



## **CITY OF TILLAMOOK PUBLIC NOTICE**

### **Proposed Ordinance Adoption**

**Monday, October 6, 2014 at 7:00 p.m.  
Tillamook City Hall Council Chambers  
210 Laurel Avenue, Tillamook**

NOTICE is hereby given that the Tillamook City Council will consider Ordinance 1293:

**AN ORDINANCE OF THE CITY OF TILLAMOOK, OREGON,  
GOVERNING THE USE AND OCCUPATION OF THE PUBLIC RIGHT OF WAY BY  
COMMUNICATIONS PROVIDERS AND ESTABLISHING A PROCESS, FEES AND  
FRANCHISE AGREEMENT TERMS FOR SUCH USE**

A copy of the ordinance is attached to this notice, and may be obtained at City Hall, 210 Laurel Avenue, Tillamook, Oregon, or online at [www.tillamookor.gov](http://www.tillamookor.gov).

THIS IS A PUBLIC MEETING PER ORS CHAPTER 192. THE CITY COUNCIL RESERVES THE RIGHT TO CALL AN EXECUTIVE SESSION PER ORS 192.660. CITY HALL IS HANDICAP-ACCESSIBLE. PLEASE CONTACT THE OFFICE OF THE CITY MANAGER SHOULD ACCOMODATIONS BE REQUIRED FOR CITIZENS WITH VISUAL OR MANUAL IMPAIRMENT. PERSONS WITH HEARING IMPAIRMENTS MAY CONTACT THE OREGON RELAY SERVICE BY PHONING 1-800-648-3458 (TDD)  
OR 1-800-848-4442(VOICE)

ORDINANCE NO. 1293

**AN ORDINANCE OF THE CITY OF TILLAMOOK, OREGON,  
GOVERNING THE USE AND OCCUPATION OF THE PUBLIC RIGHT OF WAY BY  
COMMUNICATIONS PROVIDERS AND ESTABLISHING A PROCESS, FEES AND  
FRANCHISE AGREEMENT TERMS FOR SUCH USE**

**The City of Tillamook ordains as follows:**

**Section 1. Short Title.** This Ordinance shall be referred to as the “Communications Ordinance.”

**Section 2. Jurisdiction and Management of the Public Rights of Way.**

- A. The City has jurisdiction and exercises regulatory management authority over all Public Rights of Way pursuant to the City Charter and State law. The City’s purpose for exerting its management authority over the Public Rights of Way is to protect and efficiently manage the public’s resources and to ensure fair and non-discriminatory access to the Public Right of Way.
- B. The City has jurisdiction and exercises regulatory management over each Public Right of Way whether the City has a fee, easement, or other legal interest in the Right of Way. The City has jurisdiction and regulatory management of each Right of Way whether the legal interest in the Right of Way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
- C. No Person may occupy or encroach on a Public Right of Way without the permission of the City. The City grants permission to use Rights of Way through Franchise Agreements and Construction permits.
- D. The exercise of jurisdiction and regulatory management of a Public 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.
- E. The City retains the right and privilege to cut or move any Communications Facilities located within the Public Rights of Way as the City may determine to be necessary, appropriate or useful in response to a public health or safety Emergency.

**Section 3. Regulatory Fees; Effect of Ordinance.**

- A. The fees and costs addressed in this Ordinance, and any compensation charged and paid for regarding the use of the Public Rights of Way addressed in this Ordinance, 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 Communications Provider, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of Communications Services.

- B. The City has determined that any fee provided for by this Ordinance is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees are not imposed on property or property owners.
- C. The fees and costs provided for in this Ordinance are subject to applicable federal and State laws.
- D. To the extent that this Ordinance is not in conflict with and can be implemented consistent with existing ordinances and non-expired Franchise Agreements governing the use of the Public Right of Way for Communications Services, this Ordinance shall apply to all such existing ordinances and non-expired Franchise Agreements. In the event of a conflict between this Ordinance and the terms of a Franchise Agreement governing the use of the Public Right of Way for Communications Services adopted after the Effective Date of this Ordinance, the terms of this Ordinance shall apply and prevail.
- E. A Franchise Agreement granted hereunder shall comply with the requirements of this Ordinance unless the Ordinance expressly authorizes different terms. Such authorization is indicated by the phrase “Unless otherwise expressly provided in a Franchise Agreement . . . .”

## **DEFINITIONS**

**Section 4. Definitions.** For the purpose of this Ordinance 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. Words not defined herein shall be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act. If not defined there, the words shall be given their common and ordinary meaning.

**Cable Act** - shall mean the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.*

**Cable Service** - is to be interpreted consistent with federal law and means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, required for the selection or use of such video programming or other programming service.

**Cable Service Provider** - means any provider of Cable Service.

**City** - means the City of Tillamook, 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 Tillamook, Oregon.

**Control** - means actual working Control in whatever manner exercised.

**City Property** - means and includes all real property owned by the City, other than Public Rights of Way and Utility Easements as those are defined herein, and all property held in a proprietary capacity by the City which are not subject to Right of Way franchising as provided in this Ordinance.

**Communications Facilities or Facilities** - means all plant, equipment and systems, other than customer premises equipment, used by any Communications Provider. For the purposes of this Ordinance, Facilities used by Cable Service Providers to provide Cable Service are Communications Facilities.

**Communications Provider or Provider** - means any provider of Communications Services and includes, but is not limited to, every Person who directly or indirectly owns, controls, operates or manages Communications Facilities within the City.

**Communications Service(s) or Service(s)** - 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 Services includes all forms of telephone services and voice, video, data or information transport and expressly includes Cable Service offered by a Cable Service Provider, but does not include: (1) open video system service, as defined in 47 C.F.R. 76; (2) private Communications System services provided without using the Public Rights of Way; (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; and (4) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

**Conduit** - means any structure, or portion thereof, containing one or more Ducts, Conduits, manholes, bolts, cables, fiber, or other infrastructure used by or for any telegraph, telephone, electrical utility, conductors, or Cable Service.

**Construction** - means any activity in the Public Rights of Way resulting in physical change thereto, including excavation or placement of structures, but excluding routine maintenance or repair of existing Facilities.

**Days** - means calendar Days unless otherwise specified.

**Duct** - means a single enclosed raceway for conductors or cable.

**Emergency** - has the meaning provided for in ORS 401.025.

**Facilities** - means Communications Facilities as defined herein.

**Federal Communications Commission** - means the federal administrative agency, or its lawful successor, authorized to regulate and oversee Communications or Cable Service Providers on a national level.

**Franchise or Franchise Agreement** - means an agreement between the City and a Communications Provider which grants a privilege to the Communications Provider to use

## ATTORNEY DRAFT 9.29.14

Public Right of Way within the City for a limited, dedicated purpose and in return for specific compensation.

**Franchisee** – means a Communications Provider who is a party to a valid Franchise Agreement with the City.

**OPUC** - means the statutorily created State agency in the State of Oregon responsible for licensing and regulation of certain Communications Providers as set forth in Oregon law, or its lawful successor.

**Overhead Facilities** - means utility poles, Utility Facilities and Communications Facilities above the surface of the ground, including the underground supports and foundations for such Facilities.

**Person** - means an individual, corporation, company, association, joint stock company or association, firm, partnership, or limited liability company.

**Private Communications Network** - 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 network” includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.

**Public Rights of Way or Right of Way** - include, but are not limited to, City streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and 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 or authority to grant a Franchise to occupy and use such areas for Communications Facilities. “Public Rights of Way” shall also include Utility Easements as defined below.

**Right of Way Use Fee** - means the fee imposed upon a Communications Provider for its occupation of or use of the Public Right of Way without a valid Franchise Agreement.

**State** - means the State of Oregon.

**Telecommunications Act** - means the Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*

**Underground Facilities** - means utility and Communications Facilities located under the surface of the ground, excluding the underground foundations or supports for "Overhead Facilities."

**Utility Easement** - means any easement granted to or owned by the City and acquired, established, dedicated, or devoted for public utility purposes. “Utility Easement” does not include any easement dedicated solely for City Facilities or where the proposed use by the Provider is inconsistent with the terms and conditions of any easement granted to the City.

**Utility Facilities** - means the plant, equipment and property, including but not limited to the poles, pipes, mains, Conduits, Ducts, cable, wires, plant and equipment located under, on, or above the surface of the ground within the Public Right of Way and used or to be used for the purpose of providing utilities, Cable or Communications Service.

**REGISTRATION AND FRANCHISE REQUEST**

**Section 5. Purpose.** The purpose of the registration and Franchise request process is:

- A. To assure that all Communications Service Providers who have Facilities within the City and/or who provide Communications Services within the City using the Public Right of Way comply with the ordinances, rules and regulations of the City.
- B. To provide the City with accurate and current information concerning Communications Providers who offer Communications Service within the City or who own or operate Communications Facilities within the City.
- C. To assist the City in the enforcement of this Ordinance and the collection of any City Franchise fees or Right of Way Use Fees or charges that may be due.

**Section 6. Registration and Franchise Request.**

- A. All Communication Providers who own, operate or use Facilities within the Public Right of Way and all Communication Providers who provide Communication Services to any customer within the City, shall register with the City, on a form provided by the City, within forty-five (45) Days of the effective date of this Ordinance. If such Communications Providers do not have a valid Franchise Agreement with the City, they must also request a Franchise Agreement. Any prospective Communications Providers who want to install or use Communications Facilities within the Public Right of Way or want to provide Communications Services within the City after the effective date of this Ordinance shall register and request a Franchise Agreement with the City, on a form provided by the City, prior to installing or providing Services.
- B. After registering and requesting a Franchise Agreement with the City pursuant to subsection 6.A of this Section, the Communication Provider shall, by December 31<sup>st</sup> of each year, file with the City a new registration form if it intends to maintain Facilities or provide Services at any time in the following calendar year. Communications Providers who file an initial registration pursuant to subsection 6.A on or after September 30<sup>th</sup> shall not be required to file an annual registration until December 31<sup>st</sup> of the following year.
- C. After receiving the registration and Franchise request form, the City will issue a written determination granting or denying the registration and Franchise request in whole or in part. If the registration and Franchise request is denied, the written determination shall

include the reasons for denial. The request shall be evaluated based upon the continuing capacity of the Public Rights of Way to accommodate the prospective Franchisee's proposed Facilities and legal, technical and financial ability to comply with the provisions of this Ordinance and applicable federal, State and local laws, rules, and regulations. If the request is granted, the parties will enter into Franchise Agreement negotiations pursuant to Section 29 of this Ordinance.

## **CONSTRUCTION STANDARDS**

**Section 7. General.** No Person shall commence or continue with the Construction, installation or operation of Facilities within a Public Right of Way except as provided in Sections 7 through 21 of this Ordinance and in compliance with all applicable City and State ordinances, codes, rules, and regulations.

**Section 8. Construction Codes.** 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.

**Section 9. Construction Permits Requests; Emergencies.** Except in the event of an Emergency, no Person shall construct or install any Facilities within a Public Right of Way without first obtaining Public Works and Right of Way Use permit and paying such permit fees as established by the City. No permit shall be issued for the Construction or installation of Communications Facilities within a Public Right of Way unless:

- A. The requestor has first filed a registration and Franchise request with the City as required by Sections 5 through 6 of this Ordinance; and
- B. The requestor has entered into a Franchise Agreement with the City pursuant to Sections 29 through 43 of this Ordinance.

In the event of an emergency, a permittee or its contractor may perform work on its Facilities to address the emergency without first obtaining a permit from the City provided, it attempts to notify the City prior to commencing the emergency work and in any event applies for a permit from the City and pays any applicable permit fee as soon as reasonably practicable. As used in this Section 9, "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.

**Section 10. Construction Permits.** Requests for permits to construct Communications 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. That the Facilities will be constructed in accordance with any applicable Franchise Agreement.

- C. The location and route of all Facilities to be installed aboveground or on existing utility poles.
- D. The location and route of all Facilities on or in the Public 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 within the City. Existing Facilities shall be differentiated on the plans from new Construction. If requested, a cross section shall be provided showing new or existing Facilities in relation to the street, curb, sidewalk or Right of Way.
- E. The Construction methods to be employed for protection of existing structures, fixtures, and Facilities within or adjacent to the Public Rights of Way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.

**Section 11. Verification.** All Construction permit requests shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative, that the drawings, plans and specifications submitted comply with applicable technical codes, rules and regulations.

**Section 12. Construction Schedule.** All Construction permit applications shall be accompanied by a written Construction schedule, which shall include an estimated date for completion of Construction. The Construction schedule is subject to approval by the Public Works Director. The permittee shall promptly complete all Construction activities so as to minimize disruption of the Public Rights of Way and other public and private property. All Construction work within Public 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.

**Section 13. Coordination of Construction Activities.** A Communications Provider is required to make a good faith effort to cooperate with the City.

- A. By January 1 of each year, a Communications Provider shall provide the City with a schedule of their known proposed Construction activities in, around the Public Rights of Way, or affecting the Right of Way.
- B. If requested by the City, a Communications Provider shall meet with the City to schedule and coordinate Construction in the Public Rights of Way. At that time, City will provide available information on plans for local, State, and/or federal Construction projects.
- C. All Construction locations, activities and schedules shall be coordinated, as ordered by the City Engineer or designee, to minimize public inconvenience, disruption or damages.

**Section 14. Construction Permit Fee.** Unless otherwise expressly provided in a Franchise Agreement, prior to issuance of a Construction permit, the requestor shall pay a permit fee in an amount to be established by the City. Such fee shall be designed to defray the costs of City administration of the requirements of this Ordinance.

**Section 15. Issuance of Permit.** If satisfied that the plans and documents submitted comply with all requirements of this Ordinance and with any applicable Franchise Agreement, the Public

Works Director shall issue a permit authorizing Construction of the Facilities, subject to such further conditions affecting the time, place and manner of performing the work.

**Section 16. Notice of Construction.** Except in the case of an Emergency, the permittee shall notify the Public Works Director not less than two (2) working Days in advance of any excavation or Construction in the Public Rights of Way.

**Section 17. Compliance with Permit.** All Construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the Facilities. The Public Works Director and representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

**Section 18. Noncomplying Work.** Subject to the notice requirements in Section 25, all work which does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Ordinance, may be removed, after reasonable notice to the permittee, at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provision of this Ordinance.

**Section 19. As-Built Drawings.** If requested by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and accurately depicting the location of all Facilities constructed pursuant to the permit. These plans shall be submitted to the City Engineer or designee within sixty (60) Days after completion of Construction, in a format acceptable to the City.

**Section 20. Restoration of Public Rights of Way and City Property.**

- A. When a permittee, or any Person acting on its behalf, does any work in or affecting any Public Rights of Way or City Property, it shall at its own expense, promptly restore such ways or property to good order and condition unless otherwise directed by the City.
- B. If weather or other conditions do not permit the complete restoration required by this Section, the permittee shall temporarily restore the affected Rights of Way or property. Such temporary restoration shall be at the permittee's sole expense and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.
- C. If the permittee fails to restore Rights of Way or property to good order and condition, the City shall give the permittee written notice and provide the permittee a reasonable period of time not exceeding thirty (30) Days to restore the Rights of Way or property. If, after notice, the permittee fails to restore the Rights of Way or property to as good a condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the permittee.
- D. A permittee 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 such Rights of Way or property.

**Section 21. Performance and Completion Bond.** Unless otherwise expressly provided in a Franchise Agreement, a performance bond or other form of surety acceptable to the City equal to at least 100% of the estimated cost of Constructing permittee's Facilities within the Public Rights of Way of the City shall be provided to the City before Construction is commenced.

- A. The surety shall remain in force until sixty (60) Days after substantial completion of the work, as determined in writing by the City, including restoration of Public Rights of Way and other property affected by the Construction.
- B. The surety shall guarantee, to the satisfaction of the City:
  - 1. Timely completion of Construction;
  - 2. Construction in compliance with applicable plans, permits, technical codes and standards;
  - 3. Proper location of the Facilities as specified by the City;
  - 4. Restoration of the Public Rights of Way and other property affected by the Construction; and
  - 5. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

## **FACILITIES**

**Section 22. Location of Facilities.** All Facilities located within the Public Right of Way shall be constructed, installed and located in accordance with the terms of the Construction permit and approved final plans and specifications for the Facilities, the Franchise, and all applicable City codes, rules and regulations. Unless otherwise specified in a Franchise Agreement, whenever any existing electric utilities or Communications Facilities that are located underground or are required to be located underground by City Ordinance and are within a Public Right of Way of the City, a Communications Provider occupying the same Public Right of Way must also locate its Facilities underground at its own expense.

**Section 23. Interference with the Public Rights of Way.** No Communications Provider may locate or maintain its 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 use of Public Rights of Way shall be consistent with City codes, ordinances and regulations.

## **Section 24. Relocation or Removal of Facilities.**

- A. A Communications Provider shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any Facilities within the Public Rights of Way, including relocation of aerial Facilities underground, when requested to do so in writing by the City.

- B. Nothing in this section shall be deemed to preclude a Communications Provider from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements. A Communications Provider shall timely comply with the requirements of this section regardless of whether or not it has requested or received such reimbursement or compensation.
- C. The City shall provide at least 30 days written notice of the time by which the Communications Provider must remove, relocate, change, alter or underground its Facilities. Extensions may be granted upon the Communications Provider's request. If a Communications Provider fails to remove, relocate, alter or underground any Facility as requested by the City and by the date established by the City, the Communications Provider shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays. The City may cause the Facility to be removed, relocated, altered or undergrounded at the Communications Provider's sole expense using qualified personnel or contractors consistent with applicable State and federal safety laws and regulations. Upon receipt of a detailed invoice from the City, the Communications Provider shall reimburse the City for the costs the City incurred within thirty (30) Days.

**Section 25. Removal of Unauthorized Facilities.** Within thirty (30) Days following written notice of unauthorized Facilities from the City, or at a later date agreed upon by the parties, a Communications Provider, or other Person who owns, controls or maintains any unauthorized system, Facility, or related appurtenances within the Public Rights of Way of the City shall, at its own expense, remove such unauthorized Facilities from the Public Rights of Way of the City. A system or Facility is subject to removal in the following circumstances:

- A. One (1) year after the expiration or termination of the Communications Provider's Franchise, unless the City and the Communications Provider have entered into good faith negotiations or the City has provided written authorization for abandonment in place.
- B. Upon abandonment of a Facility within the Public Rights of Way. A Facility will be considered abandoned when it is deactivated, out of service, or not used for its intended and authorized purpose for a period of ninety (90) Days or longer. A Facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the Facility is being replaced. The City shall contact the Provider before concluding that a Facility is abandoned. A Facility may be abandoned in place and not removed if authorized in writing by the City and there is no apparent risk to the public safety, health, or welfare.
- C. If the Facility was Constructed or installed without the appropriate prior authority at the time of Construction or installation.
- D. If the Facility was Constructed or installed at a location not authorized by the Communications Provider's Franchise or other legally sufficient permit.

**Section 26. Damage to Communication Provider's Facilities.** Unless directly caused by the City's negligent, careless, wrongful, willful, intentional or malicious acts, and consistent with

Oregon laws including the statutory and constitutional tort claim limits, the City shall not be liable for any damage or injury to or loss of any Facility, property, or Person within the Public Rights of Way as a result of or in connection with any public works, public improvements, Construction, excavation, grading, filling, or work of any kind in the Public Rights of Way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom.

**Section 27. Service to the City.** If the City contracts for the use of any Facilities, services, installation, or maintenance from the Communications Provider, the Communications Provider shall offer the City its' most favorable current rate charged to similar Oregon users for similar services. Other terms and conditions of such services may be specified in a Franchise Agreement or in another Agreement between the City and the Communications Provider.

**Section 28. Compensation for City Property.** If any right is granted by lease, Franchise or other manner, to use and occupy City Property for the installation of Facilities or other infrastructure, the compensation to be paid for such right and use shall be fixed by the City through a separate agreement with the Communications Provider.

## **FRANCHISE AGREEMENTS REQUIRED**

### **Section 29. Franchise Required.**

Prior to occupying City Public Rights of Way, all Communications Providers must enter into a Franchise Agreement with the City. Any Person whose Communications Facilities occupy the Public Right of Way, with or without a valid Franchise Agreement from the City, must comply with the provisions of this Ordinance, specifically including payment of the Franchise fee or Right of Way fees. Cable Service Providers shall be subject to this Ordinance and shall enter into a Cable Franchise Agreement with the City, subject to all applicable provisions of State and federal law, including the Cable Act. Such Cable Franchise agreements may provide for cable specific provisions, such as public, educational, and government access channels and the provision of services to government buildings.

### **Section 30. Scope of Franchise; Reservation of City Rights.**

- A. No Franchise granted pursuant to this Ordinance shall convey any right, title or interest in the Public Rights of Way, but shall be deemed a grant to use and occupy the Public Rights of Way for the limited purposes and term, and upon the conditions stated in the Franchise Agreement. No Franchise Agreement granted under this Ordinance shall confer any exclusive right, privilege, license or Franchise to occupy or use the Public Rights of Way for delivery of Communications Service or any other purposes. The right granted by the Franchise is limited to the right to use the Public Rights of Way for the provision of Communications Service as defined herein. A Communications Provider shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers; provided that the Communications Provider shall notify the City that such lease or agreement has been granted to a customer or lessee.
- B. Nothing in the Franchise shall be construed to prevent the City from grading, paving, repairing and/or altering any Public Rights of Way, constructing, laying down, repairing,

relocating or removing City infrastructure or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any City Infrastructure. If any of the Franchisee's Facilities interfere with the Construction, repair, replacement, alteration or removal of any Public Rights of Way, public work, City utility, City improvement or City infrastructure, except those providing Communications Service in competition with the Franchisee, such Facilities may be removed or relocated as provided in Section 24 and 25 of this Ordinance.

**Section 31. Term of Franchise; Renewals.**

- A. Term. Unless otherwise expressly provided in a Franchise Agreement, a Franchise granted hereunder shall be in effect for an initial term of five (5) years and may be renewed as provided in this section.
- B. Renewals. Unless otherwise expressly provided in a Franchise Agreement, a Franchise shall be renewed in the following manner:
  - 1. A Franchisee who desires to renew an existing, valid Franchise under this Ordinance shall, not less than one hundred eighty (180) Days before expiration of the current agreement, file a request for renewal with the City, which shall include the following information:
    - a. The information required pursuant to Section 6 of this Ordinance and any additional information required pursuant to the existing Franchise Agreement.
    - b. Any desired amendments to the existing Franchise Agreement, including the desired renewal term, provided that such amendments do not violate or conflict with this Ordinance.
  - 2. Renewal Determinations. Within ninety (90) Days after receiving a complete renewal request, the City shall issue a written determination granting or denying the renewal request in whole or in part. Such renewal shall be for a renewal term to be mutually decided on by the parties. If the renewal request is denied, the written determination shall include the reasons for non-renewal. The City shall evaluate the renewal request based upon the capacity of the Rights of Way to accommodate the Franchisee's Facilities and the Franchisee's legal, technical and financial ability to comply with the provisions of this Ordinance and any applicable federal, State and local laws, rules, or regulations.

**Section 32. Franchise Fee; Right of Way Use Fee.**

- A. A Franchise Agreement granted hereunder shall require the Franchisee to pay a Franchise fee in an amount determined by resolution of the City Council. Every Communications Provider occupying or using the Public Rights of Way without a valid Franchise Agreement shall pay a Right of Way Use Fee in the amount equal to the Franchise fee until such time as the Communications Provider enters into a valid Franchise Agreement with the City.

- C. If the Communications Provider's only use of the Public Right of Way is to place wireless Facilities above the ground on existing poles or similar structures in the Public Right of Way and the operator does not install or use lines, wires or cables, a Communications Provider is not required to pay a Right of Way Use Fee or Franchise fee under this Section, provided it complies with all other applicable requirements of this Ordinance and all other applicable City codes, regulations and rules. Nothing in this Subsection C limits the City's authority to charge reasonable rental or pole attachment rates for the private use of City Property.
- D. Unless otherwise expressly specified in a Franchise Agreement, the Franchise fees required by this Section shall be paid within thirty (30) Days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues and a calculation of the amount payable. The Franchisee shall pay interest at the rate of nine percent (9%) per annum for any payment made after the due date.
- E. The Franchise fees or Right of Way Use Fees required in this Section shall be subject to all applicable limitations imposed by federal or State statutes.

**Section 33. New Facilities or Services.** A new Franchise Agreement shall be required of any Franchisee who desires to extend or locate its Facilities within Public Rights of Way of the City if such Facilities are not included in a valid Franchise Agreement previously granted under this Ordinance. A new Franchise shall be required of any Franchisee who desires to provide an additional Service which was not included in a valid Franchise previously granted under this Ordinance.

**Section 34. Obligation to Cure As a Condition of Renewal.** No Franchise Agreement shall be renewed until any ongoing violations or defaults in the Franchisee's performance of the Franchise Agreement or other contractual agreement with the City, or of the requirements of this Ordinance, have been cured or a plan detailing the corrective action to be taken has been approved by the City.

**Section 35. Assignments or Transfers of Franchise.** A Franchise granted under this Ordinance may not directly or indirectly be transferred, assigned or disposed of by sale, lease, merger, consolidation or by other act of the Franchisee, by operation of law or otherwise, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. Such consent conditions may include:

- A. Franchisee and the proposed assignee or transferee of the Franchise shall agree in writing to assume and abide by all of the provisions of the Franchise Agreement.
- B. No transfer shall be approved unless the City determines the assignee or transferee has the legal, technical and financial ability to comply with the provisions of this Ordinance and applicable Federal, State and local laws, rules, regulations.
- C. Unless otherwise expressly provided in a Franchise Agreement, the Franchisee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a Franchise.

- D. Any transfer or assignment of a Franchise, system or integral part of a system without prior approval of the City under this Section or pursuant to a valid Franchise Agreement shall be void and is cause for termination of the Franchise as provided in Section 36.

**Section 36. Termination of Franchise Agreement.** A Franchise Agreement to use or occupy Public Rights of Way of the City may be terminated by the City for the following reasons:

- A. Construction or operation in the City or in the Public Rights of Way of the City without a Construction permit.
- B. Construction or operation at an unauthorized location or in violation of City approvals or permits.
- C. Failure to comply with Section 35 herein with respect to sale, transfer or assignment of a system or Franchise.
- D. Misrepresentation by or on behalf of a Franchisee to the City in any Registration request or Franchise or renewal request.
- E. Abandonment of Facilities in the Public Rights of Way, unless the City has authorized abandonment in place.
- F. Failure to relocate or remove Facilities as required in this Ordinance.
- G. Failure to pay taxes, compensation, fees or costs when and as due the City under this Ordinance.
- H. Insolvency or bankruptcy of the Franchisee.
- I. Violation of material provisions of this Ordinance.
- J. Violation of the material terms of a Franchise Agreement.

**Section 37. Notice and Duty to Cure.** In the event that the City believes that grounds exist for termination of a Franchise Agreement, the City shall give the Franchisee written notice of the alleged violation and shall provide a statement of the nature of the violation. City shall provide the Franchisee a reasonable period of time to furnish evidence that:

- A. Corrective action has been or is being expeditiously pursued to remedy the violation;
- B. Rebutts the alleged violation; and/or
- C. Shows that it would be in the public interest to impose a lesser penalty or sanction.

**Section 38. Public Hearing.** In the event that a Franchisee fails to provide evidence reasonably satisfactory to the City as provided in Section 37, the City Manager shall refer the apparent violation to the City Council. The City Council shall provide the Franchisee with notice and a reasonable opportunity to be heard concerning the matter.

**Section 39. Standards for Termination or Lesser Sanctions.** If persuaded that the Franchisee has violated a material provision of this Ordinance, or of a Franchise Agreement, the City Council may terminate the Franchise or may establish some lesser sanction and cure, including but not limited to the assessment of penalties pursuant to Section 42. In doing so, the City Council shall consider the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors, whether:

- A. The violation was egregious.
- B. Substantial harm resulted.
- C. The violation was intentional or repeated.
- D. There is a history of prior violations of the same or other requirements.
- E. There is a history of overall compliance.
- F. The violation was voluntarily disclosed, admitted or cured.

**Section 40. Insurance.** Unless otherwise expressly provided in a Franchise Agreement, each Communications Provider shall, as a condition of the grant, secure and maintain liability insurance policies in amounts and types satisfactory to the City which insure both the Communications Provider and the City and its elected and appointed officers, officials, agents and employees as additional insured. The liability insurance policies required by this Section shall be maintained by the Communications Provider throughout the term of the Franchise Agreement, and any such other period of time during which the Communications Provider is operating or has Facilities within the Public Rights of Way. Each Communications Provider shall maintain continuous uninterrupted coverage. As an alternative to the insurance requirements contained herein, a Communications Provider may provide evidence of self-insurance, subject to acceptance by the City.

**Section 41. General Indemnification.** Unless otherwise expressly provided in a Franchise Agreement, each Franchise Agreement shall include Franchisee's express undertaking to defend, indemnify and hold the City and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, relating to, resulting from or alleged to arise out of, relate to or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Franchisee or its affiliates, officers, employees, agents, contractors or subcontractors in the Construction, operation, maintenance, repair or removal of its Facilities, and in providing or offering Services over the Facilities or network, whether or not such acts or omissions are authorized, allowed or prohibited by this Ordinance or by a Franchise Agreement made or entered into pursuant to this Ordinance.

**Section 42. Penalties.** Unless otherwise expressly provided in a Franchise Agreement, any Person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Ordinance or a valid Franchise Agreement shall, be subject to a penalty of not less than Two-Hundred Fifty Dollars (\$250.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs.

**GENERAL PROVISIONS**

**Section 43. Duty to Provide Information.**

- A. Except in Emergencies, within sixty (60) Days of a written request from the City, each Communications Provider shall furnish the City with the following:
1. Information sufficient to demonstrate that Communications Provider has complied with all requirements of this Ordinance and any applicable Franchise Agreement, including but not limited to the Franchise fee or Right of Way Use Fee payments required by Section 32.
  2. All books, records, maps, and other documents, maintained by the Communications Provider with respect to its Facilities within the Public Rights of Way shall be made available for inspection at a location within the City at reasonable times, or at an alternate location and time agreed upon by the parties.
- B. If the City's audit or review of the Communications Provider's books, records and other documents or information demonstrate that Communications Provider has underpaid the applicable Franchise fee or the Right of Way Use Fee by three percent (3%) or more in any one year, the Communications Provider shall reimburse the City for the cost of the audit or review, in addition to correcting the underpayment as well as paying any interest owed pursuant to Section 32 of this Ordinance. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) Days of the City's notice to Communications Provider of such underpayment, or as otherwise specified in a Franchise or other Agreement

**Section 44. Governing Law.** Any Franchise Agreement granted under this Ordinance is subject to the provisions of the constitutions and laws of the United States and the State of Oregon and the ordinances and Charter of the City.

**Section 45. Severability and Preemption.** If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Ordinance is for any reason 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 the Ordinance 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 of the Ordinance, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this Ordinance shall be valid and enforceable to the fullest extent permitted by law. In the event that federal or State laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Ordinance, then the provision shall be read to be preempted only to the extent required by law. In the event such federal or State law, rule, or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the City.

**Section 46. Other Remedies.** Nothing in this Ordinance shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Ordinance.

**Section 47. Captions.** The captions to sections throughout this Ordinance are intended solely to facilitate reading and reference to the sections and provisions contained herein. Such captions shall not affect the meaning or interpretation of this Ordinance.

**FIRST READING** by the Council this \_\_\_\_ day of \_\_\_\_\_, 2014.

**SECOND READING** by the Council this \_\_\_\_ day of \_\_\_\_\_, 2014.

**ADOPTED** by the Common Council this \_\_\_\_ day of \_\_\_\_\_, 2014.

**APPROVED** by the Mayor this \_\_\_\_ day of \_\_\_\_\_, 2014.

ATTEST:

\_\_\_\_\_  
Suzanne Weber, Mayor

\_\_\_\_\_  
Abigail Donowho, City Recorder