

ORDINANCE NO. 1281

AN ORDINANCE GRANTING TO COASTCOM, INC., AN OREGON CORPORATION, A FRANCHISE TO CONSTRUCT, OPERATE, AND MAINTAIN A TELECOMMUNICATIONS NETWORK WITHIN THE CITY OF TILLAMOOK OREGON, AND DECLARING AN EMERGENCY

WHEREAS, CoastCom, Inc., an Oregon corporation provides telecommunications services within the City of Tillamook, Oregon; and

WHEREAS, CoastCom, Inc. (“Franchisee”) has applied for a telecommunications franchise pursuant to local ordinances relating to telecommunications located in the public rights of way, and the city of Tillamook (“City”) has reviewed said application and has determined that it meets the requirements of the City’s Ordinance subject to the terms and conditions stated herein;

NOW THEREFORE, the City of Tillamook Ordains as Follows:

Section 1. Definitions.

Gross Revenues: revenue received by Franchisee from its customers in the City derived from Telecommunications Services provided by Franchisee using the Telecommunications Network and as further described in Section 11, excluding any taxes, access or similar governmental fees or charges. All such revenue remains subject to applicable FCC rules and regulations which exclude revenues from internet access services while prohibited by law.

Rights-of-Way: the present and future streets, viaducts, roadways, alleys, public highways, and avenues in the City, including rights-of-way held in fee, or by virtue of an easement or dedication.

Telecommunications: the transmission between and among points specified by the user, of information of the user’s choosing, without change in the form or content of the information as sent and received.

Telecommunications Network: infrastructure owned by Franchisee or which Franchisee has the right to use under a third party agreement utilizing one or more facilities located within the Rights-of-Way, including, but not limited to, anchors, cables, conduit, laterals, lines, poles, vaults, wires, and other appurtenances, necessary or convenient to the provision of access to the Internet and Telecommunications Services.

Telecommunications Services: the offering of Telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities uses.

Section 2. Grant of Franchise. Subject at all times to applicable requirements in this ordinance and Franchisee’s site restorative duties, the City hereby grants to Franchisee, its successors and

assigns as authorized herein, a nonexclusive right, privilege, and authority to erect, construct, operate, repair, and maintain in, under, upon, along, across, and over the Rights-of-Way, its lines, poles, anchors, wires, cables, conduits, laterals, and other necessary or convenient fixtures and equipment, for the purpose of constructing, operating, maintaining, and repairing a competitive Telecommunications Network within the City (“Franchise”).

Section 3. Franchise Not Exclusive. The Franchise shall not be construed as a limitation upon the right of the City to grant to other persons or corporations, including itself, rights, privileges, and authority the same as, similar to or different from the rights, privileges, and authority herein set forth, in the Rights-of-Way, by franchise, permit or otherwise; provided, however, that any such grant shall be done in a competitively neutral and non-discriminatory manner with respect to the rights, privileges, and authority afforded Franchisee.

Section 4. Term and Termination. The term of this Franchise shall be ten (10) years, commencing with the effective date of this Ordinance. Thereafter, this Franchise shall continue in full force and effect for an additional ten (10) years unless notice is given by either party not less than ninety (90) days before expiration, of its intention to terminate or renegotiate Franchise terms. Upon termination or expiration of the Franchise, Grantee shall within one hundred and eighty days (180) remove all its facilities from the City’s Rights-of-Way. Should the Grantee fail to remove its facilities within the one hundred and eighty day period (180), the City may remove them. Franchisee shall bear all costs of facilities removal and site restoration at its sole expense.

Section 5. No Limitation of City Authority.

5.1 Except as provided in Section 6, nothing in this Franchise shall in any way be construed or interpreted to prevent or limit the City from modifying or performing any work in the Rights-of-Way, granting other franchises for use of the Rights-of-Way, or adopting general ordinances regulating use of or activities in the Rights-of-Way.

5.2 In the event that any portion of Franchisee’s infrastructure interferes with any present or future use the City desires to make of the Rights-of-Way, Franchisee shall upon request and at its sole expense, promptly relocate such infrastructure, and unless otherwise directed by the City, restore the area where such relocation occurs to as good a condition as existed before the work was undertaken. However, if Franchisee has relocated the same facilities at the request of the City within the prior two (2) years, then Franchisee’s cost of relocation and restoration shall be paid by the City if City requested the subsequent relocation.

5.3 Except as otherwise provided by law, and subject to Section 6, nothing in this Franchise shall be construed to give Franchisee any credit or exemption from any nondiscriminatory, generally applicable business tax, or other tax now or hereafter levied upon Franchisee’s taxable real or personal property, or against any permit fees or inspection fees required as a condition of construction of any improvements upon Franchisee’s real property and imposed under a generally applicable ordinance or resolution.

Section 6. Neutral Application. The City shall impose on a competitively neutral and nondiscriminatory basis similar terms and conditions upon other similarly situated providers of Telecommunications Services operating within the City. Any requirement imposed on Franchisee that is determined not in compliance with this Section 6 shall be unenforceable against Franchisee.

Section 7. Construction, Maintenance, and Repair of Infrastructure.

7.1 Franchisee may make excavations in the Rights-of-Way for the purpose of constructing, erecting, laying, maintaining, placing or repairing Franchisee's infrastructure, and shall repair, renew, and replace the same as reasonably possible to the condition that existed prior to such excavation. Franchisee shall obtain all necessary permits for such excavation and construction, and pay all applicable fees before any site-specific, construction work begins. Such work shall be done only in accordance with plans or designs submitted to and approved by the City, such plans to be evaluated by the standards applied to the construction of other similar Telecommunications systems in the City, and maintained by the City as confidential and exempt from public disclosure to the maximum extent allowed by law. Such work shall be performed in a good and workmanlike manner and in compliance with all rules, regulations or ordinances which may now exist, during the term of this Franchise, and/or be adopted by the City, or any other governmental authority having jurisdiction over the Rights-of-Way. Prior to commencing excavation or construction, Franchisee shall give appropriate notice to other franchisees, licensees or permittees of the City owning or maintaining facilities which may be affected by the proposed excavation or construction.

7.2 In the event emergency repairs are necessary for Franchisee's facilities, Franchisee may immediately initiate such emergency repairs. Franchisee shall give notice to the City's Department of Public Works by telephone, electronic data transmittal or other appropriate means as soon as is practicable after commencement of work performed under emergency conditions. Franchisee shall make such repairs in compliance with applicable ordinances and regulations, and shall apply for any necessary permits no later than the business day next following the discovery of the need for such repairs.

7.3 Franchisee shall construct and maintain its Telecommunications Network in a manner so as to not unreasonably interfere with the City's sewer or water systems or other facilities.

Section 8. Insurance.

8.1 During the term of this Franchise, Franchisee, at its own cost and expense, shall provide and maintain workers' compensation insurance for all its subject workers, and general liability insurance with a limit of not less than \$1,000,000 for each occurrence of bodily injury, and \$1,000,000 for property damage, which coverage shall include contractual liability coverage for the indemnity provided under this Franchise, and name the City, its officials, officers, employees, and agents as additional insureds with respect to Franchisee's activities pursuant to this Franchise.

8.2 Insurance policies provided by Franchisee shall include a provision requiring written notice by the insurer to the City not less than thirty (30) days prior to cancellation or material change in coverage. If insurance coverage is canceled or materially changed, Franchisee shall prior to the effective date of such cancellation or material change, obtain the coverage required under this Section 8, and provide the City with documentation of such coverage.

8.3 Within thirty (30) days of the effective date of this Franchise and of any change in insurance coverages and/or company, Franchisee shall provide the City with a certificate of insurance executed by an authorized representative of the insurer or insurers evidencing Franchisee's insurance coverages under subsection 8.1.

Section 9. Transfers and Change in Control.

9.1 Except as provided in subsection 9.3, Franchisee shall not sell or otherwise transfer its rights in this Franchise without the written consent of the City, such consent to not be unreasonably withheld. City here does not intend to limit in any way Franchisee's potential customers. However, City intends this Franchise be considered personal to Franchisee, except for the limited purposes otherwise provided in subsection 9.3 and subject to applicable requirements of subsection 9.2.

9.2 If Franchisee wishes to transfer its rights in this Franchise pursuant to a transfer requiring written consent of the City, then Franchisee shall give the City notice of the proposed transfer and request consent for the transfer. The City shall have sixty (60) days to act upon a request for consent to a transfer. If the City fails to render a final decision on the request within said sixty (60) days, then the consent shall be deemed given, unless Franchisee and the City agree to an extension of time. Within sixty (60) days following a transfer that required written consent of the City, Franchisee shall deliver to the City documentation evidencing the transfer and an acknowledgment of the transferee that it agrees to be bound by the terms and conditions of this Franchise. A transfer requiring consent of the City that is made without the written consent of the City shall render this Franchise subject to revocation.

9.3 Franchisee shall not be required to obtain consent of the City to Franchisee's use of its property or this Franchise as collateral. However, the Telecommunications Network franchised hereunder, including any portion thereof used as collateral, shall continue to be subject to the provisions of this Franchise. Franchisee shall not be required to obtain consent of the City to a sale of tangible assets of Franchisee or to a transfer of this Franchise to a Telecommunications Services company having a majority of its beneficial ownership held by Franchisee, a parent of Franchisee, or an affiliate of Franchisee.

9.4 "Franchisee's use of its property" does include any shared third-party fractional use of Franchisee's transmission infrastructure, e.g. band width or information transmission across cable or wire, for which Franchisee receives consideration and which consideration is included in Gross Revenue and subject to a Franchise Fee hereunder. "Franchisee's use of its property" does NOT mean attachment of additional infrastructure, e.g. cable, wire or wireless transmission equipment, to Franchisee's infrastructure for use by a third party.

Section 10. Indemnification. Each party shall indemnify and hold the other harmless for any losses, claims, damages, awards, penalties or injuries incurred by any third party, including reasonable attorney's fees, which arise from any alleged breach of such indemnifying party's representations and warranties made under this Franchise, provided that the indemnifying party is promptly notified of any such claims. The indemnifying party shall have the sole right to defend such claims at its own expense. The other party shall provide, at the indemnifying party's expense, such assistance in investigating and defending such claims as the indemnifying party may reasonably request. This indemnity shall survive termination of this Franchise.

Section 11. Compensation.

11.1 Franchise Fee. In consideration of permission to use the streets and Rights-of-Way of the City for the construction, operation, and maintenance of a Telecommunications Network within the Franchise area the Franchisee shall pay to City during the term of this Franchise an amount equal to seven percent (7%) of the Franchisee's Gross Revenues. This is the "Franchise Fee".

11.2 Modification Resulting from Action by Law. Upon thirty days notice and in the event any law or valid rule or regulation applicable to this Franchise limits the Franchise Fee below the amount provided herein, or as subsequently modified, the Franchisee agrees to and shall pay the maximum permissible amount up to the rate in subsection 11.1 above. If such law or valid rule or regulation is later repealed or amended to allow a higher permissible amount, then Franchisee shall pay the higher amount commencing from the date of such repeal or amendment, up to the maximum allowable by law up to the rate in subsection 11.1 above.

11.3 Payment of Franchise Fees. Payments due under this provision shall be computed and paid quarterly for the preceding quarter, as of March 31, June 30, September 30, and December 31, each quarterly payment due and payable no later than 45 days after such dates. Not later than the date of each payment, the Franchisee shall file with the City a written statement, in a form satisfactory to the City and signed under penalty of perjury by an officer of the Franchisee, identifying in detail the amount of gross revenue received by the Franchisee, the computation basis and method, for the quarter for which payment is made.

11.4 The Franchise Fee includes all compensation for the use of the City's Rights-of-Way. The Franchise Fee shall not be deemed to be in lieu of or a waiver of any ad valorem property tax which the City may now or hereafter be entitled to, or to participate in, or to levy upon the property of Franchisee.

Section 12. Extension of City Limits. Upon annexation of any territory to the City, the rights granted herein shall extend to the annexed territory to the extent the City has such authority. All facilities owned, maintained or operated by Franchisee located within any public rights-of-ways of the annexed territory shall be subject to all of the terms of this Ordinance.

Section 13. Right to Inspect Records. In order to manage Franchisee's use of the Rights-of-Way pursuant to this Franchise, and to determine and verify the amount of compensation due to the City under this Franchise, Franchisee shall provide, upon request, the following information in such form as may be reasonably required by the City: maps of Franchisee's

Telecommunications Network; the amount collected by Franchisee from users of Telecommunications Services provided by Franchisee via its Telecommunications Network; the character and extent of the Telecommunications Services rendered therefore to them; and any other related financial information required for the exercise of any other lawful right of Franchisee under this Franchise. The City agrees that such information is confidential and that the City shall use such information only for the purpose of managing the Rights-of-Way, determining Franchisee's compliance with the terms of this Franchise, and verifying the adequacy of Franchisee Fee payments. The City further agrees to protect such information from disclosure to third parties to the maximum extent allowed by law.

Section 14. Right to Perform Franchise Fee Audit or Review; Default. In addition to all rights granted under Section 13, the City shall have the right to have performed, a formal audit or a professional review of the Franchisee's books and records by an independent private auditor, for the sole purpose of determining the Gross Revenue of the Franchisee generated through the provision of Telecommunications Services under this Franchise and the accuracy of amounts paid as Franchise Fees to the City by the Franchisee; provided, however, that any audit or review must be commenced not later than 3 years after the date on which Franchise Fees for any period being audited or reviewed were due. The cost of any such audit or review shall be borne by the City.

Section 15. Right to Inspect Construction. The City or its representatives shall have the right to inspect all construction or installation work performed pursuant to this Franchise and to make such tests as it shall find necessary to ensure compliance with the terms of this Franchise and other pertinent provisions of law relating to management of the Rights-of-Way.

Section 16. Limited Waiver of Sovereign Immunity; Venue.

16.1 The City may have sovereign or other immunities which might prevent or impair enforcement or enjoyment of the terms of this Franchise. Without making a general waiver, limitation or modification of such sovereign or other immunities, the City hereby expressly grants, in favor of Franchisee, a limited, non-assignable waiver of its immunities for claims arising under this Franchise, it being the intent of the parties that the waivers herein provided shall result in the terms and conditions of this Franchise being enforced in a competitively neutral manner. Notwithstanding any applicable statute of limitations or other law, these limited waivers of sovereign immunity shall expire when all obligations under this Franchise have been fully and completely performed or the passage of twenty four (24) months from the termination of this Franchise, whichever is later.

16.2 Venue for any proceeding brought to enforce any term or condition of this Franchise shall be the Circuit Court of the state of Oregon for Tillamook County; provided, however, that should any proceeding be brought in a federal forum, such proceeding shall be brought in the U.S. District Court of Oregon in Portland, Oregon, with the parties stipulating to trial in Portland, Oregon.

Section 17. Limitation of Liability. Franchisee and the City agree that neither shall be liable to the other for any indirect, special, or consequential damages, or any lost profits, arising out of

any provision or requirement contained herein, or, in the event this Franchise, or any part hereof, is determined or declared to be invalid.

Section 18. Compliance with Applicable Laws. Franchisee shall comply with all applicable federal, state, and local laws, ordinances, and regulations, whether now in existence or hereinafter enacted. Nothing contained in this Franchise shall be construed as authorizing the Franchisee, its officers, employees or agents, to violate any federal, state or local law, whether now in existence or hereinafter enacted, including, by way of illustration but not of limitation, any provision of Oregon anti-trust law, ORS 646.750-646.836, or the Oregon Unlawful Trade Practices Act, ORS 646.650-646.652. Nothing contained in this section shall be construed as requiring Franchisee to comply with any federal, state or local law that is repealed or otherwise rendered unenforceable subsequent to the adoption of this Franchise.

Section 19. Notice. Any notice provided for under this Franchise shall be sufficient if in writing and (1) delivered personally to the other party or deposited in the U.S. Mail, postage prepaid, certified mail, return receipt requested, (2) sent overnight by commercial air courier, or (3) sent by facsimile transmission, provided receipt of such facsimile is confirmed, in writing, on the first business day following the date of transmission. Notice shall be sent to the following address or such other address as either party may specify in writing:

City of Tillamook
210 Laurel Avenue
Tillamook, OR 97141
Phone: (503) 812-6133
Facsimile: (503) 842-3445

CoastCom, Inc.
151 E Olive Street
Newport, OR 97365
Phone: (541) 574-9999
Facsimile: (541) 265-8946

Notice shall be deemed effective upon the earliest date of actual delivery; three business days after deposit in the U.S. mail as provided herein; one business day after shipment by commercial air courier; or the same day as transmitted by facsimile, provided transmission of such facsimile is confirmed in writing as provided herein.

Section 20. Default, Notice, Remedies.

20.1 Events of Default; Notice. Time is of the essence of this Ordinance and of each of its provisions. A default shall occur under any of the following circumstances: (a) Failure of Franchisee to make any payment when due; and/or (b) Failure of Franchisee to perform any other obligations contained in this Ordinance within 30 days after notice from City specifying the nature of the default, or, if the default cannot be cured within 30 days, failure of Franchisee to commence and pursue curative action within such time with reasonable diligence.

20.2 No Notice. No notice of default and no opportunity to cure shall be required if during any 12-consecutive-month period City has already sent two notice(s) to Franchisee concerning default in the performance of the same Ordinance provision.

20.3 Remedies on Default. Failure of Franchisee to comply with the provisions of this Ordinance after written notice and a reasonable opportunity to comply shall be grounds for modification, revocation, suspension or refusal to renew the Franchise. In the event of a default,

City may revoke this Ordinance. City or Franchisee may specifically enforce the terms of this Ordinance by suit in law or equity. Attorney fees, costs and disbursements shall be awarded to the prevailing party by an arbitrator or judge of a court of competent jurisdiction, unless otherwise agreed.

20.4 Remedies Not Exclusive. The remedies provided above shall be nonexclusive and in addition to any other remedies provided by law.

20.5 30-days to Comply or Request Hearing. After written notice from the City Council or its designee that such grounds exist, the Franchisee shall have thirty (30) days from the date of mailing of the notice in which to comply or to request a public hearing before the City Council.

20.6 Failure to Comply. If the Franchisee fails to comply after City's notice of default or fails to comply with the order of the City Council entered upon the basis of findings at the public hearing, the City Council may suspend, modify, revoke or refuse to renew the Franchise, or make such action contingent upon continued noncompliance or other future action.

20.7 Public Hearing. At a public hearing, the Franchisee and other interested persons shall have an opportunity to present oral, written or documentary evidence to the City Council.

20.8 Emergency Action. In the event that the City finds an immediate and serious danger to the public, it may take emergency action regarding any existing franchise under this ordinance without notice and/or hearing. City may provide notice to Franchisee which notice is appropriate to the emergency and City's actions or intent. However, notice and/or public hearing shall be provided by City to Franchisee as soon as practicable following City's emergency action for a public hearing for the City Council to decide to ratify, modify or rescind City's prior emergency action upon such terms as the City Council deems reasonable and necessary.

Section 21. Captions. The captions to Sections of this Franchise are intended solely to facilitate reading and reference of the Sections and provisions contained herein, and shall not affect the meaning or interpretation of any Section or provision of this Franchise.

Section 22. Severability. If any part of this Franchise becomes or is held to be invalid for any reason, the determination shall affect only the invalid portion of this Franchise. In all other respects this Franchise shall remain in full force and effect as if the invalid provision had not been part of this Franchise. This Ordinance supersedes all prior oral or written agreements between City and Franchisee, and their successors and assigns regarding its subject matter.

Section 23. Waiver.

23.1 The City is vested with the power and authority to reasonably regulate, and manage, the Rights-of-Way in a competitively neutral and non-discriminatory manner, and in the public interest. Franchisee shall not be relieved of its obligations to comply with any provision of this Franchise by reason of the failure of the City to enforce prompt compliance, nor does the City waive or limit any of its rights under this Franchise by reason of such failure or neglect.

23.2 No provision of this Franchise shall be deemed waived unless such waiver is in writing and signed by the party waiving its rights. However, if Franchisee gives written notice of a

failure or inability to cure or comply with a provision of this Franchise, and the City fails to object within a reasonable time after receipt of such notice, such provision shall be deemed waived.

Section 24. Effective Date. The City Council of Tillamook finds the health, safety and welfare of Tillamook citizens will best be served by this Ordinance taking immediate effect, whether by an emergency now declared or, alternatively, by its effective date retroactively applied to the date this ordinance is passed by this Council. The Council further finds the Franchisee has either consented to the effective date described or offered no objection after being first duly and timely notified and given an opportunity to raise objections, if any. Therefore, the City Council hereby declares this ordinance shall be in full force and effect from the time of its passage and approval.

Passed by the City Council and approved by the Mayor August 5, 2013.

Attest: Abigail Donowho
Abigail Donowho, City Recorder

Approved: Suzanne Weber
Suzanne Weber, Mayor

Approved as to form:
John R. Palma
City Attorney

///

ON BEHALF OF FRANCHISEE, THE PERSON SIGNING BELOW REPRESENTS THEIR ACTUAL AND/OR APPARENT AUTHORITY TO LAWFULLY BIND FRANCHISEE, INDIVIDUALLY AND/OR AS A CORPORATION OR OTHER LEGAL ENTITY, IN CONTRACT TO ALL TERMS OF THIS ORDINANCE, AND DOES SO BIND FRANCHISEE HERE.

Accepted: 8-14, 2013.

CoastCom, Inc.

Greg Palser
Greg Palser, President,
CoastCom, Inc.

///

Approved as to form:

Richard A. Finnigan
Richard A. Finnigan
Attorney for CoastCom, Inc.