

AN ORDINANCE AMENDING BEAVERTON CODE TITLE 4 ON UTILITIES AND SANITATION BY REPEALING CHAPTER 4.20 (TELECOMMUNICATIONS SERVICE PROVIDERS) AND ADDING CHAPTER 4.15 (UTILITY FACILITIES IN PUBLIC RIGHTS OF WAY)

Whereas, the City of Beaverton has constitutional and charter authority to manage its rights of way and receive compensation for use of the rights of way consistent with applicable federal and state law;

Whereas, the City has typically granted individually-negotiated franchises to each utility using the City's rights of way to provide utility service, which franchises set forth the terms of use and compensation to be paid for such use;

Whereas, the City has determined that it can more effectively, efficiently, fairly and uniformly manage the City's rights of way and provide consistent standards for utility use of the rights of way through licenses rather than franchises;

Whereas, new Chapter 4.15 is intended to replace the rights-of-way provisions of Chapter 4.20; and

Whereas, the City finds it is in the public interest to enact the changes to the Beaverton Code as set forth in this Ordinance.

Now, therefore,

THE CITY OF BEAVERTON ORDAINS AS FOLLOWS

Section 1. Beaverton Code Chapter 4.20 is hereby repealed.

Section 2. Beaverton Code Chapter 4.15 is hereby added to read as follows:

4.15.010 Short Title.

The ordinance codified in this Chapter shall be known and may be referenced as the "Utility Facilities in Public Rights of Way" ordinance.

4.15.020 Purpose and Intent.

The purpose and intent of this Chapter is to:

- A. Permit and manage reasonable access to the rights of way of the City for utility purposes and conserve the limited physical capacity of those rights of way held in trust by the City consistent with applicable state and federal law;
- B. Assure that the City's current and ongoing costs of granting and regulating access to and the use of the rights of way are fully compensated by the persons seeking such access and causing such costs;
- C. Secure fair and reasonable compensation to the City and its residents, who have invested millions of dollars in public funds to build and maintain the rights of way, for permitting use of the rights of way by persons who generate revenue by placing facilities therein and charging residents for services delivered thereby;

- D. Assure that all utility companies, persons and other entities owning or operating facilities or providing services within the City register and comply with the ordinances, rules and regulations of the City;
- E. Assure that the City can continue to fairly and responsibly protect the public health, safety and welfare of its residents, and assure the structural integrity of its rights of way when a primary cause for the early and excessive deterioration of the rights of way is their frequent excavation by persons whose facilities are located therein;
- F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City.

4.15.030 Jurisdiction and Management of the Public Rights of Way.

- A. The City has jurisdiction and exercises regulatory management over all rights of way within the City under authority of the City charter and state law.
- B. The City has jurisdiction and exercises regulatory management over each right of way whether the City has a fee, easement or other legal interest in the right of way, and whether the legal interest in the right of way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
- C. The exercise of jurisdiction and regulatory management of a right of way by the City is not official acceptance of the right of way, and does not obligate the City to maintain or repair any part of the right of way.
- D. The provisions of this Chapter are subject to and will be applied consistent with applicable state and federal laws, rules and regulations and, to the extent possible, shall be interpreted to be consistent with such laws, rules and regulations.

4.15.040 Regulatory Fees and Compensation Not a Tax.

- A. The fees and costs provided for in this Chapter, and any compensation charged and paid for use of the rights of way provided for in this Chapter, are separate from, and in addition to, any and all other federal, state, local and City charges, including any permit fee, or any other generally applicable fee, tax or charge on the business, occupation, property or income, as may be levied, imposed or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery or transmission of utility services.
- B. The City has determined that any fee or tax provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees or taxes are not imposed on property or property owners.
- C. The fees and costs provided for in this Chapter are subject to applicable federal and state laws.

4.15.050 Definitions.

For the purpose of this Chapter the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive.

- A. "Cable service" is to be defined consistent with federal laws and means the one-way transmission to subscribers of: (i) video programming, or (ii) other programming service; and

subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

- B. "City" means the City of Beaverton, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.
- C. "City Council" means the elected governing body of the City of Beaverton, Oregon.
- D. "City facilities" means City or publicly-owned structures or equipment located within the rights of way or public easement used for governmental purposes.
- E. "Communications services" means any service provided for the purpose of transmission of information including, but not limited to, voice, video or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications services includes all forms of telephone services and voice, video, data or information transport, but does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; (4) public communications systems; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.
- F. "License" means the authorization granted by the City to a utility operator pursuant to this Chapter.
- G. "Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, local service district, governmental entity or other organization, including any natural person or any other legal entity.
- H. "Public communications system" means any system owned or operated by a government entity or entities for their exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 190.240 and 283.140. "Public communications system" does not include any system used for sale or resale, including trade, barter or other exchange of value, of communications services or capacity on the system, directly or indirectly, to any person.
- I. "Public works director" means the public works director for the City of Beaverton or any designee.
- J. "Public utility easement" means the space in, upon, above, along, across, over or under an easement for the construction, reconstruction, operation, maintenance, inspection and repair of utility facilities. "Public utility easement" does not include an easement solely for the construction, reconstruction, operation, maintenance, inspection and repair of City facilities, or where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the City.
- K. "Rights of way" means and includes, but is not limited to, the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, bridges, trails, paths, sidewalks, bicycle lanes, public utility easements and all other public ways or areas, including the subsurface under and air space over these areas, but does not include parks, parkland or other City property not generally open to the public for travel. This definition applies only to the extent of the City's right, title, interest and authority to grant a license to occupy and use such areas for utility facilities.
- L. "State" means the state of Oregon.

- M. "Utility facility" or "facility" means any physical component of a system, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plants, equipment and other facilities, located within, under or above the rights of way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service.
- N. "Utility operator" or "operator" means any person who owns, places, operates or maintains a utility facility within the City.
- O. "Utility service" means the provision, by means of utility facilities permanently located within, under or above the rights of way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer or storm sewer to or from customers within the corporate boundaries of the City, or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.
- P. "Work" means the construction, demolition, installation, replacement, repair, maintenance or relocation of any utility facility, including but not limited to any excavation and restoration required in association with such construction, demolition, installation, replacement, repair, maintenance or relocation.

4.15.060 Registration.

- A. Registration Required. Every person who desires to provide utility services to customers within the City shall register with the City prior to providing any utility services to any customer in the City. Every person providing utility services to customers within the City as of the effective date of this Chapter shall register within forty-five (45) days of the effective date of this Chapter.
- B. Annual Registration. After registering with the City pursuant to subsection A of this section, the registrant shall, by December 31 of each year, file with the City a new registration form if it intends to provide utility service at any time in the following calendar year. Registrants that file an initial registration pursuant to subsection A of this section on or after September 30 shall not be required to file an annual registration until December 31 of the following year.
- C. Registration Application. The registration shall be on a form provided by the City, and shall be accompanied by any additional documents required by the City to identify the registrant and its legal status, describe the type of utility services provided or to be provided by the registrant and list the facilities over which the utility services will be provided.
- D. Registration Fee. Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council sufficient to fully recover all of the City's costs of administering the registration program.

4.15.070 Licenses.

- A. License Required.
 - 1. Except those utility operators with a valid franchise agreement from the City, every person shall obtain a license from the City prior to conducting any work in the rights of way.
 - 2. Every person that owns or controls utility facilities in the rights of way as of the effective date of this Chapter shall apply for a license from the City within forty-five (45) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid

franchise from the City, unless a new franchise is granted by the City pursuant to subsection E of this section.

- B. License Application. The license application shall be on a form provided by the City, and shall be accompanied by any additional documents required by the application to identify the applicant, its legal status, including its authorization to do business in Oregon, a description of the type of utility service provided or to be provided by the applicant, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this Chapter.
- C. License Application Fee. The application shall be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council in an amount sufficient to fully recover all of the City's costs related to processing the application for the license.
- D. Determination by City. The City shall issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is denied, the written determination shall include the reasons for denial. The license shall be evaluated based upon the provisions of this Chapter, the continuing capacity of the rights of way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.
- E. Franchise Agreements. If the public interest warrants, the City and utility operator may enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this Chapter, consistent with applicable state and federal law. The franchise may conflict with the terms of this Chapter with the review and approval of the City Council. The franchise shall be subject to the provisions of this Chapter to the extent such provisions are not in conflict with any such franchise. In the event of a conflict between the express provisions of a franchise and this Chapter, the franchise shall control.
- F. Rights Granted.
 - 1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the City code and other applicable provisions of state or federal law, to construct, place, maintain and operate utility facilities in the rights of way for the term of the license.
 - 2. Any license granted pursuant to this Chapter shall not convey equitable or legal title in the rights of way, and may not be assigned or transferred except as permitted in subsection K of this section.
 - 3. Neither the issuance of the license nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, including without limitation the police power or regulatory power of the City, as it may exist at the time the license is issued or thereafter obtained.
- G. Term. Subject to the termination provisions in subsection M of this section, the license granted pursuant to this Chapter will remain in effect for a term of five (5) years.
- H. License Nonexclusive. No license granted pursuant to this section shall confer any exclusive right, privilege, license or franchise to occupy or use the rights of way for delivery of utility services or any other purpose. The City expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the City's right to use the rights of way, for similar or different purposes. The license is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record that may affect

the rights of way. Nothing in the license shall be deemed to grant, convey, create or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.

- I. Reservation of City Rights. Nothing in the license shall be construed to prevent the City from grading, paving, repairing or altering any rights of way, constructing, laying down, repairing, relocating or removing City facilities or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any City facilities. If any of licensee's utility facilities interfere with the construction, repair, replacement, alteration or removal of any rights of way, public work, City utility, City improvement or City facility, except those providing utility services in competition with a licensee, licensee's facilities shall be removed or relocated as provided in subsections 4.15.090(C), 4.15.090(D) and 4.15.090(E) of this Chapter, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.
- J. Multiple Services.
 1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and right-of-way fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J(1) requires a utility operator to pay the license, registration or right-of-way fee requirements owed to the City by a third party using the utility operator's facilities.
 2. A utility operator that provides or transmits more than one utility service over its facilities is not required to obtain a separate license or franchise for each utility service, provided that it gives notice to the City of each utility service provided or transmitted and pays the applicable rights-of-way fee for each utility service.
- K. Transfer or Assignment. Unless exempted by applicable state and federal laws, the licensee shall obtain the written consent of the City prior to the transfer or assignment of the license. The license shall not be transferred or assigned unless the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under federal and state laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee shall become responsible for fulfilling all the obligations under the license with respect to all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license.
- L. Renewal. At least ninety (90), but no more than one hundred eighty (180), days prior to the expiration of a license granted pursuant to this section, a licensee seeking renewal of its license shall submit a license application to the City, including all information required in subsection B of this section and the application fee required in subsection C of this section. The City shall review the application as required by subsection D of this section and grant or deny the license within ninety (90) days of submission of the application. If the City determines that the licensee is in violation of the terms of this Chapter at the time it submits its application, the City may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the City, before the City will consider the application or grant the license. If the City requires the licensee to cure or submit a plan to cure a violation, the City will grant or deny the license application within ninety (90) days of

confirming that the violation has been cured or of accepting the licensee's plan to cure the violation.

M. Termination.

1. **Revocation or Termination of a License.** The City Council may terminate or revoke the license granted pursuant to this Chapter for any of the following reasons:
 - a. Violation of any of the provisions of this Chapter;
 - b. Violation of any provision of the license;
 - c. Misrepresentation in a license application;
 - d. Failure to pay taxes, compensation, fees or costs due the City after final determination of the taxes, compensation, fees or costs;
 - e. Failure to restore the rights of way after construction as required by this Chapter or other applicable state and local laws, ordinances, rules and regulations;
 - f. Failure to comply with technical, safety and engineering standards related to work in the rights of way; or
 - g. Failure to obtain or maintain any and all licenses, permits, certifications and other authorizations required by state or federal law for the placement, maintenance or operation of the utility facilities.
2. **Standards for Revocation or Termination.** In determining whether termination, revocation or some other sanction is appropriate, the following factors shall be considered:
 - a. Whether the violation was intentional;
 - b. The egregiousness of the violation;
 - c. The harm that resulted;
 - d. The utility operator's history of compliance; and
 - e. The utility operator's cooperation in discovering, admitting and curing the violation.
3. **Notice and Cure.** The City shall give the utility operator written notice of any apparent violations before terminating a license. The notice shall include a clear and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time (no less than twenty (20) and no more than forty (40) days) for the utility operator to demonstrate that the utility operator has remained in compliance, that the utility operator has cured or is in the process of curing any violation or noncompliance, or that it would be in the public interest to impose a penalty or sanction less than termination or revocation. If the utility operator is in the process of curing a violation or noncompliance, the utility operator must demonstrate that it acted promptly and continues to actively work on compliance. If the utility operator does not respond, the Public Works Director shall refer the matter to the City Council; which shall provide a duly noticed public hearing to determine whether the license shall be terminated or revoked.

4.15.080 Construction and Restoration.

- A. **Construction Codes.** Utility facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including

without limitation the National Electrical Code, the National Electrical Safety Code, Beaverton Code Section 9.05 and the City's Engineering Design Manual.

B. Construction Permits.

1. No person shall perform any work on utility facilities within the rights of way without first obtaining all required permits. The City shall not issue a permit for the construction, installation, maintenance or repair of utility facilities unless the utility operator of the facilities has registered and applied for and received the license required by this Chapter, or has a current franchise with the City, and all applicable fees have been paid.
2. In the event of an emergency, a utility operator with a license pursuant to this Chapter or its contractor may perform work on its utility facilities without first obtaining a permit from the City, provided that, to the extent reasonably feasible, it attempts to notify the Public Works Department prior to commencing the emergency work and in any event initiates a permit application as soon as reasonably practicable, but not later than 12:00 noon of the next business day after commencing the emergency work. As used in this subsection, "emergency" means a circumstance in which immediate work is necessary to restore lost service or prevent immediate harm to persons or property.
3. Applications for permits to construct utility facilities shall be submitted upon forms to be provided by the City and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:
 - a. That the facilities will be constructed in accordance with all applicable codes, rules and regulations.
 - b. The location and route of all utility facilities to be installed aboveground or on existing utility poles and, if the utility operator owns the existing utility poles, a comprehensive summary, including ownership, of any and all infrastructure currently attached to the pole. Unless approved in writing by the Public Works Director, the construction of new utility poles is prohibited. An existing utility pole that is damaged or failing may be repaired or replaced with a new utility pole of substantially similar dimensions and materials.
 - c. The location and route of all utility facilities on or in the rights of way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route that are within the rights of way. Applicant's existing utility facilities shall be differentiated on the plans from new construction. A cross section shall be provided showing new or existing utility facilities in relation to the street, curb, sidewalk or rights of way.
 - d. The construction methods to be employed for protection of existing structures, fixtures and facilities within or adjacent to the rights of way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.
4. All permit applications shall be accompanied by the verification of a qualified and duly authorized representative of the applicant that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations. The Public Works Director may, in the Director's sole discretion, require the verification of a registered professional engineer.

5. All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by the Public Works Department.
6. Prior to issuance of a construction permit, the applicant shall pay a permit fee in the amount determined by resolution of the City Council.
7. If satisfied that the application, plans and documents submitted comply with all requirements of this Chapter, the Public Works Department shall issue a permit authorizing construction of the utility facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as they may deem necessary or appropriate.
8. Except in the case of an emergency, the permittee shall notify the Public Works Department not less than two (2) business days in advance of any excavation or construction in the rights of way.
9. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the utility facilities. The Public Works Department and its representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.
10. All construction activities must comply with the work hours and noise regulations of the City's Engineering Design Manual.
11. All work that does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Chapter, shall be removed or corrected at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provisions of this Chapter.
12. The permittee shall promptly complete all construction activities so as to minimize disruption of the City rights of way and other public and private property. All construction work within the rights of way, including restoration, must be completed within one hundred twenty (120) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the Public Works Department.

C. Performance Surety.

1. Unless otherwise provided in a franchise agreement or agreed to in writing by the City, a performance bond or other form of surety acceptable to the City equal to at least one hundred percent (100%) of the estimated cost of the work within the rights of way of the City shall be provided before construction is commenced.
2. If applicable, the performance bond or other form of surety acceptable to the City shall remain in force until substantial completion of the work, including restoration of rights of way and other property affected by the construction, as determined in writing by the City.
3. If applicable, the performance bond or other form of surety acceptable to the City shall guarantee, to the satisfaction of the City:
 - a. Timely completion of the work;
 - b. That the work is performed in compliance with applicable plans, permits, technical codes and standards;
 - c. Proper location of the facilities as specified by the City;

- d. Restoration to City standards of the rights of way and other property affected by the work; and
 - e. Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.
- D. Injury to Persons or Property. A utility operator shall preserve and protect from injury or damage other utility operators' facilities in the rights of way, the public using the rights of way and any adjoining property, and take other necessary measures to protect life and property, including but not limited to buildings, walls, fences, trees or facilities that may be subject to damage from the permitted work. A utility operator shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and shall comply with all applicable Americans with Disabilities Act requirements.
- E. Restoration. A utility operator shall be responsible for all injury to persons or damage to public or private property resulting from its failure to properly protect people and property and to carry out the work.
1. When a utility operator, or any person acting on its behalf, does any work in or affecting any rights of way, it shall, at its own expense, promptly restore such ways or property to the same or better condition as existed before the work was undertaken, in accordance with applicable federal, state and local laws, codes, ordinances, rules and regulations, unless otherwise directed by the City and as determined by the Public Works Department.
 2. If weather or other conditions beyond the utility operator's control do not permit the complete restoration required by the City, the utility operator shall temporarily restore the affected rights of way or property. Such temporary restoration shall be at the utility operator's sole expense and the utility operator shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule may be subject to approval by the City.
 3. If the utility operator fails to restore rights of way or property as required in this Chapter, the City shall give the utility operator written notice and provide a period of time not less than ten (10) days and not exceeding thirty (30) days to restore the rights of way or property. If, after said notice, the utility operator fails to restore the rights of way or property as required in this Chapter, the City shall cause such restoration to be made at the expense of the utility operator. In cases where the City believes that an emergency or threat to public safety exists, it may act without notice to and at the expense of the utility operator. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City within thirty (30) days for the costs the City incurred.
- F. Inspection. Every utility operator's facilities shall be subject to the right of periodic inspection by the City to determine compliance with the provisions of this Chapter and all other applicable state and City codes, ordinances, rules and regulations. Every utility operator shall cooperate with the City in permitting the inspection of utility facilities upon request of the City. The utility operator shall perform all testing, or permit the City to perform any testing at the utility operator's expense, required by the City to determine that the installation of the utility

operator's facilities and the restoration of the rights of way comply with the terms of this Chapter and applicable state and City codes, ordinances, rules and regulations.

- G. Coordination of Construction. All utility operators are required to make a good faith effort to both cooperate with and coordinate their construction schedules with those of the City and other users of the rights of way.
1. Prior to January 1 of each year, utility operators shall provide the City with a schedule of known proposed construction activities for that year in, around or that may affect the rights of way.
 2. At the City's request, utility operators shall meet with the City annually, or as determined by the City, to schedule and coordinate construction in the rights of way.
 3. All construction locations, activities and schedules within the rights of way shall be coordinated as ordered by the Public Works Department to minimize public inconvenience, disruption or damages.

4.15.090 Location of Facilities.

- A. Location of Facilities. Unless otherwise agreed to in writing by the City, whenever any existing electric utilities, cable facilities or communications facilities are located underground within a right of way of the City, a utility operator with permission to occupy the same right of way shall locate its facilities underground at its own expense. This requirement shall not apply to facilities used for transmission of electric energy at nominal voltages in excess of fifty thousand (50,000) volts or to pedestals, cabinets or other above-ground equipment of any utility operator. No such above-ground equipment, or any aerial facilities other than electric energy transmission wires in excess of fifty thousand (50,000) volts, shall be constructed without the written approval of the City, in addition to the permit required by section 4.15.080(B).
- B. Interference with the Rights of Way. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the rights of way by the City, by the general public or by other persons authorized to use or be present in or upon the rights of way. All use of the rights of way shall be consistent with City codes, ordinances, rules and regulations.
- C. Relocation of Utility Facilities.
1. When requested to do so in writing by the City, a utility operator shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any utility facility within a right of way, including relocation of aerial facilities underground.
 2. Nothing herein shall be deemed to preclude the utility operator from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements. However, the utility operator shall timely comply with the requirements of this section regardless of whether or not it has requested or received such reimbursement or compensation.
 3. The City shall coordinate the schedule for relocation of utility facilities and based on such effort, shall provide written notice of the time by which the utility operator must remove, relocate, change, alter or underground its facilities. If a utility operator fails to remove, relocate, change, alter or underground any utility facility as requested by the City and by the date reasonably established by the City, the utility operator shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays, and the City may cause, using qualified workers in accordance with

applicable state and federal laws and regulations, the utility facility to be removed, relocated, changed, altered or undergrounded at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City within thirty (30) days for the costs the City incurred.

D. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the Public Works Department, within thirty (30) days following written notice from the City or such other time agreed to in writing by the Public Works Department, a utility operator and any other person that owns, controls or maintains any abandoned or unauthorized utility facility within a right of way shall, at its own expense, remove the facility and restore the right of way to City standards.
2. A utility system or facility is unauthorized under any of the following circumstances:
 - a. The utility facility is outside the scope of authority granted by the City under the license, franchise or other written agreement. This includes facilities that were never licensed or franchised and facilities that were once licensed or franchised but for which the license or franchise has expired or been terminated. This does not include any facility for which the City has provided written authorization for abandonment in place.
 - b. The facility has been abandoned and the City has not provided written authorization for abandonment in place. A facility is abandoned if it is not in use and is not planned for further use. A facility will be presumed abandoned if it is not used for a period of one (1) year. A utility operator may attempt to overcome this presumption by presenting plans for future use of the facility to the Public Works Department, which will determine application of the presumption in its sole discretion.
 - c. The utility facility is improperly constructed or installed or is in a location not permitted by the construction permit, license, franchise or this Chapter.
 - d. The utility operator is in violation of a material provision of this Chapter and fails to cure such violation within thirty (30) days of the City sending written notice of such violation, unless the City extends such time period in writing.

E. Removal by City.

1. The City retains the right and privilege to cut or move the facilities of any utility operator or similar entity located within the rights of way of the City, without notice, as the City may determine to be necessary, appropriate or useful in response to a public health or safety emergency. The City will use qualified personnel or contractors consistent with applicable state and federal safety laws and regulations to the extent reasonably practicable without impeding the City's response to the emergency.
2. If the utility operator fails to remove any facility when required to do so under this Chapter, the City may remove the facility using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, and the utility operator shall be responsible for paying the full cost of the removal and any administrative costs incurred by the City in removing the facility and obtaining reimbursement. Upon receipt of a detailed invoice from the City, the utility operator

shall reimburse the City for the costs the City incurred within thirty (30) days. The obligation to remove shall survive the termination of the license or franchise.

3. The City shall not be liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly therefrom, by the City or its contractor in removing, relocating or altering the facilities pursuant to subsections C, D or E of this section or undergrounding its facilities as required by subsection A of this section, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by those subsections, unless such damage arises directly from the City's negligence or willful misconduct.
- F. Engineering Designs and Plans. The utility operator shall provide the City with two complete sets of as-built plans in a form acceptable to the City showing the location of all its utility facilities in the rights of way after initial construction if the utility operator's engineered plans materially changed during construction. The utility operator shall provide two updated complete sets of as-built plans upon request of the Public Works Department, but not more than once per year.

4.15.100 Leased Capacity.

A utility operator may lease capacity on or in its systems to others, provided that, upon request, the utility operator provides the City with the name and business address of any lessee. A utility operator is not required to provide such information if disclosure is prohibited by applicable law or a valid agreement between the utility operator and the lessee, provided that the utility operator takes reasonable steps to ensure that its lessees are in compliance with this Chapter.

4.15.110 Maintenance.

- A. Every utility operator shall install and maintain all facilities in a manner that complies with applicable federal, state and local laws, rules, regulations and policies. The utility operator shall, at its own expense, repair and maintain facilities from time to time as may be necessary to accomplish this purpose.
- B. If, after written notice from the City of the need for repair or maintenance, a utility operator fails to repair and maintain facilities as requested by the City and by the date reasonably established by the City, the City may perform such repair or maintenance using qualified personnel or contractors at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

4.15.120 Vacation.

If the City vacates any rights of way, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the rights of way unless: (1) the City reserves a public utility easement, which the City shall make a reasonable effort to do provided that there is no expense to the City; or (2) the utility operator obtains an easement for its facilities. If the utility operator fails to remove its facilities within thirty (30) days after a right of way is vacated, or as otherwise directed or agreed to in writing by the City, the City may remove the facilities using qualified workers in accordance with state and federal laws and regulations at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

4.15.130 Rights-of-Way Fee.

- A. Except as set forth in subsection B of this section, every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the rights-of-way fee for every utility service provided using the rights of way in the amount determined by resolution of the City Council.
- B. A utility operator whose only facilities in the rights of way are facilities mounted on structures within the rights of way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the rights of way, shall pay the attachment fee set by City Council resolution for each attachment. Unless otherwise agreed to in writing by the City, the fee shall be paid annually, in arrears, for each year during the term of the license within thirty (30) days after the end of each calendar year, and shall be accompanied by information sufficient to illustrate the calculation of the amount payable. The utility operator shall pay interest at a rate of nine percent (9%) per year for any payment made after the due date.
- C. Rights-of-way fee payments required by this section shall be reduced by any franchise fee payments received by the City, but in no case will be less than zero dollars (\$0).
- D. Unless otherwise agreed to in writing by the City, the fee set forth in subsection A of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within thirty (30) days after the end of each calendar quarter, and shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The utility operator shall pay interest at a rate of nine percent (9%) per year for any payment made after the due date.
- E. The calculation of the rights-of-way fee required by this section shall be subject to all applicable limitations imposed by federal or state law.
- F. The City reserves the right to enact other fees and taxes applicable to the utility operators subject to this Chapter. Unless expressly permitted by the City in enacting such fee or tax, or required by applicable state or federal law, no utility operator may deduct, offset or otherwise reduce or avoid the obligation to pay any lawfully enacted fees or taxes based on the payment of the rights-of-way fee or any other fees required by this Chapter.

4.15.140 Audits.

- A. Within thirty (30) days of a written request from the City, or as otherwise agreed to in writing by the City:
 - 1. Every provider of utility service shall furnish the City with information sufficient to demonstrate that the provider is in compliance with all the requirements of this Chapter and its franchise agreement, if any, including but not limited to payment of any applicable registration fee, rights-of-way fee or franchise fee.
 - 2. Every utility operator shall make available for inspection by the City at reasonable times and intervals all maps, records, books, diagrams, plans and other documents maintained by the utility operator with respect to its facilities within the rights of way or public utility easements. Access shall be provided within the City unless prior arrangement for access elsewhere has been made with the City.
- B. If the City's audit of the books, records and other documents or information of the utility operator or utility service provider demonstrates that the utility operator or provider has

underpaid the rights-of-way fee or franchise fee by three percent (3%) or more in any one (1) year, the utility operator shall reimburse the City for the cost of the audit, in addition to any interest owed pursuant to subsection 4.15.130(D) of this Chapter or as specified in a franchise.

- C. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) days of the City's notice to the utility service provider of such underpayment.

4.15.150 Insurance and Indemnification.

A. Insurance.

1. All utility operators shall maintain in full force and effect the following liability insurance policies that protect the utility operator and the City, as well as the City's officers, agents and employees:

a. Comprehensive general liability insurance with limits not less than:

- i. Three million dollars (\$3,000,000.00) for bodily injury or death to each person;
- ii. Three million dollars (\$3,000,000.00) for property damage resulting from any one accident; and
- iii. Three million dollars (\$3,000,000.00) for all other types of liability.

b. Motor vehicle liability insurance for owned, non-owned and hired vehicles with a limit of one million dollars (\$1,000,000.00) for each person and three million dollars (\$3,000,000.00) for each accident.

c. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars (\$1,000,000.00).

2. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the state of Oregon. The insurance shall be without prejudice to coverage otherwise existing and shall name, or the certificate of insurance shall name, as additional insureds the City and its officers, agents and employees. The coverage must apply as to claims between insureds on the policy. The utility operator shall provide the City thirty (30) days prior written notice of any cancellation or material alteration of said insurance. If the insurance is canceled or materially altered, the utility operator shall maintain continuous uninterrupted coverage in the terms and amounts required. The utility operator may self-insure, or keep in force a self-insured retention plus insurance, for any or all of the above coverage.

3. The utility operator shall maintain on file with the City a certificate of insurance, or proof of self-insurance acceptable to the City, certifying the coverage required above.

- B. Financial Assurance. Unless otherwise agreed to in writing by the City, before a franchise granted or a license issued pursuant to this Chapter is effective, and as necessary thereafter, the utility operator shall provide a performance bond or other financial security, in a form acceptable to the City, as security for the full and complete performance of the franchise or license, and for compliance with the terms of this Chapter, including any costs, expenses, damages or loss to the City because of any failure attributable to the utility operator to comply with the codes, ordinances, rules, regulations or permits of the City. This obligation is in addition to the performance surety required by subsection 4.15.080(C) of this Chapter.

- C. Indemnification.

1. To the fullest extent permitted by law, each utility operator shall defend, indemnify and hold harmless the City and its officers, employees, agents and representatives from and against any and all liability, causes of action, claims, damages, losses, judgments and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failure to act or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the construction, operation, maintenance, repair or removal of its facilities, and in providing or offering utility services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this Chapter or by a franchise agreement. The acceptance of a license under section 4.15.070 of this Chapter shall constitute such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the City shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.
2. Every utility operator shall also indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from the utility operator's failure to remove or relocate any of its facilities in the rights of way or easements in a timely manner, unless the utility operator's failure arises directly from the City's negligence or willful misconduct.

4.15.160 Compliance.

Every utility operator shall comply with all applicable federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all applicable ordinances, resolutions, rules and regulations of the City, heretofore or hereafter adopted or established during the term of any license granted under this Chapter.

4.15.170 Confidential/Proprietary Information.

If any person is required by this Chapter to provide books, records, maps or information to the City that the person reasonably believes to be confidential or proprietary, the City shall take reasonable steps to protect the confidential or proprietary nature of the books, records, maps or information to the extent permitted by the Oregon Public Records Law, provided that all documents are clearly marked as confidential by the person at the time of disclosure to the City. The City shall not be required to incur any costs to protect such documents, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

4.15.180 Equal Employment Opportunity/Diversity in Workforce/Minority Business Enterprises

A. Equal Employment Opportunity.

1. The utility operator shall fully comply with applicable equal employment opportunity requirements of federal, state and local law.
2. The utility operator shall maintain a policy that all employment decisions, practices and procedures are based on merit and ability without discrimination on the basis of

an individual's race, color, religion, age, sex, national origin, sexual orientation or disability.

- B. Diversity in Workforce. The utility operator is expected to make a determined and good-faith effort to employ and advance in employment women, minorities and persons with disabilities.
- C. Minority, Female and Emerging Small Business Enterprises. The utility operator is expected to make determined and good-faith efforts to use Minority-Owned, Women-Owned and Emerging Small Businesses (MWESBs), along with Service Disabled Veteran Businesses, in its contracted expenditures, including, without limitation, contracts for the acquisition of goods, services, materials, supplies and equipment used in the construction, maintenance and operation of its utility facilities. In furtherance of the utility operator's efforts in this area, the City will be available to consult with the utility operator in providing information on, and support regarding, certified MWESB enterprises.

4.15.190 Penalties

- A. The City shall give the utility operator written notice of any violations and provide a reasonable time (no less than twenty (20) and no more than forty (40) days) for the utility operator to remedy the violations. If the Public Works Director determines the utility operator is guilty of violating any of the provisions of this Chapter or the license after the time to remedy has passed, the Public Works Director shall consider the standards found in section 4.15.070(M)(2)(a-e) of this Chapter and fine the utility operator not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues.
- B. A determination made by the Public Works Director is a quasi-judicial decision and is not appealable to the City Council. Appeals from any determination made by the Public Works Director shall be solely and exclusively by writ of review to the Circuit Court of Washington County, as provided in ORS 34.010 to 34.100.
- C. Nothing in this Chapter shall be construed as limiting any judicial or other remedy the City may have at law or in equity for enforcement of this Chapter.

4.15.200 Severability and Preemption.

- A. The provisions of this Chapter shall be interpreted to be consistent with applicable federal and state law, and shall be interpreted, to the extent possible, to cover only matters not preempted by federal or state law.
- B. If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this Chapter shall not be affected thereby but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state laws, rules or regulations, the provision shall be preempted only to the extent required by law and any portion not preempted shall survive. If any federal or state law resulting

in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision shall thereupon return to full force and effect and shall thereafter be binding without further action by the City.

4.15.210 Application to Existing Agreements.

To the extent that this Chapter is not in conflict with and can be implemented consistent with existing franchise agreements, this Chapter shall apply to all existing franchise agreements granted to utility operators by the City.

Section 3. This Ordinance shall become operative on October 1, 2016.

First reading this 19th day of April, 2016.

Second reading and passage by this Council this 3rd day of May, 2016.


Approved by the Mayor this 4th day of May, 2016.

ATTEST:



CATHERINE L. JANSEN, City Recorder

APPROVED:



DENNY DOYLE, Mayor