any claim or action arising hereunder, and COX shall have the authority to decide the appropriateness and the amount of any such settlement. In the event that the terms of any such settlement do not include the release of City and City does not consent to the terms of any such settlement or compromise, COX shall not settle the claim or action, but its obligation to indemnify City shall in no event exceed the amount of such settlement.

13. Notices. Any notice to be given under this Agreement shall be in writing and may be delivered to either personally, by facsimile or by certified or registered mail with postage prepaid and return receipt requested, addressed as follows:

If to City:

Mayor, City of Bethel Heights
530 Sunrise Dr.
Bethel Heights, Arkansas 72764

If to COX:

COX Communications
Attention: Vice-President of Government Affairs
901 So. George Washington Blvd.
Wichita, KS 67211

With a courtesy copy to:

Cox Communications, Inc.
ATTN: Government Affairs
1400 Lake Hearn Dr.
Atlanta, GA 30319

14. Compliance with Laws. COX shall comply with all applicable federal, state and local laws during the term of this Agreement, to the extent such laws apply to COX and to its obligations under this Agreement.

16. Taxes. Nothing contained in this Agreement shall be construed to exempt COX's Cable Service from any tax, levy or assessment which is or may later be properly authorized by law; provided any tax, levy or assessment on any COX product is equally applicable to all other businesses in the City.

18. Books and Records; City's Right of Inspection and Audit

18.1. COX shall maintain books of account and records adequate to enable COX to demonstrate that it is in compliance with the obligation to pay the fees described in Section 3.1 and Section 4.2 of this Agreement with respect to its Cable Service. COX shall also maintain books and records to demonstrate COX's compliance with all other terms of this Agreement. COX shall not be required to maintain books and records for compliance purposes under this Agreement for a period longer than the applicable Arkansas State Statute of Limitations for contract matters.

18.2. The City shall have the right to audit COX, with respect to any payment made under this Agreement, within the applicable Arkansas State Statute of Limitations for contract matters. The City may recompute any amounts determined to be payable in satisfaction of the fees described in Section 3 and 4 of this Agreement with respect to COX's Cable Service. Any additional and valid amount due the City as a result of the audit shall be paid by COX within thirty (30) days after COX receives a written notice from the City. The notice that the City sends to COX shall include a copy of the audit report.

18.3. In the event that payment of any valid fees described in Section 3.1 of this Agreement with respect to Cable Service that has been recomputed pursuant to Section 18.2 above is not made on or before the expiration of thirty (30) days following written notice by the City, COX shall be charged and shall pay, in addition to the amount due, interest from the due date at the maximum legal rate of interest set forth in State Law.

18.4. City acknowledges that some of the records which may be provided by COX may be classified as confidential or proprietary and, therefore, may subject COX to competitive disadvantage if made public. City shall therefore maintain the confidentiality of any and all records provided to it by COX subject, including cooperating with COX in protecting such

confidential or proprietary information in the event an open records or similar request is received by the City pursuant to applicable laws.

18.5. City and COX acknowledge that all notifications required pursuant to this Agreement constitute a condition precedent that must be timely met prior to either party bringing any claim or lawsuit arising out of this Agreement.

19. Furnishing of Information. Each Party shall cooperate to make available or cause to be made available information requested by the other Party relating to this Agreement and each Party's obligations under this Agreement to the extent such information may be requested in writing by a Party and is in the possession or the control of the other Party. Any disputes between the Parties as to any information requested pursuant to this Section shall be subject to the dispute resolution process described in Section 10 of this Agreement.

20. Termination and Revocation of Agreement. A verified and continuing pattern of noncompliance with any material provision of this Agreement shall constitute a material breach of this Agreement. This Agreement may be revoked, after a full due process hearing, by a simple majority vote of the City Council upon the recommendation of the City, for a material breach of this Agreement after giving COX at least thirty (30) days notice in writing of intention to revoke such Agreement, unless such violation is corrected during the period of notice, or unless COX has made a reasonable attempt to correct the violation during that time and is unable to correct such violation despite such reasonable attempts. The time for COX to correct any violation or liability shall be extended by the City if the necessary action to correct such violation is of such a nature or character as to require more than thirty (30) days within which to perform, provided COX provides written notice that it requires more than thirty (30) days to correct such violations and commences the corrective action within the thirty (30) day period and thereafter uses reasonable diligence to correct the violation.

20.1. In addition to all other rights, powers, or remedies pertaining to the City in connection with this Agreement or otherwise, the City reserves the right to terminate this Agreement and all rights and privileges of COX under this Agreement if any of the following events shall occur and not be cured in a timely manner.

a. Substantial failure on more than one occasion to comply with any material provision of this Agreement or any other local, state, or Federal law or regulation of a nature such as to prevent COX from carrying out all of the terms of this Agreement for a period of more than one (1) month.

b. COX does not pay any undisputed portion of the fees, payments, or contributions required under this Agreement, when due and payable under this Agreement.

c. Any material representation or warranty made by COX in connection with this Agreement shall be false in any material respect when made.

d. COX shall violate any other material covenant, agreement or condition of this Agreement and such violation shall not have been corrected, within such reasonable period of time to cure as granted to COX by the City pursuant to the provisions of this Agreement.

e. COX attempts to evade any of the provisions of this Agreement or practices any fraud or deceit upon the City or upon subscribers.

21. Inspection Rights.

21.1. The City shall have the right to inspect, upon reasonable prior written notice, and at its expense, all construction and installation work performed by COX of Cable Service specific facilities on the public rights-of-way as it shall find necessary to ensure compliance with a specified permit. Any such inspection shall be solely for the benefit of the City.

22. Amendment of this Agreement.

22.1. This Agreement may be amended or modified only by a written instrument executed by both Parties or as otherwise provided by law or the occurrence of any condition stated herein.

22.2. Except as provided below, the Parties agree to consult in the event that any court, agency, commission, legislative body, or other authority of competent jurisdiction issues a finding that limits the validity or enforceability of this Agreement, in whole or in part. Should the finding be final, non-appealable and binding upon either the City or COX, this Agreement shall be deemed modified or limited to the extent necessary to address the subject of the finding unless either Party, within thirty (30) days of receipt of the ruling, provides written notice to the other Party of election to terminate, in which case this Agreement shall terminate within six (6) months or such earlier period as the Parties mutually may agree. Where the effect of a finding is a modification, the Parties shall enter into good faith negotiations to modify this Agreement in the manner which best effectuates its overall purposes and the intentions of the Parties. Failure to reach a mutually satisfactory modification within ninety (90) days of the commencement of such efforts shall entitle either Party to terminate this Agreement on the provision of thirty (30) days' written notice.

23. Assignment. COX may not assign or transfer this Agreement or any interest therein, without the prior consent of the City, which consent shall not be unreasonably withheld or delayed.

23.1. Notwithstanding anything to the contrary, no consent shall be required, however, for (1) a transfer of an agreement or any interest therein to an Affiliate or (2) a transfer in trust, by mortgage, hypothecation, or by assignment of any rights, title or interest of COX in this Agreement or the system in order to secure indebtedness.

23.2. In the event of a transfer of this Agreement the transferee or assignee must agree, in writing, to be bound by the terms of this Agreement subject to applicable law.

24. Entire Agreement. This Agreement constitutes the entire agreement between City and COX with respect to the subject matter contained herein and supersedes all prior or contemporaneous discussions, agreements, and/or representations of or between City and COX regarding the subject matter hereof.

25. Waiver. Failure on the part of either Party to enforce any provision of this Agreement shall not be construed as a waiver of the right to compel enforcement of such provision or any other provision.

26. Miscellaneous.

26.1. COX and City each hereby warrants that it has the requisite power and authority to enter into this Agreement and to perform according to the terms hereof.

26.2. The headings used in this Agreement are inserted for convenience or reference only and are not intended to define, limit or affect the interpretation of any term or provision hereof. The singular shall include the plural; the masculine gender shall include the feminine and neutral gender.

26.3. COX and City shall cooperate fully with one another in the execution of any and all other documents and in the completion of any additional actions including, without limitation, the processing of permits that may be necessary or appropriate to give full force and effect to the terms and intent of this Agreement.

26.4. Nothing contained in this Agreement is intended or shall be construed as creating or conferring any rights, benefits or remedies upon, or creating any obligations of the Parties hereto toward any person or entity not a party to this Agreement, unless otherwise expressly set forth herein.

26.5. For purposes of this Agreement:

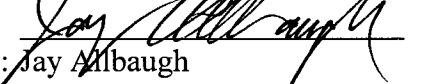
“Cable Service” shall have the same meaning as the definition found at 47 U.S.C. § 522(6);

“Cable System” shall have the same meaning as the definition found at 47 U.S.C. § 522(7).

27. Counterpart Execution. This Agreement may be signed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute one and the same agreement. Signature pages may be transmitted by facsimile and any signature transmitted by facsimile will be given the same force and effect as an original signature.

IN WITNESS WHEREOF, the parties hereto, by their duly authorized representatives, have executed this Agreement and made the same effective as of this 17th day of April, 2012.

COXCOM, LLC

By: 
Name: Jay Allbaugh
Title: Vice President, Government & Public Affairs

CITY OF BETHEL HEIGHTS, ARKANSAS

By: 
Name: Jeff Hitchenson
Title: Mayor

ATTACHMENT A

Customer Service Standards as described in Section 6 of the Agreement:

6.1. COX will maintain a local, toll-free or collect call telephone access line that will be available to subscribers to its Cable Services twenty-four (24) hours a day, seven days a week. Trained COX representatives will be available to respond to customer telephone inquiries during normal business hours. After normal business hours, the access line may be answered by a service or an automated response system, including an answering machine. Inquiries received after normal business hours must be responded to by a trained company representative on the next business day, except for service interruptions.

6.2. Under normal operating conditions, telephone answer time by a customer representative, including wait time, shall not exceed thirty (30) seconds when the connection is made. If the call needs to be transferred, transfer time shall not exceed thirty (30) seconds. These standards shall be met no less than ninety (90) percent of the time under normal operating conditions, measured on a quarterly basis. COX will not be required to acquire equipment or perform surveys to measure compliance with the telephone answering standards described in this Section unless an historical record of complaints indicates a clear failure to comply.

6.3. Under normal operating conditions, an COX customer will receive a busy signal less than three (3) percent of the time.

6.4. COX customer service center and bill payment locations will be open at least during normal business hours and will be conveniently located.

6.5. Under normal operating conditions, each of the following four standards related to installations, outages and service calls will be met no less than ninety-five (95) percent of the time measured on a quarterly basis:

a. Standard installations will be performed within seven (7) business days after an order has been placed. "Standard" installations are those that are located up to one hundred twenty-five (125) feet from the existing distribution system.

b. Excluding conditions beyond the control of COX, COX will begin working on "service interruptions" promptly and in no event later than twenty-four (24) hours after the interruption becomes known. COX must begin actions to correct other service problems the next business day after notification of the service problem.

c. The "appointment window" alternatives for installations, service calls, and other installation activities will be either a specific time or, at maximum, a four-hour time block during normal business hours. (COX may schedule service calls and other installation activities outside of normal business hours for the express convenience of the customer.)

d. COX may not cancel an appointment with a customer after the close of business on the business day prior to the scheduled appointment.

e. If a COX representative is running late for an appointment with a customer and will not be able to keep the appointment as scheduled, the customer will be contacted. The appointment will be rescheduled, as necessary, at a time that is convenient for the customer.

6.6. Refund checks will be issued promptly, but no later than either (i) the customer's next billing cycle following resolution of the request or thirty (30) days, whichever is earlier, or (ii) the return of the equipment supplied by COX if service is terminated.

6.7. Credits for service will be issued no later than the customer's next billing cycle following the determination that a credit is warranted.

6.8. The following definitions shall apply to the terms listed below; as such terms are used in Section 6 of the Agreement:

a. "Normal business hours" means those hours during which most similar businesses in the City are open to serve customers. In all cases, "normal business hours" must include some evening hours at least one night per week and/or some weekend hours.

b. "Normal operating conditions" means those service conditions that are within the control of COX. Those conditions that are not within the control of COX include, but are not limited to, natural disasters, civil disturbances, power outages, telephone network outages and severe or unusual weather conditions. Those conditions that are ordinarily within the control of COX include, but are not limited to, special promotions, pay-per-view events, rate increases, regular peak or seasonal demand periods and maintenance or upgrade of the Cable System.

c. "Service interruption," means the loss of picture or sound on one or more Cable Service channels.