

ORDINANCE NO. 262-19

AN ORDINANCE OF THE CITY OF DURHAM PROVIDING FOR A LICENSE AND FEES FOR USE AND OCCUPANCY OF PUBLIC RIGHTS OF WAY BY PROVIDERS OF TELECOMMUNICATIONS, AND REPEALING ORDINANCE 256-13.

Whereas, the City under authority of ORS 221.515 now imposes a privilege tax on “telecommunications carriers” (as defined in ORS 133.721) who use City public rights of way to provide services to customers within the City as compensation for that use by that category of telecommunications provider; and,

Whereas, the City similarly imposes a franchise fee, calculated as a percentage of revenue earned from customers within the City, upon Cable Operators who use public rights of way within the City under the terms of franchises managed by the Metropolitan Area Communications Commission of Oregon; and,

Whereas, the City desires to clarify the terms by which it may require other providers of telecommunications who similarly use or occupy City public rights of way with facilities and equipment used to provide those services, to obtain a license for that use as allowed by federal and state law; and,

Whereas, the City finds that information as to the presence of all telecommunications providers who own facilities and equipment as defined in this Ordinance, whether operated by that owner or by others, is necessary for the public health, safety and welfare and that all such providers thus should be required to regularly inform the City of their use of City public rights of way; and,

Whereas, the City has jurisdiction and exercises regulatory management of all public rights of way within the City under authority of the city charter and federal and state law, including the federal Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*), the Cable Communications Policy Act of 1984 (47 U.S.C. 521 *et seq.*), and ORS 373.020 (granting city jurisdiction over users of state highway rights of way within cities);

NOW, THEREFORE, THE CITY OF DURHAM, OREGON ORDAINS AS FOLLOWS:

Section 1. Definitions. As used in this Ordinance:

“**Affiliate**” means any other person controlling, controlled by or under common control with a Provider. “Control” as used in this definition means the right to direct and control another person by contract or otherwise.

“**Cable Operator**” has the same meaning as provided in 47 U.S.C. Sec. 522(5).

“**Cable System**” has the same meaning as provided in 47 U.S.C. Sec. 522(7).

“City public rights of way” means any and all property dedicated to use by the general public for pedestrian or vehicle access within the City including county roads and state highways and the subsurface and air space under and over same, and easements granted to the City for use for public utilities generally if use of same for telecommunications is not inconsistent with the terms of the grant;

“Facilities and equipment” mean the tangible components installed, maintained, or operated over, on and under the surface of City public rights of way, such as the plant, poles, pipes, vaults, mains, conduits, ducts, cables, wires, antennae and similar items used to transmit, receive, distribute or provide telecommunications services to customers whether within or without the City.

“Facilities-based Provider” (hereafter, **“Provider”**) means a person who, by itself or by an **Affiliate**, provides facilities for **Telecommunications** (including the transmission of **Information service** or **Telecommunications service** or both) to premises or locations either or both within the City’s legal boundaries or to and from locations outside those boundaries, whether directly to an end user or for the use of another person or entity providing service to an end user, by means of the Provider’s **Facilities and equipment**, and who is not doing business within the City exclusively as a “telecommunications carrier” or exclusively as a cable operator.

“Gross City Revenues” means any and all revenues of any kind, nature or form, without deduction for expense, less net uncollectibles, earned by a Provider from the use of the Provider’s Facilities and Equipment to provide telecommunications to any premises within the City, whether that use is by the Provider itself or by or for the benefit of a person or entity who is not itself a Facilities-based Provider, subject to all applicable limitations imposed by federal or state law.

“Information Service” has the meaning set out in Title 47, Section 153, United States Code as that definition may be amended or renumbered from time to time.

“Telecommunications” means the transmission of information including but not limited to voice, video or data without regard to the transmission protocol employed.

“Telecommunications services” means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used.

Section 2. Application and Annual Renewal Required. A Provider doing business as other than or in addition to that of (a) a telecommunications carrier, or (b) a Cable Operator or any of its Affiliates providing service using a Cable System, shall apply for a license to occupy and use City public rights of way for its Facilities and Equipment. Any Provider currently occupying and using City public rights of way who intends to do business within the City in the succeeding calendar year shall renew its application by December 1 of the year prior.

Section 3. Form of Application. A Provider shall apply for a license and for a renewal of the license by submitting the following information in writing to the City Administrator or the designee of the City Administrator (“City Administrator or designee”):

- a. The Provider’s business name as registered with the state of Oregon, the state of incorporation if a corporation, principal office address and contact information for that address, and the name, title, address and telephone, email and any other contact information for the person to whom notices to the Provider from the City may be sent;
- b. The Provider’s application for and current Certificate of Authority or similar license from the Oregon Public Utility Commission or the Federal Communications Commission or both, if any, and if none, a statement as to why no certificate is required;
- c. The name, address and all other contact information for the person(s) to be contacted in case of an emergency affecting the Provider’s facilities or equipment within City public rights of way;
- d. A description of the Provider’s existing or proposed facilities and equipment within City public rights of way, in sufficient detail to enable the City to determine whether the facilities and equipment at any given location are or will be underground or aerial, where they (will) lie in relation to those portions of City public rights of way improved for use of motor vehicles and those portions improved for bicycle or pedestrian use, and the total lineal footage within City public rights of that the Provider’s facilities and equipment occupy;
- e. A description of the services that the Provider offers or intends to offer by use of facilities and equipment within City public rights of way, and whether the Provider offers or intends to offer those services to customers at addresses within the City;
- f. Information sufficient for the City to determine if the Provider is subject to a City business license fee under separate City ordinance, and,
- g. Payment to the City in advance of the minimum annual license fee in the amount set by Council Resolution.

Section 4. Grant of License; Term. The City Administrator or designee may grant an initial and a renewal license for occupancy and use of all or of a portion of City public rights of way (as described in the license) to a Provider who submits the information required for an application at the level of detail that, in the judgment of the City Administrator or designee, meets the purposes of this Ordinance. The initial term of the license shall be from the date issued until December 31 of the calendar year following issuance. The Administrator may renew the license for up to four successive one-year terms (coincident with the calendar year) in the same manner. The City by separate ordinance or resolution shall provide for the terms of a license renewal beyond the five-year term established by this Ordinance.

Section 5. Compensation for Use. No person shall occupy City public rights of way with facilities or equipment for the provision of telecommunications without a valid franchise or license allowing such occupancy, and without paying to the City compensation for such use. A franchise between the City and a Provider shall control occupancy and use of City public rights of way including any compensation payable by the Provider to the City for such occupancy and use. Any franchisee who wishes to install Small Wireless Facilities but whose franchise does not specifically authorize the installation of Small Wireless facilities in City public rights of way shall either amend the franchise to address Small Wireless Facilities or obtain a valid license prior to the installation of any Small Wireless Facilities in any public rights of way in the City. A Provider without a franchise, who is not exempt from the requirement to obtain a license under Section 2 of this Ordinance, shall pay to the City as fair and reasonable compensation for such occupancy and use a license fee in an amount and at such intervals as the City Council declares by Resolution. Unless otherwise agreed to in writing by the City, payment shall be paid annually, in arrears, within thirty (30) days after the end of each calendar year for each year or portion of a year during which the Provider occupies City public rights of way with facilities or equipment, and shall be accompanied by an accounting of Gross Revenues, if applicable, and a calculation of the amount payable. The fee shall be calculated on Gross City Revenues or, for a Provider who does not provide services to and does not earn revenue from service to premises within the City, calculated on the lineal footage of the Provider's Facilities and Equipment within the City. The City may set a minimum amount of compensation payable notwithstanding the amount of revenue earned or the total length of City public rights of way used or occupied by any Provider. The City shall provide prior notice to known Providers in advance of any proposed Council enactment of an increase in the compensation payable for such use or occupancy that is proposed following the effective date of this Ordinance. Compensation payable for use of City public rights of way shall be required in addition to and not in lieu of any and all other federal, state, regional, local and City taxes and fees imposed on or due from a Provider, including but not limited to any fees imposed by the City for plan review and inspection of any proposed aerial or underground work within the boundaries of City public right of way. Pursuant to Ordinance 260-18, all fees applicable to the placement of Small Cell Wireless Facilities in the City ROW shall be addressed by separate resolution of the City Council. Any and all compensation payable to the City by a Provider for use or occupancy of City public rights of way shall be subject to all applicable limitations of state and federal law.

Section 6. City General Ordinances Apply as to Provider's Work within City Public Rights of Way. The grant of a license to occupy City public rights of way shall not be construed to prevent the City or any other state or local government public utility provider from construction, reconstruction, maintenance or repair of any and all of that government provider's public improvements over, under and on the surface of those rights of way. Upon notice from the City that a Provider's

facilities and equipment interfere with such construction, reconstruction, maintenance or repair, the Provider shall cause the interfering facilities and equipment to be removed or relocated at the Provider's expense and in a manner acceptable to the City, conforming to all applicable federal, state and local laws setting standards for such work and conforming to the terms and conditions of any permit required for the work by any federal, state or local authority with jurisdiction over the work. Nothing in this Ordinance or in the terms of any permit issued by the City for work in City public rights of way shall be deemed to prohibit a Provider from seeking reimbursement from private parties or customers for the Provider's costs to relocate its facilities (including conversion of facilities from overhead to underground).

Section 7. License is Not Exclusive Nothing in this Ordinance shall be deemed to grant any right, title or other real property interest in City public rights of way nor any unique property right in any person but instead shall be deemed a non-exclusive grant to use and occupy those rights of way for a limited purpose and term and on the conditions stated in this Ordinance and in all other relevant City, state, regional or federal laws, rules or ordinances as now exist or may hereafter be enacted, including but not limited to requirements for undergrounding of utility facilities and equipment.

Section 8. Penalties for Non-Compliance. A Provider who fails or refuses to pay compensation for its occupancy and use of City public rights of way when payment is due shall pay interest on the amount past due at the rate of 9% per annum. The interest penalty is not exclusive, and the City shall be entitled to any remedy available to it at law or in equity to require payment of any and all compensation due the City for such use. A Provider shall preserve, for at least three years following the commencement of its use of City public rights of way and following the end of any license term, and shall make available to the City on the City's demand, within 30 days of receiving such demand, any and all records produced or kept by the Provider showing the Provider's calculation of the compensation due the City as required by this Ordinance and by any City Resolution setting the amount of compensation to be paid.

Section 9. Severance. If any section, subsection, paragraph, phrase or word (hereafter, "part") of this Ordinance is held to be unconstitutional, void or illegal, either on its face or as applied, such a holding shall not affect the applicability, constitutionality, or legality of any other part. To that end, the Council declares its intent that the parts of this Ordinance are intended to be severable, and declares that the intent of this Ordinance is that it would have been adopted if the unconstitutional, void or illegal parts, if any, had not been included.

Section 10. Prior Ordinance Continued. The privilege tax on the local exchange access revenues earned by telecommunication carriers (aka telecommunications utilities) who occupy City public rights of way imposed and continued by Ordinance 260-18 shall be and remains in full force and effect.

Section 11. Prior Ordinance Repealed and Updates to Ordinance References. Ordinance 256-13 is repealed. Pursuant to Ordinance 222-05, the City Attorney is authorized to update references to Ordinance 256-13 in other City ordinances and resolutions, including but not limited to references in Ordinance 260-18, to this Ordinance.

First Reading: October 22, 2019
Second Reading: November 26, 2019

CITY OF DURHAM

By: _____
Gery Schirado, Mayor

ATTEST:

Linda Tate, City Administrator/Recorder