

REVISED

Staff Summary Report

Council Meeting Date: 11/08/07

Agenda Item Number: 14

SUBJECT: Request Council approval authorizing the Mayor to execute an agreement between CoxCom, Inc. and the City of Tempe for the use of excess underground "city-owned" conduit by CoxCom to provide a fiber-optic network for the Fire Department.

DOCUMENT NAME: 20071108ITDH2 AMERICAN CABLE TELEVISION (0802-01)

SUPPORTING DOCS: No

COMMENTS: Use of the City's excess conduit capacity will speed up the delivery of services and prevent street trenching in the downtown area.

PREPARED BY: DAVE HECK, DEPUTY IT MANAGER (x8777)

REVIEWED BY: GENE OBIS, IT MANAGER (x8353)

LEGAL REVIEW: JENAE NAUMANN, ASSISTANT CITY ATTORNEY (x8402)

FISCAL NOTE: N/A

RECOMMENDATION: Staff recommends approval, authorizing the Mayor to execute an agreement between CoxCom, Inc. and the City of Tempe for the use of excess underground "city-owned" conduit by CoxCom to provide a fiber-optic network for the Fire Department.

**CONDUIT USE AGREEMENT
BETWEEN CITY OF TEMPE AND COXCOM, INC.**

C2007-___

This Conduit Use Agreement (“Agreement”) is made and entered into as of the ___ day of October, 2007, by and between the City of Tempe (“City”), a municipal corporation and CoxCom, Inc., a Delaware corporation (“Company”)

RECITALS

- A) WHEREAS, the Company, pursuant to its current cable license (the “License”) with City provides a PEG Channel for use by City and this channel is used by City Departments for training purposes.
- B) WHEREAS, both parties desire to construct a fiber network connecting all Police and Fire Stations and other municipal facilities.
- C) WHEREAS, City owns conduit in Fifth Street between Farmer Ave and Myrtle in Tempe, AZ, which has available capacity.
- D) WHEREAS, the ability of Company to use City’s excess conduit capacity in order to provide the necessary fiber feed for the City’s facilities (the “City Facilities”) as described on Exhibit A which is attached hereto and made a part hereof would reduce Company’s construction costs and expedite the provisioning of the fiber.

NOW, THEREFORE, for good and valuable consideration and intending to be legally bound hereby, the parties agree as follows:

1. City will provide the Company with access to and use of approximately 2000 feet of the City’s 1-1/4” interduct located in a 4”inch conduit running east-west along Fifth St between Farmer Ave. and Myrtle in Tempe, AZ (the “Interduct”).

2. City agrees to provide access to Company to install Company’s fiber optic and other cables (the “Company Facilities”) in City’s said conduit and to operate the Company Facilities in City’s said conduit, commencing upon the date of execution hereof. Subject to the terms and conditions of the License, this Agreement shall be in effect for as long as the Company provides Metropolitan-area Broadband Data Services (the “Services”) to the City Facilities. Notwithstanding the foregoing, Company may terminate the Agreement by providing City at least thirty (30) days written notice of its intent to terminate the provision of the Services to the City Facilities, in which event; this Agreement shall terminate on the date set forth in such written notice.

3. In addition to the right to access the City’s Conduit, Company shall have the right to access all necessary vaults, manholes, and handholes for the purpose of installation, maintenance, removal or repair of the Company Facilities in the Interduct. City shall provide a “knock-out” and sleeve into the manhole housing the Interduct located between Farmer Ave. and Myrtle, and Company will pull fiber through the Interduct for the purpose of providing CATV and Metropolitan-area Broadband Data services to City facilities.

4. Company will only use one (1) of the vacant interducts. The remaining interducts are reserved for future City use.

5. Both parties acknowledge this Agreement has been entered into solely for the purpose of providing CATV and Metropolitan-area Broadband Data services to the City Facilities. Any and all other uses are excluded.

6. Within ninety (90) days after termination of this Agreement, Company may remove the Company Facilities, or abandon same to City's ownership, and City may use or dispose of them, as City may decide. If City wishes, and upon written demand by City, Company shall remove the Company Facilities from City's said conduit. Except as otherwise provided under this Agreement, all right, title and interest in the Company Facilities shall at all times remain exclusively with Company, unless abandoned to the City.

7. City shall maintain the City's conduit, including the tubes of innerduct in the City's conduit installed by Company at City's expense, unless the same is damaged by Company, its employees, agents or contractors. If any maintenance to be performed by City is of the type that may cause interruption of the Company Facilities, City shall use commercially reasonable efforts to notify Company as soon as practical and shall schedule such maintenance at a mutually convenient time. If the City's conduit is damaged by Company, its employees, agents or contractors, then Company shall be solely responsible for the expenses incurred by the City in repairing or replacing the City's conduit. If the City's conduit and the Company Facilities are damaged by a third party or by the City, then the damaging party shall be responsible for repairing or replacing the City's conduit and Company Facilities.

8. If City is required to relocate the Company Facilities at any time during the term of this Agreement, City shall provide Company with thirty (30) days advance written notice and shall schedule any relocation of the Company Facilities at a mutually convenient time, and provided further that City shall be responsible for removing, reinstalling, repairing or replacing its conduit and Company shall be responsible for removing, reinstalling, repairing or replacing the Company Facilities located within the City's conduit. In the event of a required relocation, City shall provide Company with as much advance written notice as possible so that Company may remove the Company Facilities in a timely manner. If Company is unable to remove the Company Facilities from the City's conduit, City shall remove same and shall invoice Company for the reasonable cost and expense of removing the Company Facilities to allow City to timely relocate the City's conduit as required. City shall have no liability to Company for any interruption of communication services caused by relocation of the Company Facilities.

9. City and Company shall be liable, to each other and to third parties, for any losses resulting from their negligent acts and omissions, and the negligent acts and omissions of their employees acting within the scope of their employment, subject to applicable law. NOTWITHSTANDING THE FOREGOING, IN NO EVENT SHALL EITHER PARTY BE LIABLE FOR ANY INDIRECT, INCIDENTAL, CONSEQUENTIAL, SPECIAL, RELIANCE, PUNITIVE OR ENHANCED DAMAGES OF ANY KIND OR NATURE WHATSOEVER (INCLUDING BUT NOT LIMITED TO ANY LOST PROFITS, LOST SAVINGS, OR BUSINESS HARM)

ARISING OUT OF OR RELATING TO THE COMPANY FACILITIES OR THE CITY'S CONDUIT EVEN IF ADVISED OF THE POSSIBILITY OF SUCH DAMAGES.

10. In the event that either party fails to comply with any provision of this Agreement, which default shall not have been cured by the defaulting party within thirty (30) days of receipt of written notice from the other party specifying the nature of such default, then the non-defaulting party may at any time thereafter pursue any available remedy at law or in equity. Without limiting the generality of the foregoing, upon the occurrence of any material default, the non-defaulting party may (without undertaking any legal, administrative or dispute resolution action) revoke or terminate this Agreement upon written notice to the defaulting party; provided, however, in the case of default which cannot reasonably be cured within thirty (30) days, the defaulting party shall be granted such additional time as is reasonably necessary to cure such default in the sole judgment of the non-defaulting party (not to exceed sixty (60) days after receipt of the written notice of default) before revocation or termination of this Agreement.

11. In no event shall either party have any claim or right against the other party for any failure of performance by such other party if such failure of performance is caused by or is the result of (i) causes beyond the reasonable control of such other party, including, but not limited to, third party cable cuts, acts of God, fire, flood, or other natural disaster; (ii) laws, orders, rules, regulations, directions, or actions of governmental authorities having jurisdiction over this Agreement; (iii) any civil or military action including national emergencies, riots, war, civil insurrections, or (iv) taking by condemnation or eminent domain of a party's facilities or equipment ("Force Majeure"). If a Force Majeure occurs during the term of this Agreement, this Agreement shall remain in effect for a period of sixty (60) days from the date of the inception of such Force Majeure event but the parties' performance obligations under this Agreement shall be suspended for such sixty (60) day period. In the event the Force Majeure event continues for a period longer than sixty (60) days, either party may terminate this Agreement without incurring any liability to the other party.

12. This Agreement shall not be assigned by either party (except to a wholly owned affiliate thereof or an affiliate which is commonly owned) without the prior written consent of the other party (not to be unreasonably withheld), except that Company may, without consent by the City, assign its rights under this Agreement to any corporation or other entity which succeeds to all or substantially all the assets and operations of Company pursuant to any merger, consolidation, reorganization, sale of assets or similar transaction. The provisions hereof shall extend to and bind the successors and permitted assigns of the parties hereto.

13. If any provision contained in this Agreement shall, to any extent, be invalid or unenforceable, the remainder of this Agreement shall not be affected thereby, and each and every provision of this Agreement shall be valid and enforceable to the fullest extent permitted by law.

14. In the event that the term of this Agreement shall violate applicable law in the State of Arizona, then the relevant section of the provision granting such term shall be deemed null and void to the extent that it may conflict therewith without invalidating the

remaining provisions of this Agreement and Company shall be granted the maximum term permissible under the laws of the State of Arizona.

15. The parties to this Agreement intend that this Agreement shall be binding and legally valid upon them. In order to preclude any application of the Rule Against Perpetuities or any similar rule or provision which would otherwise invalidate and nullify this Agreement, the parties agree that this Agreement shall expire, unless otherwise previously terminated, on the last day of the time period legally permitted by the Rule Against Perpetuities in the State of Arizona.

16. All notices shall be in writing and deemed properly given or made upon receipt if delivered by registered or certified mail, postage prepaid to the addresses listed below. Any notice mailed as provided herein shall be deemed received on the fifth (5th) business day after being deposited with the U.S. Postal Service.

IN WITNESS WHEREOF, the parties have executed this Agreement as of the date set forth above.

CITY OF TEMPE, a municipal corporation

By: _____
HUGH HALLMAN
Mayor

COXCOM, INC.

By: _____
Its: _____
Title: _____

ATTEST:

City Clerk

APPROVED AS TO FORM:

City Attorney

Exhibit A - City Conduit Route

