

## **ORDINANCE 260-18**

### **AN ORDINANCE OF THE CITY OF DURHAM ADOPTING REGULATIONS RELATING TO UTILITY FACILITIES IN PUBLIC RIGHTS OF WAY AND REPEALING ORDINANCE 106-82, ORDINANCE 140-86, ORDINANCE 197-99, ORDINANCE 203-00, ORDINANCE 227-05 AND ORDINANCE 236-07**

**WHEREAS**, the City of Durham has Constitutional and Charter authority to manage its rights of way and to receive compensation for use of the rights of way consistent with applicable state and federal law; and

**WHEREAS**, the City has granted individually-negotiated franchises to certain utilities using the City's rights of way to provide utility service, which franchises generally set forth the terms of use of the rights of way and the compensation to be paid to the City for this use; and

**WHEREAS**, the City has deemed it desirable to clarify, update and consolidate the City's regulations applicable to the use of City rights of way by utilities; and

**WHEREAS**, the City intends that the terms of use and compensation to be paid to the City as provided in any individually-negotiated franchises effective as of the date of this Ordinance shall remain effective after adoption of this Ordinance; and

**WHEREAS**, the City finds adoption of this Ordinance is in the public interest;

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

**Section 1:** The regulations related to the use of public rights of way within the City as set forth in Exhibit A are hereby adopted.

**Section 2:** Ordinance 106-82, Ordinance 140-86, Ordinance 197-99, Ordinance 203-00, Ordinance 227-05 and Ordinance 236-07 are hereby repealed.

**Section 3:** An emergency being declared so as to allow the City to take measures necessary to comply with newly adopted federal regulations, this Ordinance shall become effective immediately upon its adoption.

**Duly adopted by the City Council this 18th day of December, 2018.**

**CITY OF DURHAM**

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Gery Schirado, Mayor

**ATTEST:**

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Linda Tate, City Administrator/Recorder

## **EXHIBIT A**

### **UTILITY FACILITIES IN PUBLIC RIGHTS OF WAY**

#### **Section 1. Title.**

The ordinance codified in this Chapter shall be known and may be referenced as the utility facilities in public rights of way ordinance.

#### **Section 2. 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 for permitting use of the rights of way;
- D. Assure that all utility companies, persons and other entities owning or operating facilities and/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 citizens;
- F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City; and
- G. Comply with applicable provisions of state and federal law.

#### **Section 3. 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.

#### **Section 4. 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 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.

#### **Section 5. 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.

“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.

“City” means the City of Durham, an Oregon municipal corporation, and individuals authorized to act on the City’s behalf.

“City Council” means the elected governing body of the City of Durham, Oregon.

“City facilities” means City or publicly-owned structures or equipment located within the right of way or public easement used for governmental purposes.

“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 and whether or not the transmission medium is wireline. Communications service 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) private communications system services provided without using the public rights of way; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

“Facilities-based Provider” shall have the meaning set forth in Ordinance No. 262-19.

“License” means the authorization granted by the City pursuant to Ordinance No. 262-19.

“Person” means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association or other organization, including any natural person or any other legal entity.

“Private communications system” means a system, including the construction, maintenance or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a person for their use and not for resale, directly or indirectly. “Private communications system” includes services provided by the state of Oregon pursuant to ORS 190.240 and 283.140.

“Public utility easement” means the space in, upon, above, along, across, over or under an easement for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of utilities facilities. “Public utility easement” does not include an easement solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of City facilities, or where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the City.

“Right 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 franchise or license to occupy and use such areas for utility facilities.

“State” means the state of Oregon.

“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, plant, 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.

“Utility operator” or “operator” means any person who owns, places, operates or maintains a utility facility within the City.

“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, and/or storm sewer to or from customers within the corporate boundaries of the City, and/or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.

“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.

## **Section 6. Franchise or License Required.**

A. Every utility operator must have a valid franchise agreement from the City prior to conducting any work in the rights of way, provided that Facilities-based Providers shall obtain licenses as required in Ordinance No. 262-19 rather than a franchise. Facilities-based Providers shall be subject to the provisions of this Ordinance to the extent not in conflict with the provisions of Ordinance No. 262-19.

B. Franchise Application. The franchise application shall 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. Franchise 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 franchise.

D. Determination by City. The City shall issue, within a reasonable period of time, a written determination granting or denying the franchise in whole or in part. If the franchise is denied, the written determination shall include the reasons for denial. The franchise 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. Rights Granted.

1. The franchise granted hereunder shall authorize and permit the franchisee, 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, or the portions of the rights of way described in the franchise, for the term of the franchise.
2. Any franchise 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 J of this section.
3. Neither the issuance of the franchise nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, police power or regulatory power of the City as may exist at the time the franchise is issued or thereafter obtained.

F. Term. Subject to the termination provisions in subsection L of this section and unless otherwise provided in the franchise, the franchise granted pursuant to this Chapter will remain in effect for a term of five (5) years.

G. Franchise Nonexclusive. No franchise 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 franchise 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 franchise shall be deemed to grant, convey, create, or vest in franchisee a real property interest in land, including any fee, leasehold interest or easement.

H. Reservation of City Rights. Nothing in the franchise shall be construed to prevent the City from grading, paving, repairing and/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 franchisee'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 franchisee, franchisee's facilities shall be removed or relocated as provided in subsections 8.C, 8.D and 8.E of this Chapter, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

I. 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 franchise and privilege tax requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities.
2. A utility operator that provides or transmits more than one utility service over its facilities is not required to obtain a separate franchise for each utility service, provided that it gives

notice to the City of each utility service provided or transmitted and pays the applicable privilege tax for each utility service.

J. Transfer or Assignment. To the extent permitted by applicable state and federal laws, the franchisee shall obtain the written consent of the City prior to the transfer or assignment of the franchise. The franchise 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 franchise is transferred or assigned, the transferee or assignee shall become responsible for all facilities of the franchisee at the time of transfer or assignment. A transfer or assignment of a franchise does not extend the term of the franchise.

K. Renewal. At least ninety (90), but no more than one hundred eighty (180), days prior to the expiration of a franchise granted pursuant to this section, a franchisee seeking renewal of its franchise shall submit a franchise 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. If the City determines that the franchisee is in violation of the terms of this Chapter or its franchise at the time it submits its application, the City may require that the franchisee 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 and/or grant the franchise.

L. Termination.

1. Revocation or Termination of a Franchise. The City Council may terminate or revoke the franchise 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 franchise;
  - c. Misrepresentation in a franchise 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 and/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. The egregiousness of the misconduct;
  - b. The harm that resulted;
  - c. Whether the violation was intentional;
  - d. The utility operator's history of compliance; and/or
  - e. The utility operator's cooperation in discovering, admitting and/or curing the violation.
3. Notice and Cure. The City shall give the utility operator written notice of any apparent violations before terminating a franchise. The notice shall include a short 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 or if the City manager or designee determines that the utility operator's response is inadequate, the City manager or designee shall refer the matter to the City Council, which shall provide a duly noticed public hearing to determine whether the franchise shall be terminated or revoked.

## **Section 7. 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 the National Electrical Code and the National Electrical Safety Code and the current edition of the Oregon Department of Transportation (ODOT)/American Public Works Association (APWA) Oregon Standard Specifications for Construction. When a utility operator, or any person acting on its behalf, does any work in or affecting the rights of way, the utility operator shall, at its own expense, promptly restore the rights of way as directed by the City consistent with applicable City codes, rules and regulations. A utility operator or other person acting on its behalf 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 to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting the rights of way or property.

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 a current franchise or license with the City, and all applicable fees have been paid.
2. In the event of an emergency, a utility operator with a franchise or 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 City prior to commencing the emergency work and in any event applies for a permit from the City as soon as reasonably practicable, but not more than forty eight (48) hours after commencing the emergency work. As used in this subsection, "emergency" means a circumstance in which immediate repair to damaged or malfunctioning facilities 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.
  - 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 right 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 registered professional engineer, or other 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.
  5. All permit applications shall be accompanied by a written construction schedule, which shall include a deadline for completion of construction. The construction schedule is subject to approval by the City.
  6. Prior to issuance of a construction permit, the applicant shall pay a permit fee in an amount to be determined by resolution of the City Council.
  7. If satisfied that the applications, plans and documents submitted comply with all requirements of this Chapter, the City 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 City not less than two (2) working 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 City 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 work which 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 at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provision of this Chapter.
  11. 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 appropriate city official.
- C. Performance Surety.
1. The City may, in its sole discretion, require 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. The performance bond or other form of surety acceptable to the City shall remain in force until sixty (60) days after substantial completion of the work, as determined in writing by the City, including restoration of rights of way and other property affected by the construction.



3. 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 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 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.

E. Restoration.

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 City.
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 the utility operator a reasonable period of time not less than ten (10) days, unless an emergency or threat to public safety is deemed to exist, 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.

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 right 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 1st 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. If requested by the City, 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 City, to minimize public inconvenience, disruption, or damages.

## **Section 8. 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, the 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 thirty-five thousand (35,000) volts or to pedestals, cabinets or other above-ground equipment of any utility operator for which the City has given written approval for above-ground installation.

B. Installation of Facilities. The City reserves the right to specify the location and manner in which utility facilities may be installed within the rights of way. All facilities in the public right of way shall be installed underground unless the City specifically authorizes attachments to utility poles or other above ground facilities. Unless otherwise provided in a franchise agreement, the following requirements shall apply:

1. Whenever any new or existing facilities are located or relocated underground within a public right-of-way, franchisees currently occupying the same public right-of-way shall relocate above-ground facilities underground concurrently with the other affected utilities to minimize disruption of the public right-of-way, absent undue hardship or extraordinary circumstances as determined by the City and consistent with applicable State and Federal law.
2. Whenever any existing facilities are located underground within a public right-of-way of the City, a franchisee with permission to occupy the same public right-of-way must also locate its facilities underground.
3. All facilities installed underground shall be installed within an existing underground duct or conduit whenever surplus capacity exists within such utility facility, unless the franchisee demonstrates to the satisfaction of the City that such installation is not feasible.
4. All franchisees with permission to install overhead facilities in the right of way shall install facilities on pole attachments to existing utility poles only, and then only if surplus space is available.
5. No franchisee may locate or maintain facilities so as to unreasonably interfere with the use of the public rights-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the public rights-of-way. All such facilities shall be moved by the franchisee, temporarily or permanently as determined by the City,

at the franchisee's sole expense. All use of public rights-of-way shall be consistent with all other applicable City regulations.

6. Within 30 days following written notice from the city, a franchisee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any facilities within the public rights-of-way whenever the City shall have determined that such removal, relocation, change or alteration is reasonably necessary for:
  - a. The construction, repair, maintenance or installation of any City or other public improvement in or upon the public rights-of-way.
  - b. The operations of the City or other governmental entity in or upon the public rights-of-way.
  - c. The public interest.
7. In addition to the requirements imposed by this Ordinance, all wireless facilities authorized by the City for installation on utility poles or other above-ground facilities in the right of way shall conform to standards adopted by separate resolution of the City Council.
8. Equipment cabinets, utility vaults equipment pedestals and similar facilities must be installed underground, unless the franchisee demonstrates to the satisfaction of the City that such installation is not feasible, and constructed no larger than necessary.

C. 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.

D. Relocation of Utility Facilities.

1. 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, when requested to do so in writing by the City.
2. The City may allow payment of a fee in lieu of undergrounding when the City Engineer determines that one or more of the following circumstances exist:
  - a. The placement or relocation of the facilities underground conflicts with the City's current adopted standards for underground utility work; or
  - b. The City, the State of Oregon or another taxpayer-funded provider of utilities or right of way improvements has appropriated funds in that agency's current fiscal year for the construction of utilities or other improvements at or near the same location, and the undergrounding work will be included as part of that public agency's project; or
  - c. The scale of a private development or re-development of property is such that the undergrounding of utilities in the course of such development or redevelopment would result in a piecemeal effect when the property is viewed in its surroundings and the undergrounding work, in the City's sole estimation, is therefore better left to such future time as it may be done on a larger scale together with additional undergrounding work to achieve economies of scale in construction costs.

A fee in lieu of undergrounding, when allowed by the City, shall be calculated by the City Engineer as the amount estimated to be the present cost of such undergrounding if done in the course of the development or redevelopment in question. The fee shall be due and payable before any city permit to develop the site or to construct a structure on the site may be issued. The City may commingle all such fees collected but shall keep all such fees

collected in a separate dedicated account to be used only for costs related to the undergrounding of utilities in the course of public improvements undertaken by the City or the State of Oregon anywhere within the City's boundaries. A person paying the fee shall have no property interest in the amount paid and may not direct how or where the fee so paid is applied by the City in the future. Interest earnings on fees paid to the City in lieu of undergrounding shall accrue to the City as an offset for the inflation in construction costs that may occur between the time the fee is paid and the time that the City applies the fee to the purposes set out in this Ordinance.

3. 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, provided that 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.
4. The City 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, 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 the utility facility to be removed, relocated, 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 for the costs the City incurred within thirty (30) days.

E. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the City, within thirty (30) days following written notice from the City or such other time agreed to in writing by the City, 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.
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 overcome this presumption by presenting plans for future use of the facility.
  - 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.

**F. 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 or B 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. In no event shall the City be liable for consequential losses or damages.

**G. Engineering Designs and Plans.** Upon request, the utility operator shall provide the City with two complete sets of engineered 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 such plans materially changed during construction. The utility operator shall provide two updated complete sets of as built plans upon request of the City, but not more than once per year.

**Section 9. 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.

**Section 10. 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.

### **Section 11. Vacation.**

If the City vacates any right of way, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the right of way unless 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 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 at the utility operator's sole expense. Upon receipt of an invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

### **Section 12. Privilege Tax.**

A. Except as provided in subsection B, every utility operator 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 privilege tax for every utility service provided using the rights of way in the amount determined by resolution of the City Council.

B. Facilities-based Providers shall pay the license fee as provided in Ordinance 262-19 and the applicable City Council Resolution in lieu of the privilege tax required in this section.

C. Privilege tax 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 privilege tax set forth in subsection A of this section 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 person owns, places, operates, maintains or uses utility facilities in the City, and shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The utility shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

E. The calculation of the privilege tax 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 privilege tax or any other fees required by this Chapter.

### **Section 13. 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, privilege tax 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 demonstrate that the utility operator or provider has underpaid the privilege tax 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 12.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.

#### **Section 14. 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).
  - d. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars (\$3,000,000.00).
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 policy shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City. If the insurance is canceled or materially altered, the utility operator shall obtain a replacement policy that complies with the terms of this section and provide the City with a replacement certificate of insurance. 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. If requested by the City, before a franchise is granted or license is issued, 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 compliance with the terms of this Chapter, including any costs, expenses, damages or loss the City pays or incurs 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 7.C of this Chapter.

**C. Indemnification.**

1. Each utility operator shall defend, indemnify and hold the City and its officers, employees, agents and representatives harmless 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 or license. 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.

**Section 15. Compliance.**

Every utility operator shall comply with all 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 entire term of any license or any franchise granted under this Chapter.

**Section 16. 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 or information, to the extent permitted by Oregon Public Records Laws, 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 document, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

**Section 17. Penalties.**

- A. Any person found guilty of violating any of the provisions of this Chapter or the franchise shall be subject to a penalty of 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. Nothing in this Chapter shall be construed as limiting any judicial or other remedies the City may have at law or in equity, for enforcement of this Chapter.



**Section 18. 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 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, clause, phrase, term, provision, condition, covenant and 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.

**Section 19. 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.