



PUBLIC NOTICE CITY COUNCIL MEETING

A special meeting of the City Council of Falls City, OR will be held as follows:

Posted: 6/19/19- Frink's, City Hall, Community Center, Website

Date: Monday June 24, 2019

Time: 6:00 pm

Location: Falls City Community Center

Address: 320 N Main Street, Falls City, Oregon 97344

AGENDA

1. CALL TO ORDER

2. ROLL CALL

Jeremy Gordon, Mayor ____ Dennis Sickles ____ Lori Jean Sickles ____
Jennifer Drill ____ Tony Meier ____ Cliff Lauder ____ David Radke ____

3. PLEDGE OF ALLEGIANCE

4. MOTION TO ADOPT THE ENTIRE AGENDA

5. WORK SESSION

- a. Revenue Project
 - i. Franchises- Staff Report
 1. Telecommunications Tool Kit
 2. Master Right of Way Ordinance
 3. Master Communications Infrastructure Ordinance
 4. Current Telecomm Franchises
 5. Current Ordinances
 - b. Intro to System Development Charges- Staff Report
 - i. Types
 1. Reimbursement
 2. Improvement
 - ii. Case Study- Parry Rd.
 - c. Sewer Rate level and Rate structure discussion
 - d. Public Safety/Code Enforcement fee discussion

6. NEW BUSINESS

- a. Direct City Staff to engage City Attorney
 - i. Draft Master ROW Ordinance; or
 - ii. Master Communications Infrastructure Ordinance

The City of Falls City does not discriminate in providing access to its programs, services, and activities on the basis of race, color, religion, ancestry, national origin, political affiliation, sex, age, marital status, physical or mental disability, or any other inappropriate reason prohibited by law or policy of the state or federal government. Should a person need special accommodations or interpretation services, contact the City at 503.787.3631 at least one working day prior to the need for services and every reasonable effort to accommodate the need will be made.

7. ADJOURN

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TELECOMMUNICATIONS TOOL KIT

INTRODUCTION

The purpose of the Telecommunications Tool Kit (the tool kit) is to provide cities with information about current issues in the telecommunications field. Specifically, this tool kit addresses the area of the telecommunications field that impacts the authority of cities to collect revenue from telecommunications providers. The information and tools contained herein prepare cities to evaluate local needs and issues and then to create local solutions to the common issue of dwindling revenues from telecommunications providers. The League of Oregon Cities (the League) created this tool kit by drawing upon technical telecommunications data and resources in telecommunications law.

The sections within the tool kit provide cities with the information and resources to assess the status of telecommunications in their cities; to choose a solution for updating existing telecommunications ordinances; and to avoid issues in implementing one of the proposed solutions. In addition, several resources are included and referenced throughout the tool kit so that cities have the ability to make informed decisions based on what is in the best interest of each individual community.

BACKGROUND

Technology has rapidly advanced in the last decade. On the one hand, advancement in technology is beneficial to cities in that new technology allows cities to provide efficient service to residents; attracts new businesses and economic development; provides access to health care providers; and fosters enhanced educational opportunities for local children and adults. On the other hand, keeping up with technology and specifically keeping up with ways to regulate new technology poses a challenge to cities. One of the most immediate challenges related to technology advancements is found in the field of telecommunications. Here, the challenge to cities is crafting a revenue capturing mechanism that does two things: 1) allows cities to continue to collect revenue from telecommunications providers and 2) withstands political and legal challenges.

To understand the current issues, it is helpful to revisit the traditional relationship between telecommunications providers and cities. Historically, Oregon cities have used franchise agreements to establish the terms of use of the public rights-of-way by utilities including wireline telecommunications providers. A franchise agreement imposes a franchise fee on utilities for the use of the public rights-of-way. This fee is generally based on a percentage of gross revenue that the utility company receives for providing the service to city residents. Other systems for establishing the amount of the franchise fee (i.e. linear foot fees, attachment fees, or per pole fees) are used when the gross revenue system is not suitable. In some Oregon cities, franchise agreements have been replaced by licensing agreements that contain provisions that are similar to those found in a franchise agreement. Detailed information about the franchise agreement or licensing agreement that a particular city uses can be found in the city's ordinances.

Cities have experienced an onslaught of challenges to franchising, rights-of-way management, and taxing authority through local referrals, state and federal legislation, and litigation. Meanwhile, the predominate system of franchising telecommunications providers has not kept pace with technology. Thus, the information contained in this tool kit describes incremental steps that cities can take to protect their authority to manage the public right-of-way and to preserve critical telecommunications revenues.

In 1996, the federal government enacted the Federal Telecommunications Act of 1996, 47 U.S.C.A. 151 *et seq.* (the Telecom Act). The Telecom Act impacts state and local laws that prohibit the provision of telecommunications services.¹ However, the Telecom Act also preserves local authority to manage the rights-of-way and receive compensation for use of the rights-of-way.² Since the enactment of the Telecom Act, several telecommunications companies

¹ See 47 U.S.C. § 253(a). Section 253(a) preempts any state or local law or regulation that "prohibit[s] or has the effect of prohibiting" the provision of telecommunications services.

² See 47 U.S.C. § 253(c). Section 253(c) states: "Nothing in this [Section 253] affects the authority of State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-

have challenged cities' authority to charge franchise fees. The telecommunications companies' argument has been that the fees act or could act as a prohibition of the provision of telecommunications services in violation of the Telecom Act. In spite of these legal challenges, for the most part, courts have upheld local authority to manage the rights-of-way and to receive compensation for use of the rights-of-way.

Here, in addition to the Telecom Act, Oregon Revised Statutes (ORS) 221.515³ establishes a limit on a city's authority to collect a privilege tax from certain telecommunications providers. These telecommunications providers are incumbent local exchange carriers (ILECs) that provide exchange access services. Under this state statute, cities may only collect up to 7% of the revenue that ILECs receive from customers for the exchange access service. This 7% limit is intended to compensate cities for the ILECs' use of the public rights-of-way. This limitation is not applicable to any other services that ILECs provide or to any non-ILEC phone service providers.

way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government." Section 253(c) operates as a "safe harbor," meaning that a law or regulation that violates Section 253(a) is "saved," which is to say not preempted, if it is a right-of-way management regulation or sets compensation for use of the rights-of-way as described in Section 253(c). It also means that Section 253(c) cannot be used as a separate cause of action. In other words, telecommunications carriers could not sue cities based on a regulation that is alleged to be discriminatory. A telecommunications carrier could sue a city regarding regulations that effectively prohibit the provision of service.

³ ORS 221.515 Privilege tax on telecommunications carriers; maximum rate; deduction of additional fees.

(1) The council of every municipality in this state may levy and collect from every telecommunications carrier operating within the municipality and actually using the streets, alleys or highways, or all of them, in such municipality for other than travel, a privilege tax for the use of those streets, alleys or highways, or all of them, in such municipality in an amount which may not exceed seven percent of the gross revenues of the telecommunications carrier currently earned within the boundaries of the municipality. The privilege tax authorized in this section shall be for each year, or part of each year, that such telecommunications carrier operates within the municipality.

(2) As used in this section, "gross revenues" means those revenues derived from exchange access services, as defined in ORS 403.105, less net uncollectibles from such revenues.

(3) A telecommunications carrier paying the privilege tax authorized by this section shall not be required to pay any additional fee, compensation or consideration, including the free use or construction of telecommunications facilities and equipment, to the municipality for its use of public streets, alleys, or highways, or all of them, and shall not be required to pay any additional tax or fee on the gross revenues that are the measure of the privilege tax. As used in this subsection, "use" includes, but is not limited to, street openings, construction and maintenance of fixtures or facilities by telecommunications carriers. As used in this subsection, "additional fee, compensation or consideration" does not include commissions paid for siting public telephones on municipal property. To the extent that separate fees are imposed by the municipality on telecommunications carriers for street openings, construction, inspection or maintenance of fixtures or facilities, such fees may be deducted from the privilege tax authorized by this section. However, telecommunications carriers shall not deduct charges and penalties imposed by the municipality for noncompliance with charter provisions, ordinances, resolutions or permit conditions from the privilege tax authorized by this section.

(4) For purposes of this section, "telecommunications carrier" has the meaning given that term in ORS 133.021.

In response to the Telecom Act and ORS 221.515, the League of Oregon Cities (the League) contracted with the law firm Beery, Elsner & Hammond LLP (then known as Beery & Elsner), to draft a Master Telecommunications Infrastructure Ordinance (2000 MTIO). The purpose of the 2000 MTIO was to provide cities with a model ordinance that complied with the Telecom Act and ORS 221.515 while also preserving city authority to receive compensation for the use of the public rights-of-way.

Shortly after the League made the 2000 MTIO available to its members, telecommunications companies challenged city authority to charge franchise fees under the Telecom Act. Two notable cases were *City of Auburn v. Qwest Corp.*⁴ and *Sprint Telephony PCS, L.P. v. County of San Diego*.⁵ In the *City of Auburn* case, the main issue was whether the Telecom Act preempted cities from requiring local franchises and other right-of-way use fees from telecommunications companies. The court's decision indicated that the Telecom Act did preempt cities from imposing these kinds of requirements upon the telecommunications companies where the local regulation impacted the telecommunications company rather than the right-of-way. Later, the court in *Sprint Telephony* overruled a portion of the court's decision in *City of Auburn* finding that a telecommunications provider that sues a municipality under the Telecom Act's preemption sections was required to show that the challenged ordinance actually prohibited the provision of telecommunications or wireless services, not the mere possibility of prohibition, which was the standard established in *City of Auburn*.

After the decision in *City of Auburn*, Qwest refused to pay franchise fees to Oregon cities. Shortly thereafter, the City of Portland with the support of the League and its members filed a lawsuit against Qwest. The cities' argument was that local regulations on telecommunications companies for the purposes of managing the rights-of-way were not preempted by the Telecom Act. As part of the analysis in this case, the court reviewed the challenged provisions of the 2000 MTIO. The court upheld most of the challenged provisions of the 2000 MTIO and decided the case in favor of the cities. Qwest appealed this decision twice. The first time, the cities prevailed. The second time, following the *Sprint Telephony* decision, Qwest withdrew its challenge.

For cities, the important point is that local authority to manage the rights-of-way and to receive compensation for use of the rights-of-way is still valid. However, given these legal challenges and other changes in the world of telecommunications law, the League decided that it would be prudent to revisit the 2000 MTIO. Earlier this year, the League once again contracted with Beery, Elsner & Hammond LLP to perform an analysis of the 2000 MTIO. The conclusions of the analysis of the 2000 MTIO included that while most of the provisions remain valid under existing law, there are some provisions that should be revised in response to recent issues. While

⁴ *City of Auburn v. Qwest Corp.*, 260 F.3d 1160 (2001).

⁵ *Sprint Telephony PCS, L.P. v. County of San Diego*, 543 F. 3d 571 (2008)

many of the suggested revisions are straight forward, adoption could result in protest from some telecommunications providers. After receiving and reviewing the analysis, the League followed the suggestions of Beery, Elsner & Hammond LLP and requested that the firm draft updated model ordinances for the League and its members. The resulting ordinances are a Master Utility Right-of-Way Ordinance (2010 MUROWO) and an updated Master Communications Infrastructure Ordinance (2010 MCIO). Both of these ordinances reflect the most up-to-date laws and trends in right-of-way management.

IDENTIFY THE LOCAL ISSUES

This section provides a framework for assessing your city's current means of collecting revenue from telecommunications providers. The following questions are meant to help a city create a list of items that it might want to address. After compiling this list a city can then closely review the two model ordinances to determine which ordinance most aligns with the needs of the local community. (NOTE: This section of the tool kit requires expansion, as it is currently in its preliminary draft. Through additional reports and case studies, the League will continue to round out this preliminary framework so that it will become a useful tool for cities to use in identifying local issues related to telecommunications providers and management of the public rights-of-way.)

Who are the telecommunications providers in your city?	
<ul style="list-style-type: none"> • What telecommunications infrastructure is used in your city? <i>telephone, Cable TV, Cable Internet, Cable Phone, DSL</i> • What types of telecommunications services are available to residents? <i>see above</i> 	
What amount does your city collect from telecommunications providers?	
<ul style="list-style-type: none"> • Has your city considered whether the amount of revenue that it collects is too high, too low, or adequate according to state and federal law? <i>Too Low, No revenue for some services, low revenue for others</i> • What authority does your city base this amount on? <i>Industry Custom, Current telecom rulings</i> • Does your city charter provide broad authority to the city to manage the public right-of-way within the city? <i>Not specifically, but all powers</i> • What are the different fee or tax mechanisms that the city uses to collect those revenues? <i>Expired franchises, Current franchises (more)</i> 	
If applicable, when were your city's telecommunications ordinances adopted?	
<ul style="list-style-type: none"> • How old are any existing franchise agreements with telecommunications providers? <i>N/A</i> • Does your city track expiration dates of existing franchise agreements? <i>YES</i> • If so, is there an internal system that triggers staff to pursue franchise renewal when necessary? <i>NO</i> 	

In relation to the public rights-of-way, where are the majority of the local telecommunications providers located in your city?

- Does your city track the type of infrastructure that is being used to provide telecommunications providers to residents? **NO**
- Are telecommunications services solely provided to residents within your city or do telecommunications services go to residents outside city limits? **Don't Know**

How efficient is your city's management of public rights-of-way?

- Is staff in favor of a more streamlined process for managing the public rights-of-way particularly as related to utilities use? **Yes!**

CHOOSE A SOLUTION THAT FITS LOCAL POLICY

Now that your city has identified its specific telecommunications issues using the framework above, you may be in a position to choose a solution. Please keep in mind that all of the proposed solutions are merely suggestions and that factors in each city are unique. While there may be many additional solutions, this section provides cities with at least four possibilities.

SOLUTION #1

- **ADOPT THE 2010 MCIO (SEE APPENDIX B)**

This update regains the substance of the 2000 MTIO but includes options that address trends in telecommunications and right-of-way management. As mentioned in a previous section, an analysis of the 2000 MTIO resulted in the recommendation that while most of the 2000 MTIO provisions remain valid some revisions could be adopted to reflect changes in laws as well as issues that cities have faced. The revisions that the 2010 MCIO makes are as follows:

- Updates language to align with current industry standards and trends;
- Ensures that ordinance provisions are consistent with applicable law, references, and definitions;
- Makes changes that may improve a city's position under an agreement with telecommunications providers;
- Revises language to add flexibility to the existing ordinances;
- Contains an application/review fee to cover the city's costs of entering into a franchise agreements;
- Acts to capture revenue from telecommunications providers that existing ordinances may not; and
- Provides cities with a couple of mechanism choices for capturing registration fees from telecommunications providers who do not occupy the public rights-of-way.

If choosing this solution, a city should consider how adoption of the ordinance may impact the current construction standards; the coordination of roles and responsibilities among different staff members or city departments; and public records law among other considerations. Cities choosing adoption of this ordinance should also consider preparing information on the process that can be provided to each applying telecommunications provider including info on the registration and franchise requirements.

IMPLEMENT THE SOLUTION

This section of the tool kit provides guidance on how to avoid the referendum process and legal challenges when a city is considering adopting a telecommunications ordinance. In addition, this section contains brief information from cities that have tried to implement ordinances to collect revenues from telecommunications providers but were ultimately defeated at the ballot. Finally, this section provides guidelines for how cities can take steps to present a legal challenge to an ordinance that collects revenue from telecommunications providers. Each city had a unique experience, but the lessons learned can be beneficial to all cities interested in the adoption of a similar ordinance. Furthermore, it is important to note that the following information is meant to provide cities with guidance and to encourage cities to pursue their own solutions. That said, neither the League nor any of the cities discussed in the report are meant to suggest that these examples are the only actions for another city. Instead, a city considering an ordinance to collect revenue from telecommunications providers is encouraged to go through their own evaluation and analysis as explained herein. The political environment and the revenue expectations are unique in every community, and cities must always take this into consideration along with the risks in choosing to adopt an ordinance that could face potential challenges.

THE REFERENDUM PROCESS AND THE PRECAUTIONS

Although city authority to manage the use of the public rights-of-way and receive compensation for its use has been consistently and uniformly upheld by the courts, the telecommunications industry has used the referendum process to challenge exercises of local authority to move from a franchise based system to a tax system. Thus, even if a local ordinance is a lawful exercise of local authority, when referred to the ballot by agents of the deep pocketed telecommunications industry, the local ordinance is lucky to survive. In the relatively short history of Oregon cities attempting to adopt ordinances that establish a city's authority to tax telecommunications providers the efforts of cities have been met with well-funded opposition. When an ordinance is related to taxes on telecommunications providers, a pattern of a non-local driven and financially backed referendum process has emerged. Typically, the non-local forces are directly or indirectly linked to the telecommunications industry and have state and/or national agendas.

INITIATIVE AND REFERENDUM

By a 1902 state constitutional amendment, Oregon has direct voter initiative and referendum. These powers were extended to the local government level in 1906. The initiative authorizes citizens to propose and enact or repeal laws outside of the more traditional legislative process. The referendum involves submitting measures already enacted by the governing body to a vote of the people. The procedures for both processes (direct voter initiative and referendum) as they relate to city measures can be found in statute or ordinances.

The threat of an out-of-state political effort aimed at sabotaging a local effort to adopt an ordinance similar to the two model ordinances presented here is real. The telecommunications industry consistently ranks in the top twenty industries for total lobbying expenditures. According to a national research group that tracks political spending, the telecommunications industry has invested in lobbying efforts related to issues surrounding cellular phones and Internet regulation, increasing accessibility, halting attempts to impose internet taxes and maintaining access to the spectrum of available frequencies that is controlled by the Federal Communications Commission (the FCC)^{6 7}. Other investments in lobbying efforts include promoting federal research and development spending, intellectual property law and telecommunications laws related to fraud, spyware, and email spam. Additionally, the issue of net neutrality has attracted lobbying attention from the telecommunications industry. Net neutrality is a set of policies that would ultimately result in more government regulation of broadband internet service. The industry claims that these additional regulations would stifle innovation and competition, and for the most part, vigorously opposes it.

The telecommunications industry is not merely keeping track of legislative issues at the federal level. In fact, the telecommunications industry has used the local referendum process to challenge previous exercises of local authority to move from a franchise based system to a tax system, even though home rule cities generally have the authority to tax sources of revenue earned within the corporate boundaries of the city and may include broader revenue bases in the calculation of the tax. The following examples of municipal efforts to implement a telecommunications tax represent instances where such efforts have met with strong resistance from the telecommunications industry in the form of political opposition.

CITY	ORDINANCE	RESULT
SPRINGFIELD	Would have established a new tax on wireless telecommunications, a tax that applied to all utilities doing business in the city, and the provision of a per foot rental rate for use of rights of way.	The ordinance was referred and roughly one percent of the approximately \$30,000 spent in campaign funding came from local opponents. The ordinance was defeated by a vote of 76 percent to 24 percent.
CORVALLIS	Would have placed a five percent tax on all revenues generated from telecommunications services billed to residents of Corvallis, including wireless providers. A portion of the revenue was earmarked to fund public safety needs like the purchase of equipment for the fire department.	The ordinance was referred and after spending \$100,000 campaigning against the ordinance, the telecommunications industry successfully defeated the ordinance.

⁶ 47 U.S.C. § 151 creates the FCC.

⁷ The Center for Responsive Politics: www.opensecrets.org

CITY	ORDINANCE	RESULT
NORTH PLAINS	Would have imposed a five percent privilege tax on utilities operating within the city and would have included utilities located and <i>not located</i> in the right of way, thereby including wireless telecommunications providers.	The ordinance was referred but before a vote took place, the city council repealed it.

POTENTIAL LEGAL CHALLENGES AND PRECAUTIONS

Technology is changing faster than laws, ultimately leading to an increase in litigation. This is typically the case where cities are trying to regulate new and different service providers under the assumptions of old ordinance drafted for a different type of infrastructure. The uncertainties arising from ongoing litigation are compounded by legislative and regulatory challenges to eliminate or restrict existing franchise, rights-of-way and taxing authority, as well as preempt the ability of cities to provide telecommunications services.

Since the enactment of the Telecom Act, the telecommunications industry has been under increasing pressure to protect its bottom line as its industry begins to develop into a more competitive environment. Consequently, over the last several years, the area of telecommunications regulation has received a great deal of attention at the state and federal levels including activity by the FCC, which is charged with implementing the Telecom Act.

Challenges to local tax ordinances on telecommunications providers can only be brought under the Telecom Act regarding regulations that effectively prohibit the provision of service—not under 253(c) based on a regulation that is alleged to be discriminatory. Telecommunications companies that can show that the local regulation impacts the company rather than the right-of-way will succeed in a legal challenge having successfully demonstrated that the ordinance is preempted under Section 253 of the Telecom Act. The courts reason that such a local regulation could function to effectively prohibit a company from providing services.

RESOURCES

The following section highlights additional resources related to telecommunications that cities may choose to consult for further information. Some of these resources are available through the League and others through third party organizations. The League would like to remind its members that while these resources provide extensive information, the world of telecommunications is complex and any decisions that a city makes as to city policy or adoption of an ordinance should be reviewed by your city attorney.

RESOURCES AVAILABLE THROUGH THE LEAGUE

The tool kit and the two ordinances are just a first step in an ongoing process that the League plans to undertake to keep its members up to date on all things related to telecommunications. Therefore, the resources available through the League will continue to expand. Currently, the Telecommunications page of the League's A-Z index includes a variety of resources for cities.

The Telecommunications page of the League's A-Z Index:

<http://www.oregocity.org/AZindex/tabid/510/itemid/3569/language/en-US/Default.aspx>

RESOURCES AVAILABLE THROUGH THIRD-PARTY ORGANIZATIONS

Oregon Public Utilities Commission Telecom page:

<http://www.puc.state.or.us/PUC/telecom/index.shtml>

FCC home page:

<http://www.fcc.gov/>

National Association of Telecommunications Officers and Advisors (NATOA) home page:

<http://www.natoa.org/>

Oregon Telecommunications Association (OTA) – Home page:

<http://www.ota-telecom.org/displaycommon.cfm?an=1>

APPENDICES

APPENDICES

APPENDIX A: GLOSSARY OF TERMS

BROADBAND: High-speed Internet connections that allow users to connect to Web sites and download content at a faster speed. Broadband can also be wireless carrying voice, video and data channels simultaneously. Per the Federal Communications Commission (the FCC), broadband refers to advanced communications systems capable of providing high-speed transmission of services such as data, voice, and video over the Internet and other networks. Transmission is provided by a wide range of technologies, including digital subscriber line (DSL) and fiber optic cable, coaxial cable, wireless technology, and satellite. Broadband platforms make possible the convergence of voice, video, and data services onto a single network.

BROADBAND OVER POWER LINE (BPL): BPL systems use existing electrical power lines as a transmission medium to provide high-speed communications capabilities by coupling radio frequency (RF) energy onto the power line, which is then distributed into the home. BPL systems operate on an unlicensed basis under Part 15 of the FCC's rules. Because power lines reach virtually every community in the country, BPL has the potential to play an important role in providing broadband services to American homes and consumers. There are two types of BPL systems: 1) In-House BPL, which uses the electrical outlets available within a building to transfer information between computers and other home electronic appliances; and 2) Access BPL systems, which carry high-speed communication signals outdoors over the medium voltage (MV) lines, from a point where there is a connection to the Internet (backhaul point), to neighborhoods, where they are distributed to homes via the low voltage (LV) power lines or Wi-Fi links.

CABLE MODEM SERVICE: interstate information service and cable modem service does not contain a telecom service subject to common carrier regulations under Title II

CABLE PROVIDER: Companies with rights-of-way franchises to provide cable services. Many of these companies now provide voice and data services. Examples include Comcast and Charter.

CABLE SERVICES: defined in the Telecom Act as (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

COMPETITIVE LOCAL EXCHANGE CARRIER (CLEC): Providers of local phone services which have Public Utility Commission certificates for operation. Some own a facility located in the public rights-of-way and some may pay compensation to a facility-based carrier for use of that facility for resale purposes.

DIGITAL SUBSCRIBER LINE (DSL): A generic name for a family of digital lines that are provided by CLECs and local telephone companies to their local subscribers. Such services go by different names. Such service proposes to give the subscriber up to eight million bits per second one way, downstream to the customer and somewhat fewer bits per second upstream to the phone company. DSL lines typically operate on one pair of wires like a normal analog phone line. (Newton's Telecom Dictionary, 25th Edition)

EXCHANGE ACCESS: In the telephone networks, the provision of exchange services for the purpose of originating or terminating interexchange telecommunications. Such services are provided by facilities in an exchange area for the transmission, switching, or routing of interexchange telecommunications originating or terminating within the exchange area. The Telecom Act defined exchange access as the offering of access to telephone exchange service or facilities for the purpose of the origination or termination of telephone toll services. (Newton's Telecom Dictionary, 25th Edition)

INCUMBENT LOCAL EXCHANGE CARRIERS (ILECs): Traditional phone companies that provide exchange access service (dial tone service). Some of these incumbent providers provide cable and data services.

LONG DISTANCE/LONG HAUL SERVICE PROVIDERS: Service providers that do not offer local service, but "transmit" through public rights-of-way via facilities. They may own, lease, or pay compensation to a facility based carrier. Examples include AT& T, MCI, and Sprint.

PRIVILEGE TAXES: Typically grant each telecommunications service provider a nonexclusive privilege to use city rights-of-way to provide service. In exchange for the privilege to use the rights-of-way, the telecommunications service providers are required to pay a fee, sometimes calculated by the linear foot of communications facilities located within the city.

RESELLER: Companies that may or may not own telecommunications facilities, but pay compensation to a facility based provider for use of their systems to deliver wholesale or retail services to an end user.

VOICE OVER INTERNET PROTOCOL (VOIP): Wireless or wireline technology that allows the use of a broadband Internet connection to make voice telephone calls. A special adapter is used to send a voice call in a digital form using the Internet rather than the traditional voice stream. A wireless example is Clearwire; a wireline example is Comcast Digital Voice.

WIRELESS SERVICE PROVIDERS: Companies that provide telecommunications services primarily through wireless technologies such as Verizon Wireless, Sprint, AT& T, Nextel and T-Mobile, and wireless resellers such as Virgin Mobile, TelePlus and Consumer Cellular that pay compensation to a wireless provider for use of their facilities. Some wireless companies provide broadband services—direct connections to the Internet.

**APPENDIX B: MASTER COMMUNICATIONS INFRASTRUCTURE
ORDINANCE (2010)**

SOLUTION #3:

- **REPLACE THE 2000 MTIO WITH THE 2010 MCIO**

Many cities adopted the League's 2000 MTIO. For those cities, replacing the 2000 MTIO with the updated 2010 MCIO may be a viable option. Please refer to Solution #1 for the highlights and considerations associated with this solution.

SOLUTION #4

- **UPDATE EXISTING ORDINANCES AND FRANCHISE AND LICENSE AGREEMENTS**

If the model ordinances do not meet the needs of your city, then it may be useful to use the considerations of the model ordinances to update the city's existing ordinance and franchise and license agreements. If your city does not have a related ordinance in place, perhaps the model ordinances and/or the considerations that they create will help in drafting ordinances that meet your city's needs. The overview sections of the model ordinances contain information that could be used to help recognize the areas where your existing ordinances may need to be updated or revised.

SOLUTION #2

- **ADOPT THE 2010 MUROWO (SEE APPENDIX C)**

This model ordinance is applicable to all utilities using facilities within a city's right-of-way with the exception of cable providers due to federal law. Recognizing the inefficiency of multiple mechanisms for managing the public rights-of-way, this utility neutral ordinance prescribes a more streamlined method for public right-of-way management and revenue collection across a wide spectrum of utilities, including telecommunications providers. The basis for this model ordinance is the principle that all utilities that use the right-of-way should pay for such use regardless of whether or not they own the infrastructure located in the right-of-way, as the utilities are deriving a benefit from the use. The 2010 MUROWO shares some of the same provisions as the 2010 MCIO as well as the following:

- Establishes a license requirement in lieu of a franchise agreement;
- Removes the requirement that a city negotiate every franchise agreement that it enters; and
- Results, theoretically, in a more efficient and effective solutions.

Likewise, the 2010 MUROWO carries with it some of the same considerations indicated in Solution #1 above. For instance, when implementing the 2010 MUROWO, each city should evaluate the efficient coordination of the roles and responsibilities of the various departments that may be charged with implementing these provisions and requirements. In addition, prior to adopting the 2010 MUROWO, a city should prepare information on the process that can be provided to each utility. This information should include details regarding both the registration and franchise requirements. Finally, cities should make utilities, especially telecommunications providers aware of the fact that any documents that they provide to the city will be subject to the Oregon Public Records Laws (ORS 192). Thus, city staff should remind the utility companies that they must designate any documents that they regard a proprietary to keep those documents confidential.

APPENDIX C: MASTER UTILITY RIGHT OF WAY ORDINANCE (2010)

MASTER UTILITY RIGHT OF WAY ORDINANCE

October 2010

-- ADVICE FOR ADOPTION¹ --

Overview:

Historically, Oregon cities have granted franchises to each utility using the rights of way to provide service—electric, natural gas, telephone and cable service providers. The franchises generally set forth the terms of use of the rights of way (construction, restoration and permitting, for example) and the compensation to be paid to the City for this use (franchise fees).

Recently, many cities have experienced the potential limitations with the traditional franchising model. For example, some telecommunications companies have refused to enter into new franchises, while others will only agree to a franchise that effectively limits or waives City authority in some areas of right of way management. The negotiations often result in right of way requirements that vary from utility to utility, complicating staff's effort to manage permits, construction, restoration and inspection of work in the rights of way. In order to address these limitations, the Utility Right of Way Ordinance provides a more effective and efficient system for managing rights of way.

The Ordinance is a comprehensive right of way management ordinance that is designed to ensure that the City can effectively manage its rights of way with or without franchise agreements with utilities. The Ordinance is intended to: establish clear guidelines, standards, and requirements for all utilities that request to operate within your community; ensure local authority to manage rights of way for the health and safety of local residents; and assure adequate compensation to local taxpayers for private use of publicly-owned rights of way. The requirements it contains are designed to be limited and streamlined, while preserving municipal authority. When implementing the Ordinance, each City should evaluate how it can coordinate the roles and responsibilities of various departments that may be charged with implementing these provisions and requirements.

Prior to adopting this Ordinance, a City should prepare information on the process that can be provided to each applying utility. This should include information on both the registration and franchise requirements, thereby putting the onus on providers to specify which requirements apply based on their use of the City's rights of way and the services provided in the City.

As cities work with utilities for registration and/or franchising, staff should be aware that utilities may consider information on current and future facilities to be competitively sensitive or otherwise confidential. Generally, most of the documents and other information that utilities will

¹ The Advice for Adoption is intended to provide general guidance for all cities considering the Ordinance. It does not constitute legal advice, nor does it address the specific circumstances of any individual City nor reflect the policy choices, legislative intent or legal position of any individual City.

provide to cities will be subject to the Oregon Public Records Laws (ORS Ch.192). City staff, therefore, should remind utilities of these requirements and instruct them to specifically designate any materials that they regard as proprietary and request to be kept confidential, consistent with section 17 of the Ordinance.

Additional Issues for Consideration:

• License Requirement

The Ordinance establishes a license requirement in lieu of the traditional franchise. Rather than negotiate with each utility, the City will issue licenses that require compliance with the terms of the Ordinance. All utilities that use the rights of way, including private companies offering telephone, cable,² gas, and electric service, as well as public water and sewer facilities, are subject to the license requirement.

All existing franchises will remain in effect until they expire, at which time the utility will be subject to the Ordinance. The City will have the option to continue to enter into franchise agreements that vary from the terms of the Ordinance if the City determines that it is in the public interest, so long as the terms of the franchise agreement are competitively neutral.

• Registration Requirement

The Ordinance requires any company that provides utility service within the City to register with the City each year. There are two alternative definitions of "utility service" in Section 5 to consider. Alternative A defines "utility service" to include the provision of electricity, natural gas, communications service, cable service, water, sewer and storm sewer, but only if the service is provided over a facility permanently in the rights of way. This definition does not cover service providers that do not use the rights of way to provide service, such as wireless telephone service providers. Alternative B provides a definition of "utility service" that should be used by cities that wish to cover utility service providers regardless of whether or not they use facilities in the rights of way.

• Construction Standards and Location Requirements

Each City should apply its own existing construction standards, including street use permit process, standards of construction and restoration, location and relocation, etc., to all utilities covered by the Ordinance. Each City should review its existing standards and consider any changes that may be needed. If existing standards are sufficient, the applicable sections in this Ordinance should be omitted and replaced with a provision requiring utilities to comply with the relevant Chapters of the City code. If a City does not have adequate construction standards and location requirements, we recommend the construction and location provisions of the Ordinance, located in sections 8-9.

² Under Federal law, cable operators must have a franchise from the City to provide cable service. The Ordinance is subject to state and federal law, and thus cable operators will continue to be required to obtain franchises from this City. Cable franchises may incorporate many of the provisions of this Ordinance, but should also include any public, educational and government (PEG) channel and support requirements and other cable-specific issues not covered by this Ordinance.

Rate Recommendations:

Section 6.D. Registration Fee

The registration fee must be set by Council resolution. This could be part of a City's existing fee resolution or a separate resolution. Setting the fee by resolution provides cities with the opportunity to periodically review the fee and more easily make adjustments to reflect changes in personnel costs, technology, use of the rights of way and other relevant factors.

Cities have a policy choice to make with respect to the registration fee. At a minimum, cities should implement a registration fee sufficient to cover the administrative costs of processing the registrations. (See Alternative B in subsection 6.D below).

Cities also have the option to impose a registration fee that would operate like a privilege tax in that it would be based on the revenue utilities earn from providing services service in the City, but it would not be based on use of the rights of way. (See Alternative A in subsection 6.D below.) This approach would require all utilities (including wireless carriers, if the Alternative B definition of "utility services" is adopted), to pay for providing service in the City, regardless of whether or not they use the right of way to provide that service. (Those who use the rights of way also would be subject to a privilege tax for the privilege of using the City's rights of way as discussed more fully below.)

Many cities would receive additional revenue from this approach. This approach would allow cities to collect fees in addition to the privilege tax. Further, the registration fee would capture non-exchange access revenue from incumbent communications carriers, which is potentially a significant portion of the carriers' revenue.

For cities that implement a registration fee related to provision of service (as opposed to a nominal fee to cover the administrative costs of registration), we suggest a registration fee of between 2% and 5% of a utility provider's gross revenue derived from the provision of utility services within the City. "Gross revenue" should be defined as any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, subject to all applicable limitations imposed by federal or state law.

Note that a City may choose to require both registration fees: a registration application fee, which is paid annually at the time of submitting the registration application to cover the costs of processing the application, and the revenue-based registration fee to be paid quarterly for provision of service in the City.

Section 7.C. License Application Fee

This fee should be sufficient to cover the City's costs related to processing the license application. Cities should estimate the amount of staff time and other costs required to develop the license application, review and issue licenses, and for ongoing administration of the program.

Section 8.B.6. Permit Fee

The permit fee should be sufficient to cover the City's costs for permitting and inspections. Cities should estimate the amount of staff time and other costs required to develop the permit application, review and issue permits, inspect work and restoration, and ongoing administration of the program.

Section 13. Privilege Tax

Cities must establish the amount of the privilege tax by resolution. As with the registration fee, this could be part of a City's existing fee resolution or a separate resolution.

Cities have a policy choice to make with respect to the privilege tax. The Ordinance requires all utilities that use the rights of way, regardless of whether or not they own the facilities, to pay the privilege tax. Cities could choose to limit the privilege tax requirement to "utility operators," which by definition includes only those who own, place, operate or maintain facilities in the rights of way. This, however, would not cover the utilities that use the rights of way but who do not own the facilities they use. We recommend cities require all utilities that use the rights of way to pay for such use, regardless of whether or not they own the facilities they use, as they are deriving a benefit from use of a public asset.³

We suggest the following privilege taxes:

Electric	5% of gross revenues
Natural Gas	5% of gross revenues
Communications	7% of gross revenues ⁴
Cable	5% of gross revenues ⁵
Water	5% of gross revenues
Sewer	5% of gross revenues
Storm Sewer	5% of gross revenues

³ We strongly recommend that cities that opt not to impose a revenue-based registration fee expressly extend the privilege tax to all utilities that use of the rights of way to provide service as suggested in Section 13 of this Ordinance. If a revenue-based registration fee is enacted, the City will receive revenue from utilities that use but do not own facilities in the rights of way. In that case, the City may choose to limit the privilege tax to owners of facilities and/or allow utilities to deduct from the registration fee any privilege taxes paid.

⁴ Under state law, at ORS 221.515, City authority to charge a privilege tax on incumbent local exchange carriers is limited to 7% of gross revenues from "exchange access services." The Ordinance explicitly states that it is subject to any state or federal law limitations, which would include the limitation in ORS 221.515. However, this limitation does not apply to competitive local exchange carriers or to other revenues of incumbent providers. It is some cities' practice to charge competitive providers 5% rather than 7% in light of the more limited definition of gross revenues applicable only to incumbent carriers.

⁵ Under federal law, at 47 U.S.C. §541, local authority to charge a franchise fee or tax on cable operators is limited to 5% of gross revenue. Cable operators that pay a 5% franchise fee under their cable franchise agreement will not be obligated to pay the 5% privilege tax in addition to the franchise fee. The Ordinance explicitly states that it is subject to any state or federal law limitations, which would include this limitation.

The resolution must state that "gross revenues" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, subject to all applicable limitations imposed by federal or state law.

We also recommend that cities implement a per foot fee for utilities that have facilities in the rights of way but do not serve customers in the City. This fee would apply, for example, to a communications facility that runs through the City but is not used to provide service to residents of the City. Under the gross revenue-based system, the owners of these types of facilities are getting the benefit of the use of the rights of way without paying for it, because those facilities do not generate revenue within the City. We recommend a fee of \$2.00 to \$4.00 per lineal foot of facilities in the City rights of way, depending on their impact on the right of way and the nature and location of the right of way occupied.

While cities have the authority to charge wireless service providers a fee based on gross revenues earned within the City, a City may choose to exclude from the revenue-based privilege tax wireless providers with antennas on existing poles in the right of way, but who do not otherwise occupy the rights of way. These providers could instead be subject to a flat fee per pole as an alternative to the gross revenue-based fee that would otherwise apply to wireless companies with antennas in the right of way. The following language is recommended for such an approach: "For utility operators with no facilities in the rights of way other than facilities mounted on structures within the rights of way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the rights of way, the privilege tax shall be a flat fee per structure or such other fee determined by resolution of the City Council."

If a City includes wireless providers in its registration fee and desires to exempt them entirely from the privilege tax, the following may be added to section 13 instead of the language suggested in the previous paragraph: "So long as it complies with the registration requirements in sections 6, other applicable City codes, regulations and rules, and any agreement for use of the rights of way, a person providing communications services is not required to pay the privilege tax under this section if the person's only use of the right of way is to place wireless transmitting or receiving facilities above the ground on existing poles or similar structures in the right of way and does not install or use lines, wires or cables."

Finally, pursuant to ORS 294.160, cities are required to provide an opportunity for interested persons to comment on the Ordinance to the extent it prescribes a new or increased fee. The specific amount of the fees established by this Ordinance will be adopted by a separate Council resolution, which also is subject to this state law requirement.

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 _____, 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 _____, 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.

"License" means the authorization granted by the City to a utility operator pursuant to this Chapter.

"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 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" [ALTERNATIVE A: 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, telecommunications 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.]

[ALTERNATIVE B: means (i) the provision of electricity, natural gas, communications services, cable services, water, sewer, and/or storm sewer to customers within the corporate boundaries of the City, and/or (ii) the transmission of any of these services through the City, 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 and 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. Registration.

A. Registration Required. Every person that desires to provide utility services to customers within the City shall register with the City prior to providing any utility services to any customer in the City. Every person providing utility services to customers within the City as of the effective date of this Chapter shall register within forty-five (45) days of the effective date of this Chapter.

B. Annual Registration. After registering with the City pursuant to subsection 6.A of this section, the registrant shall, by December 31st of each year, file with the City a new registration form if it intends to provide utility service at any time in the following calendar year. Registrants that file an initial registration pursuant to subsection 6.A on or after September 30th shall not be required to file an annual registration until December 31st of the following year.

C. Registration Application. The registration shall be on a form provided by the City, and shall be accompanied by any additional documents required by the City to identify the registrant and its legal status, describe the type of utility services provided or to be provided by the registrant and list the facilities over which the utility services will be provided.

D. Registration Fee. [ALTERNATIVE A: Every person providing utility services to customers in the City shall pay an annual registration fee in an amount to be determined by resolution of the City Council. The fee 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. Every person subject to this subsection D shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date. The registration fee required by this subsection D shall be subject to all applicable limitations imposed by federal or state law.]

[ALTERNATIVE B: Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council.]

Section 7. Licenses.

A. License Required.

1. Except those utility operators with a valid franchise agreement from the City, every person shall obtain a license from the City prior to conducting any work in the rights of way.
2. Every person that owns or controls utility facilities in the rights of way as of the effective date of this Chapter shall apply for a license from the City within forty-five (45) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid franchise from the City, unless a new franchise is granted by the City pursuant to subsection E of this section 7.

B. License Application. The license application shall be on a form provided by the City, and shall be accompanied by any additional documents required by the application to identify the applicant, its legal status, including its authorization to do business in Oregon, a description of the type of utility service provided or to be provided by the applicant, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this Chapter.

C. License Application Fee. The application shall be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council in an amount sufficient to fully recover all of the City's costs related to processing the application for the license.

D. Determination by City. The City shall issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is denied, the written determination shall include the reasons for denial. The license shall be evaluated based upon the provisions of this Chapter, the continuing capacity of the rights of way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.

E. Franchise Agreements. If the public interest warrants, the City and utility operator may enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this Chapter, consistent with applicable state and federal law. The franchise may conflict with the terms of this Chapter with the review and approval of City Council. The franchisee shall be subject to the provisions of this Chapter to the extent such provisions are not in conflict with any such franchise.

F. Rights Granted.

1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the City code and other applicable provisions of state or federal law, to construct, place, maintain and operate utility facilities in the rights of way for the term of the license.
2. Any license granted pursuant to this Chapter shall not convey equitable or legal title in the rights of way, and may not be assigned or transferred except as permitted in subsection K of this section.
3. Neither the issuance of the license nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, police power or regulatory power of the City as may exist at the time the license is issued or thereafter obtained.

G. Term. Subject to the termination provisions in subsection M of this section, the license granted pursuant to this Chapter will remain in effect for a term of five (5) years.

H. License Nonexclusive. No license granted pursuant to this section shall confer any exclusive right, privilege, license or franchise to occupy or use the rights of way for delivery of utility services or any other purpose. The City expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the City's right to use the rights of way, for similar or different purposes. The license is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the rights of way. Nothing in the license shall be deemed to grant, convey, create, or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.

I. Reservation of City Rights. Nothing in the license shall be construed to prevent the City from grading, paving, repairing 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 licensee's utility facilities interfere with the construction, repair, replacement, alteration or removal of any rights of way, public work, City utility, City improvement or City facility, except those providing utility services in competition with a licensee, licensee's facilities shall be removed or relocated as provided in subsections 9.C, 9.D and 9.E of this Chapter, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

J. Multiple Services.

1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and 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 license or franchise for each utility service, provided

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

K. **Transfer or Assignment.** To the extent permitted by applicable state and federal laws, the licensee shall obtain the written consent of the City prior to the transfer or assignment of the license. The license shall not be transferred or assigned unless the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under federal and state laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee shall become responsible for all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license.

L. **Renewal.** At least ninety (90), but no more than one hundred eighty (180), days prior to the expiration of a license granted pursuant to this section, a licensee seeking renewal of its license shall submit a license application to the City, including all information required in subsection B of this section and the application fee required in subsection C of this section. The City shall review the application as required by subsection D of this section and grant or deny the license within ninety (90) days of submission of the application. If the City determines that the licensee is in violation of the terms of this Chapter at the time it submits its application, the City may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the City, before the City will consider the application and/or grant the license. If the City requires the licensee to cure or submit a plan to cure a violation, the City will grant or deny the license application within ninety (90) days of confirming that the violation has been cured or of accepting the licensee's plan to cure the violation.

M. **Termination.**

1. **Revocation or Termination of a License.** The City Council may terminate or revoke the license granted pursuant to this Chapter for any of the following reasons:
 - a. Violation of any of the provisions of this Chapter;
 - b. Violation of any provision of the license;
 - c. Misrepresentation in a license application;
 - d. Failure to pay taxes, compensation, fees or costs due the City after final determination of the taxes, compensation, fees or costs;
 - e. Failure to restore the rights of way after construction as required by this Chapter or other applicable state and local laws, ordinances, rules and regulations;
 - f. Failure to comply with technical, safety and engineering standards related to work in the rights of way; or
 - g. Failure to obtain or maintain any and all licenses, permits, certifications and other authorizations required by state or federal law for the placement, maintenance 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 license. 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 license shall be terminated or revoked.

Section 8. Construction and Restoration. [NOTE: This section should be made consistent with any other Code provisions regarding the matters covered by this section.]

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. 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 registered and applied for and received the license required by this Chapter, or has a current franchise with the City, and all applicable fees have been paid.
2. In the event of an emergency, a utility operator with a license pursuant to this Chapter or its contractor may perform work on its utility facilities without first obtaining a permit from the City, provided that, to the extent reasonably feasible, it attempts to notify the 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 (*dept/div*).
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 (*dept/division*) 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 (*dept/div*) 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 (*dept/div*) and their 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. Unless otherwise provided in a franchise agreement or agreed to in writing by the City, a performance bond or other form of surety acceptable to the City equal to at least one hundred percent (100%) of the estimated cost of the work within the rights of way of the City shall be provided before construction is commenced.
2. 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 (*dept/div*).
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. 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 *(list appropriate dept/div)*, to minimize public inconvenience, disruption, or damages.

Section 9. 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. The City reserves the right to require written approval of the location of any such above-ground equipment in the right of way.

B. Interference with the rights of way. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the rights of way by the City, by the general public or by other persons authorized to use or be present in or upon the rights of way. All use of the rights of way shall be consistent with City codes, ordinances, rules and regulations.

C. Relocation of Utility Facilities.

1. 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. 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.

3. 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.

D. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the (*dept/div*), 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.

E. Removal by City.

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

administrative costs incurred by the City in removing the facility and obtaining reimbursement. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days. The obligation to remove shall survive the termination of the license or franchise.

3. The City shall not be liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly therefrom, by the City or its contractor in removing, relocating or altering the facilities pursuant to subsections B, C or D of this section or undergrounding its facilities as required by subsection A of this section, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by those subsections, unless such damage arises directly from the City's negligence or willful misconduct.

F. Engineering Designs and Plans. The utility operator shall provide the City with two complete sets of 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 10. 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 11. 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 12. 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 13. Privilege Tax.

A. 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. 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).

C. Unless otherwise agreed to in writing by the City, the tax set forth in subsection A.1 of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within thirty (30) days after the end of each calendar quarter, and shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The utility shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

D. The calculation of the privilege tax required by this section shall be subject to all applicable limitations imposed by federal or state law.

E. 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 14. 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 13.C 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 15. 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. Unless otherwise agreed to in writing by the City, before a franchise granted or license issued pursuant to this Chapter is effective, and as necessary thereafter, the utility operator shall provide a performance bond or other financial security, in a form acceptable to the City, as security for the full and complete performance of the franchise or license, if applicable, 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 8.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. The acceptance of a license under section 7 of this Chapter shall constitute such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the City shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

2. Every utility operator shall also indemnify the City for any damages, claims, additional costs or expenses assessed against or payable by the City arising out of or resulting, directly or indirectly, from the utility operator's failure to remove or relocate any of its facilities in the rights of way or easements in a timely manner, unless the utility operator's failure arises directly from the City's negligence or willful misconduct.

Section 16. 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 granted under this Chapter.

Section 17. 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 18. Penalties. [NOTE: Cities should make this consistent with existing penalty provisions.]

A. Any person found guilty of violating any of the provisions of this Chapter or the license 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 19. 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 20. 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.

Appendix B:

MASTER COMMUNICATIONS INFRASTRUCTURE ORDINANCE

Second Edition
Updated October 2010

-- ADVICE FOR ADOPTION¹ --

Overview:

The Federal Telecommunications Act of 1996 protects cities' authority to manage the rights of way and receive fair and reasonable compensation for the use of those rights of way by telecommunications carriers, provided that they do so on a "competitively neutral and nondiscriminatory basis." In 2000, the Master Telecommunications Infrastructure Ordinance was drafted to help cities manage the rights of way in compliance with the terms of the Telecommunications Act.

After years of litigation, Oregon courts have determined that the original Ordinance is consistent with these requirements, and with other state and federal laws and rules. This update retains the substantive provisions of the original Ordinance, but includes new options for implementation that address recent trends in communications and right of way management, including new services and service providers that may not have been subject to the original Ordinance. As with the original Ordinance, the updated Ordinance is intended to: establish clear guidelines, standards, and requirements for all communications providers that request to operate within your community; ensure local authority to manage right of way for the health and safety of local residents; and assure adequate compensation to local taxpayers for private use of publicly-owned rights of way. The requirements it contains are designed to be limited and streamlined, while preserving municipal authority. When implementing the Ordinance, each City should evaluate how it can coordinate the roles and responsibilities of various departments that may be charged with implementing these provisions and requirements. Note that cities are expected to rely upon existing zoning and development codes in addition to this Ordinance.

Prior to adopting this Ordinance, a City should prepare information on the process that can be provided to each applying communications provider. This should include information on both the registration and franchise requirements, thereby putting the onus on providers to specify which requirements apply based on their use of the City's rights of way and the services provided in the City.

¹ The Advice for Adoption is intended to provide general guidance for all cities considering the Ordinance. It does not constitute legal advice, nor does it address the specific circumstances of any individual City nor reflect the policy choices, legislative intent or legal position of any individual City.

As cities work with communications providers for registration and/or franchising, staff should be aware that these providers often consider information on current and future facilities to be competitively sensitive and are highly attuned to anti-trust issues. Generally, most of the documents and other information that communications providers will provide to cities will be subject to the Oregon Public Records Laws (ORS Ch.192). City staff, therefore, should remind providers of these requirements and instruct them to specifically designate any materials that they regard as proprietary and request to be kept confidential, consistent with Section 67 of the Ordinance.

Additional Issues for Consideration:

• Franchise Requirement

City staff, with the assistance of communications providers, will need to determine whether or not the company needs to obtain a Franchise. Only those communications providers that occupy the City's public rights of way will need to obtain franchises. All other providers (e.g. wireless services, non-facilities based competitive telecommunications providers, resellers and other communications providers) will only need to register with the City. The Ordinance, at Section 29, makes clear that all persons that occupy the rights of way are subject to the terms of the Ordinance whether or not they have obtained a franchise. This language is intended to ensure that the provider complies with the Ordinance even if its franchise has lapsed or it has refused to enter into a new franchise agreement.

• Exceptions to Registration Requirement

Private communications networks that are not using the public rights of way should not be required to register or obtain a franchise, though they may be subject to other city regulatory requirements such as the requirement to obtain a business license. (If such a network does use the public rights of way, a City is advised to require a franchise with compensation based on a per foot charge.)

• Construction Standards and Location Requirements

Each City should apply its own existing construction standards, including street use permit process, standards of construction and restoration, location and relocation, to communications facilities construction. Each City should review its existing standards and consider any changes that may be needed. If existing standards are sufficient, the Construction sections in this ordinance should be omitted and replaced with a provision requiring communications providers to comply with the relevant Chapter(s) of the City code.

If a City does not have adequate construction standards and location requirements, the construction and location provisions of the Ordinance, located in Sections 9-28, may be useful. However, Cities should consider adopting construction standards and location requirements that will apply to all utilities using the right of way as an alternative to defining these requirements in individual franchises. Uniform standards for all utilities are much more easily enforced by City staff than different standards for different types of utilities. Further, some telecommunications companies have argued that construction standards that are different for telecommunications companies than

for other utilities run afoul of the Telecommunications Act.

Rate Recommendations:

Section 7. Registration Fee

The registration fee must be set by Council resolution. This could be part of a City's existing fee resolution or a separate resolution. Setting the fee by resolution provides cities with the opportunity to periodically review the fee and more easily make adjustments to reflect changes in personnel costs, technology, use of the rights of way and other relevant factors.

As noted in Section 7 of the Ordinance, cities have a policy choice to make with respect to the registration fee. At a minimum, cities should implement a registration application fee sufficient to cover the administrative costs of processing the registrations.

Cities also have the option to impose a registration fee that would operate like a privilege tax in that it would be based on the revenue companies earn from providing communications service in the City, but it would not be based on use of the rights of way. This approach would ensure that all communications providers, including wireless providers (unless expressly excluded)², are subject to the same fees for providing service in the City, regardless of whether or not they use the right of way to provide that service. (Those who use the rights of way also would be subject to a franchise fee or right of way use fee for the privilege of using the City's rights of way as discussed more fully below.)

Many cities would receive additional revenue from this approach. A right of way-based franchise fee does not capture revenue from companies that provide service in the City but do not own facilities in the right of way, including competitive telecommunications providers and wireless providers, which revenue would be captured by this approach. This approach would also allow cities to collect fees on non-exchange access revenue from incumbent telecommunications providers, which is potentially a significant portion of the providers' revenue.

For cities that implement a registration fee related to provision of service (as opposed to a nominal fee to cover the administrative costs of registration), we suggest a registration fee of between 2% and 5% of a communications provider's gross revenue derived from the provision of communications services within the City. "Gross revenue" should be defined as any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, subject to all applicable limitations imposed by federal or state law.

Section 31. Application / Review Fee

This fee should be sufficient to cover a City's costs of entering into the franchise agreement. We recommend a \$2,000 deposit with credit/billing for amounts under or exceeding deposit.

² Cities desiring to exclude wireless companies from these regulations should delete the phrase "and whether or not the transmission medium is wireline" from the definition of "communications services" in Section 4.

Section 36. Franchise Fee

Cities must establish the amount of the franchise fee by resolution. As with the registration fee, this could be part of a City's existing fee resolution or a separate resolution.

As noted in Section 36 of the Ordinance, cities have a policy choice to make with respect to the franchise fee. The Ordinance only requires those companies that "occupy" the rights of way to obtain a franchise and pay the franchise fee. There may be providers that use the rights of way but do not own the facilities they use and thus would not be required to pay the franchise fee. Cities should consider requiring providers that use the rights of way to pay for such use, regardless of whether or not they own the facilities they use, as they are deriving a benefit from the use of a public asset. Cities desiring to cover all users of the rights of way should include subsection 36.B of the Ordinance.³

We suggest the following franchise fee:

1. Communications Providers that Provide Communications Service to Customers within the City: [5% or 7%] of gross revenue from the provision of communications services to customers in the City. "Gross revenues" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, subject to all applicable limitations imposed by federal or state law.
2. Communications Providers that do not Provide Communications Service to Customers within the City: \$ _____ per lineal foot of communications facilities in the City.

Cities need to determine the appropriate percentage for communications providers. We recommend between five and seven percent. In making this determination, cities should consider applicable state laws, which in some cases limit City authority to charge certain telecommunications providers fees for use of the rights of way, as explained below.

1. Telecommunications Carriers, as defined by ORS 221.515

Cities' authority to charge telecommunications carriers for use of the rights of way is capped at seven (7) percent of franchisee's gross revenues earned within the boundaries of the City, as set forth in ORS 221.515. "Telecommunications carriers" do not include competitive providers and thus this definition is generally limited to incumbent providers (which are the local phone companies that are required to provide service in their service area). For these providers, gross revenues means those revenues derived from "exchange access services," as defined in ORS 401.710, less net uncollectibles from such revenues. The scope of services included in the

³ We strongly recommend that cities that opt not to impose a revenue-based registration fee expressly extend the franchise fee to all providers that use of the rights of way to provide service as suggested in subsection 36.B. If a revenue-based registration fee is enacted, the City will receive revenue from providers that use but do not own facilities in the rights of way. In that case, the City may choose to limit the franchise fee to owners of facilities and/or allow a provider to deduct from the registration fee any franchise fees paid.

definition of "exchange access services" to some extent depends on the providers' tariff on file with the Oregon Public Utility Commission, but generally includes only the connection to the local telecommunications network (i.e., the dial tone), not other services commonly provided to customers such as caller ID, call waiting, and call forwarding. By referencing "applicable limitations imposed by federal and state law," the suggested language above incorporates this limitation. We do not recommend cities adopt the limited definition in the statute so that in the event there is a change to state law, cities do not have to amend their fee resolution. It is also important to note that other revenues of these providers are not subject to this limitation.

A "telecommunications carrier" that pays seven percent (7%) of gross revenues as set forth in the statute is not required to pay any additional fee, compensation or consideration to a city for its use of public streets, alleys, or highways. "Use" includes, but is not limited to, street openings, construction and maintenance of fixtures or facilities by telecommunications carriers. To the extent that separate fees are imposed for street openings, construction, inspection or maintenance of fixtures or facilities, such fees may be deducted from the franchise fee or privilege tax. Telecommunications carriers may not deduct charges and penalties imposed by the municipality for noncompliance with charter provisions, ordinances, resolutions, or permit conditions.

2. Competitive Access Providers

As stated above, ORS 221.515 does not apply to competitive access providers and thus cities are not obligated to apply the limited definition of gross revenues in ORS 221.515 to competitive providers. There is no express limit on City authority to require franchise fees from competitive providers. Many cities currently require competitive access providers to pay five percent (5%) of gross revenues, while others require seven percent (7%) to be consistent with the percentage paid by incumbent providers. Remember that no franchise fee would be required for providers that are not facilities-based providers unless the City imposes the revenue-based registration fee.

3. Long Distance Providers / Private Networks / Others Occupying the Right of Way But Not Providing Service to Customers in the City

For providers that do not provide service to customers in the City, a gross revenue-based fee would not result in any payment to the City for use of the rights of way. We recommend a per foot charge based on installation in the rights of way. Per foot charges vary based on right of way impact and value; we suggest a per foot charge between \$2.00 to \$4.00.

Finally, pursuant to ORS 294.160, cities are required to provide an opportunity for interested persons to comment on the Ordinance to the extent it prescribes a new or increased fee. The amount of the fees established by this Ordinance will be adopted by a separate Council resolution, which also is subject to this state law requirement.

MASTER COMMUNICATIONS INFRASTRUCTURE ORDINANCE

October 2010

SHORT TITLE AND INTENT

Section 1. Short Title: This Ordinance may 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 over all public 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 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 by franchises and 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 of the City, as the City may determine to be necessary, appropriate or useful in response to a public health or safety emergency.

Section 3. Regulatory Fees and Compensation Not a Tax

- A. The fees and costs provided for in this Ordinance, and any compensation charged and paid for use of the public rights of way provided for 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 or tax 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 or taxes 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.

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 defined consistent with federal laws and means the one-way transmission to subscribers of video programming, or 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 _____, 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 _____, 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 - means the plant and equipment, other than customer premises equipment, used by a communications provider.

Communications Provider - means any provider of communications services and includes, but is not limited to, every person that directly or indirectly owns, controls, operates or manages communications facilities within the City.

Communications Service - 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.

Communications System - see "Communications facilities" above.

Conduit - means any structure, or portion thereof, containing one or more ducts, conduits, manholes, handholes, bolts, or other facilities used for any telegraph, telephone, cable television, electrical, or communications conductors, or cable right of way, owned or controlled, in whole or in part, by one or more public utilities.

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.

Federal Communications Commission - means the federal administrative agency, or its lawful successor, authorized to regulate and oversee communications providers, services and providers on a national level.

Franchise - means an agreement between the City and a grantee which grants a privilege to use public right of way and utility easements within the City for a dedicated purpose and for specific compensation.

Grantee - means the person to which a franchise is granted by 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, 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. *(Make consistent with city's definition of same.)*

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 communications 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 of the City and used or to be used for the purpose of providing utility or communications services.

REGISTRATION OF COMMUNICATIONS PROVIDERS

Section 5. Purpose: The purpose of registration is:

- A. To assure that all communications providers who have facilities and/or provide services within the City comply with the ordinances, rules and regulations of the City.
- B. To provide the City with accurate and current information concerning the communications providers who offer to provide communications services within the City, or that 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 charges that may be due the City.

Section 6. Registration Required:

- A. Except as provided in Section 8 hereof, all communications providers having communications facilities within the corporate limits of the City, and all communications providers that offer or provide communications services to any customer within the City, shall register within forty-five (45) days of the effective date of this Ordinance. Any communications provider that desires to have communications facilities within the corporate limits of the City or to provide communications services to any customer within the City after the effective date of this Ordinance shall register prior to such installation or provision of service.
- B. After registering with the City pursuant to subsection 6.A of this Section, the registrant shall, by December 31st of each year, file with the City a new registration form if it intends to provide communications services at any time in the following calendar year. Registrants that file an initial registration pursuant to subsection 6.A on or after September 30th shall not be required to file an annual registration until December 31st of the following year.
- C. The appropriate application and license from: a) the Oregon Public Utility Commission (PUC); or b) the Federal Communications Commission qualify as necessary registration information. To the extent not included in the application and license materials submitted pursuant to this subsection 6.C, applicants also shall provide the following information:
 - 1. The identity and legal status of the registrant, including the name, address, and telephone number of the duly authorized officer, agent, or employee responsible for the accuracy of the registration information.
 - 2. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an emergency.
 - 3. A description of the registrant's existing or proposed communications facilities within the City, a description of the communications facilities that the registrant intends to construct, and a description of the communications services that the registrant intends to offer or provide to persons, firms, businesses, or institutions within the City.
 - 4. Information sufficient to determine whether the transmission, origination or receipt of the communications services provided, or to be provided, by the registrant constitutes an occupation or privilege subject to the City's business license requirements. A copy of the business license or the license number must be provided.

Section 7. Registration Application Fee: Each application for registration as a communications provider shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council. *(The dollar amount should be set at an amount sufficient to recover the City's costs of issuing and administering the registration requirement).*

OPTIONAL ADDITIONAL REGISTRATION FEE:

- A. Every communications provider shall pay an annual registration fee in an amount to be determined by resolution of the City Council.
- B. Unless otherwise agreed to in writing by the City, the fee 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 communications provider shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.
- C. The registration fee required by this Section shall be subject to all applicable limitations imposed by federal or state law.

Section 8. Exceptions to Registration: The following communications providers are exempted from registration:

- A. Communications facilities that are owned and operated exclusively for its own use by the State or a political subdivision of this State.
- B. A private communications network, provided that such network does not occupy any public rights of way of the City.

CONSTRUCTION STANDARDS

Section 9. General: No person shall commence or continue with the construction, installation or operation of communications facilities within a public right of way except as provided in Sections 12 through 28, and with all applicable codes, rules, and regulations.

Section 10. Construction Codes: Communications 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 11. Construction Permits: Except in the event of an emergency, no person shall construct or install any communications facilities within a public right of way without first obtaining a construction permit, and paying the construction permit fee established in Section 15 of this Ordinance. No permit shall be issued for the construction or installation of communications facilities within a public right of way:

- A. Unless the communications provider has first filed a registration statement with the City as required by Sections 5 through 8 of this Ordinance; and if applicable,
- B. Unless the communications provider has first applied for and received a franchise pursuant to Sections 29 through 46 of this Ordinance.

In the event of an emergency, a franchisee or its contractor may perform work on its communications 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 and pays the permit fee as soon as reasonably practicable, but not more than forty eight (48) hours after commencing the emergency work. As used in this Section 11, "emergency" means a circumstance in which immediate repair to damaged or malfunctioning communications facilities is necessary to restore lost service or prevent immediate harm to persons or property.

Section 12. Permit Applications: Applications 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 the 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 new 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 which are within the public rights of way. Applicant's existing facilities shall be differentiated on the plans from new construction. 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 13. Applicant's Verification: 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.

Section 14. Construction Schedule: 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 *(dept/div)*.

Section 15. Construction Permit Fee: Unless otherwise provided in a franchise agreement, 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. Such fees shall be designed to defray the costs of city administration of the requirements of this ordinance. *(Policy choice - permit fee to be determined by city.)*

Section 16. Issuance of Permit: If satisfied that the applications, plans and documents submitted comply with all requirements of this Ordinance and the franchise agreement, the *(list city dept/division)* shall issue a permit authorizing construction of the 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.

Section 17. Notice of Construction: Except in the case of an emergency, the permittee shall notify the *(dept/div)* not less than two (2) working days in advance of any excavation or construction in the public rights of way.

Section 18. 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 *(dept/div)* and their representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

Section 19. Noncomplying Work: Subject to the notice requirements in Section 27, 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, 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 Ordinance.

Section 20. Completion of Construction: 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 city 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 as contemplated by Section 14.

Section 21. As-Built Drawings: If requested by the City for a necessary public purpose, as determined by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and certified to the City as accurately depicting the location of all communications 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 22. 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 and as determined by the City Engineer or designee.
- 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. Any corresponding modification to the construction schedule may be subject to approval by the City.
- 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 said 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 in 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 23. Performance and Completion Bond: Unless otherwise 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 communications facilities within the public rights of way of the City shall be provided 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.

LOCATION OF COMMUNICATIONS FACILITIES

Section 24. 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 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, cable facilities or communications facilities are located underground within a public right of way of the City, a grantee occupying the same public right of way must also locate its communications facilities underground at its own expense.

Section 25. Interference with the Public Rights of Way: No grantee may locate or maintain its communications 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 26. Relocation or Removal of Facilities:

- A. A grantee shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any communications 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 26 shall be deemed to preclude grantee from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements, provided that grantee shall timely comply with the requirements of this Section 26 regardless of whether or not it has requested or received such reimbursement or compensation.
- C. The City shall provide written notice of the time by which grantee must remove, relocate, change, alter or underground its facilities. If grantee fails to remove, relocate, alter or underground any facility as requested by the City and by the date established by the City, grantee 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 facility to be removed, relocated, altered or undergrounded at grantee'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, grantee shall reimburse the City for the costs the City incurred within thirty (30) days.

Section 27. Removal of Unauthorized Facilities: Within thirty (30) days following written notice from the City, any grantee, communications provider, or other person that owns, controls or maintains any unauthorized communications system, facility, or related appurtenances within the public rights of way of the City shall, at its own expense, remove such facilities and/or appurtenances from the public rights of way of the City. A communications system or facility is unauthorized and subject to removal in the following circumstances:

- A. One (1) year after the expiration or termination of the grantee's communications franchise, unless the City has provided written authorization for abandonment in place.
- B. Upon abandonment of a facility within the public rights of way of the City. 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 make a reasonable attempt to contact the communications 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 system or facility was constructed or installed without the appropriate prior authority at the time of installation.
- D. If the system or facility was constructed or installed at a location not permitted by the grantee's communications franchise or other legally sufficient permit.

Section 28. Coordination of Construction Activities: All grantees are required to make a good faith effort to cooperate with the City.

- A. By January 1 of each year, grantees shall provide the City with a schedule of their known proposed construction activities in, around or that may affect the public rights of way.
- B. If requested by the City, each grantee shall meet with the City annually or as determined by 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.

COMMUNICATIONS FRANCHISE

Section 29. Communications Franchise:

- A. A communications franchise shall be required of any communications provider who desires to occupy public rights of way of the City.
- B. Any person whose communications facilities occupy the public right of way without a valid franchise agreement from the City must comply with the provisions of this Ordinance, including payment of the franchise fee pursuant to Section 36.

Section 30. Application:

- A. Any person that desires a communications franchise must register as a communications provider and shall file an application with *(dept/div)* which includes the following information:
 - 1. The identity of the applicant.
 - 2. A description of the communications services that are to be offered or provided by the applicant over its communications facilities.
 - 3. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the facilities located or to be located within the public rights of way in the City, including the location and route requested for applicant's proposed communications facilities. *(City may wish to specify such maps be provided in a specific computerized format.)*
 - 4. The area or areas of the City the applicant desires to serve and a preliminary construction schedule for build-out to the entire franchise area.
 - 5. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities and to offer or provide the communications services proposed.
 - 6. An accurate map showing the location of any existing communications facilities in the City that applicant intends to use or lease.
- B. Any communications provider that occupies the public rights of way of the City without a franchise as of the effective date of this Ordinance shall file an application pursuant to this Section within forty-five (45) days of the effective date of this Ordinance. Any communications provider that desires to occupy the public rights of way of the City after the effective date of this Ordinance shall register prior to installation of any communications facilities in the public rights of way.

Section 31. Application and Review Fee:

- A. Subject to applicable state law, applicant shall reimburse the City for such reasonable costs as the City incurs in entering into the franchise agreement.
- B. An application and review fee to be determined by resolution of the City Council shall be deposited with the City as part of the application filed pursuant to Section 30 above. Expenses exceeding the deposit will be billed to the applicant or the unused portion of the deposit will be returned to the applicant following the determination granting or denying the franchise.

Section 32. Determination by the City: The City shall issue a written determination granting or denying the application in whole or in part. If the application is denied, the written determination shall include the reasons for denial. The application shall be evaluated based upon the continuing capacity of the rights of way to accommodate the applicant's proposed facilities and the applicant's legal, technical and financial ability to comply with the provisions of this Ordinance and applicable federal, state and local laws, rules, regulations and policies.

Section 33. Rights Granted: 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. The right granted by the franchise is limited to the right to use the public rights of way for the provision of communications services as defined herein. 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 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 grantee's communications facilities interfere with the construction, repair, replacement, alteration or removal of any public rights of way, public work, City utility, City improvement or City facility, except those providing communications services in competition with a grantee, grantee's facilities shall be removed or relocated as provided in Section 26 and 27 of this Ordinance, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

Section 34. Term of Grant: Unless otherwise specified in a franchise agreement, a communications franchise granted hereunder shall be in effect for a term of five (5) years.

Section 35. Franchise Territory: Unless otherwise specified in a franchise agreement, a communications franchise granted hereunder shall be limited to a specific geographic area of the City to be served by the franchise grantee, and the public rights of way necessary to serve such areas, and may include the entire city.

Section 36. Franchise Fees:

- A. A communications franchise granted hereunder shall require the grantee to pay the franchise fee in an amount determined by resolution of the City Council.

[OPTION: Including subsection B below in addition to subsection A will ensure payment from competitive access providers that use the right of way to provide service but do not own the facilities and thus are not required to get a franchise. It will also ensure that providers that are required to have a franchise but do not have one are subject to the fee (this is also covered by subsection 29.B). This provision would include wireless providers that use City rights of way to provide service. If a City does not want this to apply to wireless providers, they should add the following at the end of subsection B: "So long as it complies with the registration requirements in Sections 5 through 8 of this Ordinance, other applicable City codes, regulations and rules, and any agreement for use of the public rights of way, a communications provider is not required to pay the right of way fee under this Section if the communications provider's only use of the public right of way is to place wireless transmitting or receiving 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."]

- B. Every communications provider that uses the public rights of way in the City to provide communications services without a franchise, whether or not the provider owns the communications facilities used to provide its services and whether or not the provider is required to obtain a franchise pursuant to Section 29 of this Ordinance, shall pay a right of way use fee in the amount of the franchise fee determined by resolution of the City Council. The duty to provide information set forth in Section 49 of this Ordinance shall apply to information of communications providers subject to the right of way use fee in this subsection 26.B sufficient to demonstrate compliance with this subsection.
- C. Unless otherwise agreed to in writing by the City, the fee 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 communications provider shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.
- D. The franchise fee required by this Section shall be subject to all applicable limitations imposed by federal or state law.

Section 37. Amendment of Grant: Conditions for amending a franchise:

- A. A new application and grant shall be required of any communications provider that desires to extend or locate its communications facilities in public rights of way of the City which are not included in a franchise previously granted under this Ordinance.
- B. If ordered by the City to locate or relocate its communications facilities in public rights of

way not included in a previously granted franchise, the City shall grant an amendment without further application.

- C. A new application and grant shall be required of any communications provider that desires to provide a service which was not included in a franchise previously granted under this Ordinance.

Section 38. Renewal Applications: A grantee that desires to renew its franchise under this Ordinance shall, not less than one hundred eighty (180) days before expiration of the current agreement, file an application with the City for renewal of its franchise which shall include the following information:

- A. The information required pursuant to Section 30 of this Ordinance.
- B. Any information required pursuant to the franchise agreement between the City and the grantee.

Section 39. Renewal Determinations: Within ninety (90) days after receiving a complete application under Section 38 hereof, the City shall issue a written determination granting or denying the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reasons for non-renewal. The application shall be evaluated based upon the continuing capacity of the rights of way to accommodate the applicant's proposed facilities and the applicant's legal, technical and financial ability to comply with the provisions of this Ordinance and applicable federal, state and local laws, rules, regulations and policies.

Section 40. Obligation to Cure As a Condition of Renewal: No franchise shall be renewed until any ongoing violations or defaults in the grantee's performance of the agreement, or of the requirements of this Ordinance, have been cured, or a plan detailing the corrective action to be taken by the grantee has been approved by the City.

Section 41. Assignments or Transfers of System or Franchise: Ownership or control of a majority interest in a communications system or franchise may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, without the prior consent of the City, which consent shall not be unreasonably withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

- A. Grantee and the proposed assignee or transferee of the franchise or system shall agree, in writing, to assume and abide by all of the provisions of the franchise.
- 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 and policies.

- C. Unless otherwise provided in a franchise agreement, the grantee 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 communications franchise.
- D. Any transfer or assignment of a communications franchise, system or integral part of a system without prior approval of the City under this Section or pursuant to a franchise agreement shall be void and is cause for revocation of the franchise.

Section 42. Revocation or Termination of Franchise: A franchise to use or occupy public rights of way of the City may be revoked 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.
- C. Failure to comply with Section 41 herein with respect to sale, transfer or assignment of a communications system or franchise.
- D. Misrepresentation by or on behalf of a grantee in any application to the City.
- E. Abandonment of communications facilities in the public rights of way, unless the City has authorized abandonment in place pursuant to subsection 27.B.
- 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 grantee.
- I. Violation of material provisions of this Ordinance.
- J. Violation of the material terms of a franchise agreement.

Section 43. Notice and Duty to Cure: In the event that the City believes that grounds exist for revocation of a franchise, the City shall give the grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time, not exceeding thirty (30) days, to furnish evidence that:

- A. Corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;

- B. Rebutts the alleged violation or noncompliance; and/or
- C. It would be in the public interest to impose some penalty or sanction less than revocation.

Section 44. Public Hearing: In the event that a grantee fails to provide evidence reasonably satisfactory to the City as provided in Section 43 hereof, the City Manager may refer the apparent violation or non-compliance to the City Council. The City Council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

Section 45. Standards for Revocation or Lesser Sanctions: If persuaded that the grantee has violated or failed to comply with material provisions of this Ordinance, or of a franchise agreement, the City Council shall determine whether to revoke the franchise, or to establish some lesser sanction and cure, including but not limited to assessment of penalties pursuant to Section 61, considering the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors. Whether:

- A. The misconduct was egregious.
- B. Substantial harm resulted.
- C. The violation was intentional.
- 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 46. Other City Costs: All grantees shall, within thirty (30) days after written demand therefore, reimburse the City for all reasonable direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of the franchise or any franchise agreement consistent with applicable state and federal laws.

GENERAL FRANCHISE TERMS

Section 47. Facilities: Upon request, each grantee shall provide the City with an accurate map or maps certifying the location of all communications facilities within the public rights of way. (*City should consider whether and how they wish to receive updated maps on a periodic basis.*)

Section 48. Damage to Grantee's Facilities: Unless directly and proximately caused by negligent, careless, wrongful, willful, intentional or malicious acts by the City, and consistent with Oregon law, the City shall not be liable for any damage to or loss of any communications facility within the public rights of way of the City 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 49. Duty to Provide Information:

- A. Except in emergencies, within sixty (60) days of a written request from the City, each grantee shall furnish the City with the following:
 - 1. Information sufficient to demonstrate that grantee has complied with all requirements of this Ordinance, including but not limited to the franchise fee payments required by Section 36 and any franchise agreement.
 - 2. All books, records, maps, and other documents, maintained by the grantee with respect to its facilities within the public rights of way shall be made available for inspection by the City at reasonable times and intervals.
- B. Such information, books, records, maps, and other documents shall be furnished at a mutually agreed upon location within the City unless the City agrees in writing to a location outside the City.
- C. If the City's audit or review of the books, records and other documents or information of the grantee demonstrate that grantee has underpaid the franchise fee by three percent (3%) or more in any one year, grantee shall reimburse the City for the cost of the audit or review, in addition to any interest owed pursuant to Section 36 of this chapter or as specified in a franchise. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) days of the City's notice to grantee of such underpayment.

Section 50. Service to the City: If the City contracts for the use of communication facilities, communication services, installation, or maintenance from the grantee, the grantee shall offer the City the grantee's most favorable rate available at the time of the request charged to similar users within Oregon for a similar volume of service, subject to any of grantee's tariffs or price lists on file with the OPUC. With the City's permission, the grantee may deduct the applicable charges from fee payments. Other terms and conditions of such services may be specified in a separate agreement between the City and grantee.

Section 51. 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 communications facilities, the compensation to be paid for such right and use shall be fixed by the City. *(City should consider these provisions for property, other than rights of way, that are owned by the City.)*

Section 52. Cable Franchise: Communication providers providing cable service shall be subject to the cable franchise requirements in *(cite city ordinance or code section)*.

Section 53. Leased Capacity: A grantee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers; provided that the grantee shall notify the City that such lease or agreement has been granted to a customer or lessee.

Section 54. Grantee Insurance: *(NOTE: Cities may wish to consider requests from qualified companies for self insurance and negotiation of reduced insurance coverage requirements.)*

Unless otherwise provided in a franchise agreement, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the City, and its elected and appointed officers, officials, agents and employees as additional insured:

- A. Comprehensive general liability insurance with limits not less than
 - 1. Three Million Dollars (\$3,000,000) for bodily injury or death to each person;
 - 2. Three Million Dollars (\$3,000,000) for property damage resulting from any one accident; and,
 - 3. Three Million Dollars (\$3,000,000) for all other types of liability.
- B. Automobile liability for owned, non-owned and hired vehicles with a limit of One Million Dollars (\$1,000,000) for each person and Three Million Dollars (\$3,000,000) for each accident.
- C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars (\$1,000,000).
- 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).
- E. The liability insurance policies required by this Section shall be maintained by the grantee throughout the term of the communications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its communications facilities. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until thirty (30) days after receipt by the City, by registered mail, of a written notice addressed to the *(insert appropriate City dept/div)* of such intent to cancel or not to renew."
- F. Each grantee shall maintain continuous uninterrupted coverage in the terms and amounts required in this Section. If the insurance is canceled or materially altered, the grantee shall obtain a replacement policy that complies with the terms of this Section and provide the City with a replacement certificate of insurance.

- G. As an alternative to the insurance requirements contained herein, a grantee may provide evidence of self-insurance subject to review and acceptance by the City.

Section 55. General Indemnification: Each franchise agreement shall include, to the extent permitted by law, grantee'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 attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its communications facilities, and in providing or offering communications services over the facilities or network, whether 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 56. Performance Surety: Before a franchise granted pursuant to this Ordinance is effective, and as necessary thereafter, the grantee shall provide a performance bond, in form and substance acceptable to the City, as security for the full and complete performance of a franchise granted under this Ordinance, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the City. This obligation is in addition to the performance surety required by Section 23 for construction of facilities.

GENERAL PROVISIONS

Section 57. Governing Law: Any franchise granted under this Ordinance is subject to the provisions of the Constitution and laws of the United States, and the State of Oregon and the ordinances and Charter of the City.

Section 58. Written Agreement: No franchise shall be granted hereunder except by a writing duly executed by the franchisee and the City.

Section 59. Nonexclusive Grant: No franchise granted under this Ordinance shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights of way of the City for delivery of communications services or any other purposes.

Section 60. 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 hereof, 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 61. Penalties: Any person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Ordinance 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. *(Penalties need to be tailored to each city's civil infraction process.)*

Section 62. 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 63. 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.

Section 64. Compliance with Laws: Any grantee under this Ordinance shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all ordinances, resolutions, rules and regulations of the City heretofore or hereafter adopted or established during the entire term of any franchise granted under this Ordinance, which are relevant and relate to the construction, maintenance and operation of a communications system.

Section 65. Consent: Wherever the consent of either the City or of the grantee is specifically required by this Ordinance or in a franchise granted, such consent will not be unreasonably withheld.

Section 66. Application to Existing Ordinance and Agreements: To the extent that this Ordinance is not in conflict with and can be implemented with existing ordinance and franchise agreements, this Ordinance shall apply to all existing ordinance and franchise agreements for use of the public right of way for communications services.

Section 67. Confidentiality: The City agrees to use its best efforts to preserve the confidentiality of information as requested by a grantee, to the extent permitted by the Oregon Public Records Law, provided that documents are clearly marked as confidential by the grantee at the time of disclosure to the City. The City shall not be required to incur any costs to protect the confidentiality of such document, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

RESOLUTION 10-2017

A RESOLUTION EXTENDING THE FRANCHISE AGREEMENT BETWEEN THE CITY OF FALLS CITY AND CHARTER COMMUNICATIONS THROUGH THE 5TH OF JUNE 2029.

Findings:

- 1) The City of Falls City desires to provide cable service to the residents of Falls City.
- 2) Charter Communications has been the Local provider of Cable service to the residents of Falls City and has equipment established in the City right of ways.
- 3) The City of Falls City and Charter Communications have a franchise agreement in place that expires on the 5th of June, 2019.
- 4) The City of Falls City and Charter Communications have agreed to renew the current Cable Agreement for 10 years.

NOW THEREFORE, THE COMMON COUNCIL OF THE CITY OF FALLS CITY RESOLVES AS FOLLOWS:

Section 1: Section 15.7 of the Franchise Agreement adopted by Falls City Council on June, 5, 2004 is hereby amended so the term of the franchise is extended 10 years.

Section 2. The new expiration date on the franchise agreement between Falls City and Charter Communications will expire the 5th day of June, 2029.

Section 3. All other terms and conditions of the franchise agreement shall continue in full force and effect, subject to applicable law.

June 8, 2017

Date

Attest:

6/8/2017

Date


Terry Ungricht, Mayor


Johanna Birr, City Clerk

AGREEMENT TO AMEND AND RENEW CABLE FRANCHISE

WHEREAS, Falcon Cable Systems Company II, L.P., locally known as Charter Communications ("Charter") currently holds a cable franchise with Falls City, OR, granted by Charter Franchise Agreement ("Franchise"), on June 5, 2004; and

WHEREAS, Charter and Falls City, OR wish to renew the franchise and amend certain terms therein as set forth herein.

WHEREAS, it is in the public interest to renew the current Franchise for an additional terms of years so that cable service to the public will not be interrupted.

NOW, THEREFORE, in consideration of the foregoing, Charter and Falls City, OR agree as follows:

Section 1: Section 15.7 of the Franchise is hereby amended so that the term of the Franchise is extended for 10 years and the expiration date of the Franchise is June 5, 2029.

Section 2: All other terms and conditions of the Franchise shall continue in full force and effect, subject to applicable law.

PASSED AND APPROVED this 8 day of June, 2017.

City of Falls City, OR

By: Terry Ungricht

Name/Title: Terry Ungricht, Mayor

ACCEPTED THIS _____ day of _____, _____

Falcon Cable Systems Company II, L.P.
I/k/a Charter Communications

By: _____

Name/Title: _____

CHARTER FRANCHISE AGREEMENT

This Franchise Agreement is between the City of Falls City, OR hereinafter referred to as the "Franchising Authority" and Falcon Cable Systems Company II, L.P., d/b/a Charter Communications, hereinafter referred to as the "Grantee."

WHEREAS, the Franchising Authority finds that the Grantee has substantially complied with the material terms of the current Franchise under applicable laws, and that the financial, legal and technical ability of the Grantee is sufficient to provide services, facilities and equipment necessary to meet the future cable-related needs of the community, and

WHEREAS, having afforded the public adequate notice and opportunity for comment, Franchising Authority desires to enter into this Franchise with the Grantee for the construction and operation of a cable system on the terms set forth herein; and

WHEREAS, the Franchising Authority and Grantee have complied with all federal and State-mandated procedural and substantive requirements pertinent to this franchise renewal;

NOW, THEREFORE, the Franchise Authority and Grantee agree as follows:

SECTION I Definition of Terms

1.1 Terms. For the purpose of this franchise the following terms, phrases, words and their derivations shall have the meaning ascribed to them in the Cable Communications Policy Act of 1984, as amended from time to time (the "Cable Act"), unless otherwise defined 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 word "shall" is mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.

- A. "Cable System," "Cable Service," "Cable Operator" and "Basic Cable Service" shall be defined as set forth in the Cable Act
- B. "Council" shall mean the City Council of Falls City, the governing body of the City of Falls City, OR.

- C. "Cable Act" shall mean the Cable Communication Policy Act of 1984, as amended, 47 U.S.C. §§ 521, et. seq.
- D. "FCC" shall mean the Federal Communications Commission and any successor governmental entity thereto.
- E. "Franchise Authority" shall mean the City of Falls City, OR.
- F. "Franchise" shall mean the non-exclusive rights granted pursuant to this franchise to construct and operate a Cable System along the public ways within all or a specified area in the Service Area.
- G. "Grantee" shall mean Falcon Cable Systems Company II, L.P., d/b/a Charter Communications or its lawful successor, transferee or assignee.
- H. "Gross Revenue" means any revenue received by the Grantee from the operation of the Cable System to provide Cable Services in the Service Area, provided, however, that such phrase shall not include: (1) any taxes, fee or assessment of general applicability collected by the Grantee from Subscribers for pass-through to a government agency, including the FCC User Fee; (2) unrecovered bad debt; and (3) any PEG or I-Net amounts recovered from Subscribers.
- I. "Installation" shall mean the connection of the Cable System from feeder cable to Subscribers' terminals.
- J. "Person" shall mean an individual, partnership, association, organization, corporation or any lawful successor, transferee or assignee of said individual, partnership, association, organization or corporation.
- K. "Public School" shall mean any school at any educational level operated within the Service Area by any public, private or parochial school system, but limited to, elementary, junior high school, and high school.
- L. "Reasonable notice" shall be written notice addressed to the Grantee at its principal office or such other office as the Grantee has designated to the Franchise Authority as the address to which notice should be transmitted to it.
- M. "Service Area" shall mean the geographic boundaries of the Franchise Authority, and shall include any additions thereto by annexation or other legal means, subject to the exception in subsection 6.1 hereto..
- N. "State" shall mean the State of Oregon.
- O. "Street" shall include each of the following located within the Service Area: public streets, roadways, highways, bridges, land paths, boulevards, avenues, lanes, alleys,

Grantee may petition the Franchising Authority for a modification of this Franchise. The Grantee shall be entitled, with respect to said lesser obligations to such modification(s) of this Franchise as to insure fair and equal treatment by this Franchise and said other agreements.

In the event that a non-franchised multichannel video-programming distributor provides service to the Service Area, the Grantee shall have a right to request Franchise amendments that relieve the Grantee of burdens that create a competitive disadvantage to the Grantee. In requesting amendments, the Grantee shall file a petition seeking to amend the Franchise. Such petitions shall:

1. Indicate the presence of a non-franchised competitor(s);
2. Identify the basis for Grantee's belief that certain provisions of the Franchise place Grantee at a competitive disadvantage;
3. Identify the burdens to be amended or repealed in order to eliminate the competitive disadvantage.

The Franchising Authority shall not unreasonably withhold granting the Grantee's petition.

2.4 Police Powers and Conflicts with Franchise. This Franchise is a contract and except as to those changes which are the result of the Franchising Authority's exercise of its general police power, the Franchising Authority may not take any unilateral action which materially changes the explicit mutual promises in this contract. Any changes to this Franchise must be made in writing signed by the Grantee and the Franchising Authority. In the event of any conflict between this Franchise and any Franchising Authority ordinance or regulation, this Franchise will prevail.

2.5 Cable System Franchise Required. No Cable System shall be allowed to occupy or use the streets or public rights-of-way of the Service Area or be allowed to operate without a Cable System Franchise.

sidewalks, circles, drives, easements, rights-of-way and similar public ways and extensions and additions thereto, including but not limited to public utility easements, dedicated utility strips, or rights-of-way dedicated for compatible uses now or hereafter held by the Franchising Authority in the Service Area, which shall entitle the Grantee to the use thereof for the purpose of installing, operating, repairing and maintaining the Cable System.

- P. "Subscriber" shall mean any person lawfully receiving Cable Service from the Grantee.

SECTION 2 **Grant of Franchise**

2.1 Grant. The Franchising Authority franchise hereby grants to the Grantee a nonexclusive Franchise which authorizes the Grantee to erect, construct, operate and maintain in, upon, along, across, above, over and under the Streets, now in existence and as may be created or established during its terms; any poles, wires, cable, underground conduits, manholes, and other conductors and fixtures necessary for the maintenance and operation of a Cable System. Nothing in this Franchise shall be construed to prohibit the Grantee from offering any service over its Cable System that is not prohibited by federal, State or local law.

2.2 Term. The Franchise and the rights, privileges and authority hereby granted shall be for an initial term of 15 years, commencing on the Effective Date of this Franchise as set forth in subsection 15.8, unless otherwise lawfully terminated in accordance with the terms of this Franchise.

2.3 Franchise Requirements For Other Franchise Holders. In the event that the Franchising Authority grants one (1) or more franchise(s) or similar authorizations, for the construction, operation and maintenance of any communication facility which shall offer services substantially equivalent to services offered by the Cable System, it shall not make the grant on more favorable or less burdensome terms. If said other franchise(s) contain provisions imposing lesser obligations on the company(s) thereof than are imposed by the provisions of this Franchise,

SECTION 3
Franchise Renewal

3.1 Procedures for Renewal. The Franchising Authority and the Grantee agree that any proceedings undertaken by the Franchising Authority that relate to the renewal of the Grantee's Franchise shall be governed by and comply with the provisions of Section 626 of the Cable Act, or any such successor statute.

SECTION 4
Indemnification and Insurance

4.1 Indemnification. The Grantee shall, by acceptance of the Franchise granted herein, defend the Franchising Authority, its officers, boards, commissions, agents, and employees for all claims for injury to any person or property caused by the negligence of Grantee in the construction or operation of the Cable System and in the event of a determination of liability shall indemnify and hold Franchising Authority, its officers, boards, commissions, agents, and employees harmless from any and all liabilities, claims, demands, or judgments growing out of any injury to any person or property as a result of the negligence of Grantee arising out of the construction, repair, extension, maintenance, operation or removal of its wires, poles or other equipment of any kind or character used in connection with the operation of the Cable System, provided that the Franchising Authority shall give the Grantee written notice of its obligation to indemnify the Franchising Authority within ten (10) days of receipt of a claim or action pursuant to this section. Notwithstanding the foregoing, the Grantee shall not be obligated to indemnify the Franchising Authority for any damages, liability or claims resulting from the willful misconduct or negligence of the Franchising Authority or for the Franchising Authority's use of the Cable System, including any PEG channels.

4.2 Insurance.

- A. The Grantee shall maintain throughout the term of the Franchise insurance in amounts at least as follows:

Workers' Compensation	Statutory Limits
Commercial General Liability	[\$1,000,000] per occurrence, Combined Single Liability (C.S.L.) [\$2,000,000] General Aggregate
Auto Liability including coverage on all owned, non-owned hired autos Umbrella Liability	[\$1,000,000] per occurrence C.S.L.
Umbrella Liability	[\$1,000,000] per occurrence C.S.L.

- B. The Franchising Authority shall be added as an additional insured to the above Commercial General Liability, Auto Liability and Umbrella Liability insurance coverage.
- C. The Grantee shall furnish the Franchising Authority with current certificates of insurance evidencing such coverage.

SECTION 5
Service Obligations

5.1 No Discrimination. Grantee shall not deny service, deny access, or otherwise discriminate against Subscribers, channel users, or general citizens on the basis of race, color, religion, national origin, age or sex.

5.2 Privacy. The Grantee shall fully comply with the privacy rights of Subscribers as contained in Cable Act Section 631 (47 U.S.C. § 551).

SECTION 6
Service Availability

6.1 Service Area. The Grantee shall make Cable Service distributed over the Cable System available to every residence within the Service Area where there is a minimum density of at least thirty (30) residences per mile as measured from Grantee's closest existing Cable System plant. The Grantee may elect to provide Cable Service to areas not meeting the above standard.

6.2 Service to New or Previously Unserved Single Family Dwellings. The Grantee shall offer Cable Service to all new homes or previously unserved single dwellings located within 150 feet of Grantee's feeder cable at its published rates for standard Installation.

6.3 New Development Underground. In cases of new construction or property development where utilities are to be placed underground, the Franchising Authority agrees to require as a condition of issuing a permit for open trenching to any developer or property owner that such developer or property owner give Grantee at least 30 days prior notice of such construction or development, and of the particular dates on which open trenching will be available for Grantee's installation of conduit, pedestals and/or vaults, and laterals to be provided at Grantee's expense. Grantee shall also provide specifications as needed for trenching. Costs of trenching and easements required to bring service to the development shall be borne by the developer or property owner; except that if Grantee fails to install its conduit, pedestals and/or vaults, and laterals within five (5) working days of the date the trenches are available, as designated in the notice given by the developer or property owner, then should the trenches be closed after the five-day period, the cost of new trenching is to be borne by Grantee.

SECTION 7
Construction and Technical Standards

7.1 Compliance with Codes. All construction practices and installation of equipment shall be done in accordance with all applicable sections of the National Electric Safety Code. .

7.2 Construction Standards and Requirements. All of the Grantee's plant and equipment, including but not limited to the antenna site, head-end and distribution system, towers, house connections, structures, poles, wire, cable, coaxial cable, fixtures and appurtenances shall be installed, located, erected, constructed, reconstructed, replaced, removed, repaired, maintained and operated in accordance with good engineering practices and performed by experienced maintenance and construction personnel.

7.3 Safety. The Grantee shall at all times employ ordinary care and shall use commonly accepted methods and devices preventing failures and accidents which are likely to cause damage,

7.4 Network Technical Requirements. The Cable System shall be operated so that it is capable of continuous twenty-four (24) hour daily operation, capable of meeting or exceeding all applicable federal technical standards, as they may be amended from time to time, and operated in such a manner as to comply with all applicable FCC regulations.

7.5 Performance Monitoring. Grantee shall test the Cable System consistent with the FCC regulations.

SECTION 8
Conditions on Street Occupancy

8.1 General Conditions. Grantee shall have the right to utilize existing poles, conduits and other facilities whenever possible, and shall not construct or install any new, different, or additional poles, conduits, or other facilities on public property until the written approval of the Franchising Authority is obtained, which approval shall not be unreasonably withheld.

8.2 Underground Construction. The facilities of the Grantee shall be installed underground in those Service Areas where existing telephone and electric services are both underground at the time of system construction. In areas where either telephone or electric utility facilities are installed aerially at the time of system construction, the Grantee may install its facilities aerially with the understanding that at such time as the existing aerial facilities are required to be placed underground by the Franchising Authority, the Grantee shall likewise place its facilities underground. In the event that any telephone or electric utilities are reimbursed by the Franchising Authority or any agency thereof for the placement of cable underground or the movement of cable, Grantee shall be reimbursed upon the same terms and conditions as any telephone, electric or other utilities.

8.3 Permits. The Franchising Authority shall cooperate with the Grantee in granting any permits required, providing such grant and subsequent construction by the Grantee shall not unduly interfere with the use of such Streets.

8.4 System Construction. All transmission lines, equipment and structures shall be so installed and located as to cause minimum interference with the rights and reasonable convenience of property owners and at all times shall be kept and maintained in a safe, adequate and substantial condition, and in good order and repair. The Grantee shall, at all times, employ ordinary care and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injuries, or nuisances to the public. Suitable barricades, flags, lights, flares or other devices shall be used at such times and places as are reasonably required for the safety of all members of the public. Any poles or other fixtures placed in any public way by the Grantee shall be placed in such a manner as not to interfere with the usual travel on such public way.

8.5 Restoration of Public Ways. Grantee shall, at its own expense, restore any damage or disturbance caused to the public way as a result of its operation, construction, or maintenance of the Cable System to a condition reasonably comparable to the condition of the Streets immediately prior to such damage or disturbance.

8.6 Removal in Emergency. Whenever, in case of fire or other disaster, it becomes necessary in the judgment of the Franchising Authority to remove any of the Grantee's facilities, no charge shall be made by the Grantee against the Franchising Authority for restoration and repair, unless such acts amount to gross negligence by the Franchising Authority.

8.7 Tree Trimming. Grantee or its designee shall have the authority to trim trees on public property at its own expense as may be necessary to protect its wires and facilities.

8.8 Relocation for the Franchising Authority. The Grantee shall, upon receipt of reasonable advance written notice, to be not less than ten (10) business days, protect, support, temporarily disconnect, relocate, or remove any property of Grantee when lawfully required by the Franchising Authority pursuant to its police powers. Grantee shall be responsible for any costs associated with these obligations to the same extent all other users of the Franchising Authority rights-of-way are responsible for the costs related to their facilities.

8.9 Relocation for a Third Party. The Grantee shall, on the request of any person holding a lawful permit issued by the Franchising Authority, protect, support, raise, lower, temporarily disconnect, relocate in or remove from the Street as necessary any property of the Grantee, provided that the expense of such is paid by any such person benefiting from the relocation and the Grantee is give reasonable advance written notice to prepare for such changes. The Grantee may require such payment in advance. For purposes of this subsection, "reasonable advance

written notice" shall be no less than ten (10) business day in the event of a temporary relocation and no less than one hundred twenty days (120) for a permanent relocation.

8.10 Reimbursement of Costs. If funds are available to any person using the Streets for the purpose of defraying the cost of any of the foregoing, the Franchising Authority shall reimburse the Grantee in the same manner in which other persons affected by the requirement are reimbursed. If the funds are controlled by another governmental entity, the Franchising Authority shall make application for such funds on behalf of the Grantee.

8.11 Emergency Use. If the Grantee provides an Emergency Alert System ("EAS"), then the Franchising Authority shall permit only appropriately trained and authorized Persons to operate the EAS equipment and shall take reasonable precautions to prevent any use of the Grantee's Cable System in any manner that results in inappropriate use thereof, or any loss or damage to the Cable System. The Franchising Authority shall hold the Grantee, its employees, officers and assigns harmless from any claims or costs arising out of use of the EAS.

SECTION 9 **Service And Rates**

9.1 Phone Service. The Grantee shall maintain a toll-free telephone number and a phone service operated such that complaints and requests for repairs or adjustments may be received at any time.

9.2 Notification of Service Procedures. The Grantee shall furnish each Subscriber at the time service is installed, written instructions that clearly set forth information concerning the procedures for making inquiries or complaints, including the Grantee's name, address and local

telephone number. Grantee shall give the Franchising Authority thirty (30) days prior notice of any rate increases, channel lineup or other substantive service changes.

9.3 Rate Regulation. Franchising Authority shall have the right to exercise rate regulation to the extent authorized by law, or to refrain from exercising such regulation for any period of time, at the sole discretion of the Franchising Authority. If and when exercising rate regulation, the Franchising Authority shall abide by the terms and conditions set forth by the FCC.

9.4 Continuity of Service. It shall be the right of all Subscribers to continue receiving Cable Service insofar as their financial and other obligations to the Grantee are honored.

SECTION 10 **Franchise Fee**

10.1 Amount of Fee. Grantee shall pay to the Franchising Authority an annual franchise fee in an amount equal to percent (5%) of the annual Gross Revenue. Such payment shall be in addition to taxes of general applicability owed to the Franchising Authority by the Grantee that are not included as franchise fee under federal law.

10.2 Payment of Fee. Payment of the fee due the Franchising Authority shall be made on an [annual/quarterly] basis, within 45 days of the close of each [calendar year/calendar quarter]. The payment period shall commence as of the Effective Date of the Franchise. In the event of a dispute, the Franchising Authority, if it so requests, shall be furnished a statement of said payment, reflecting the Gross Revenues and the applicable charges, deductions and computations for the period covered by the payment.

10.3 Accord and Satisfaction. No acceptance of any payment by the Franchising Authority shall be construed as a release or as an accord and satisfaction of any claim the Franchising Authority may have for additional sums payable as a franchise fee under this Franchise.

10.4 Limitation on Recovery. In the event that any Franchise payment or recomputed payment is not made on or before the dates specified herein, Grantee shall pay an interest charge, computed from such due date, at the annual rate of one percent over the prime interest rate. The period of limitation for recovery of any franchise fee payable hereunder shall be three (3) years from the date on which payment by the Grantee was due.

SECTION 11
Transfer of Franchise

11.1 Franchise Transfer. The Franchise granted hereunder shall not be transferred or assigned, without the prior consent of the Franchising Authority, such consent not to be unreasonably withheld or delayed. No such consent shall be required, however, for a transfer in trust, by mortgage, by other hypothecation, or by assignment of any rights, title, or interest of the Grantee in the Franchise or Cable System to secure indebtedness. Within thirty (30) days of receiving a request for transfer, the Franchising Authority shall notify the Grantee in writing of any additional information it reasonably requires to determine the legal, financial and technical qualifications of the transferee. If the Franchising Authority has not taken action on the Grantee's request for transfer within one hundred twenty (120) days after receiving such request, consent by the Franchising Authority shall be deemed given.

11.2 Transfer to Affiliates. The foregoing requirements shall not apply to any sale, assignment or transfer to any Person that is owned or controlled by the Grantee, or any Person that owns or controls the Grantee. Grantee shall notify the Franchising Authority thirty (30) days prior to any such sale, assignment or transfer.

SECTION 12
Records, Reports And Maps

12.1 Reports Required. The Grantee's schedule of charges, contract or application forms for regular Subscriber service, policy regarding the processing of Subscriber complaints, delinquent Subscriber disconnect and reconnect procedures and any other terms and conditions adopted as the Grantee's policy in connection with its Subscribers shall be filed with the Franchising Authority upon request.

12.2 Records Required.

The Grantee shall at all times maintain:

- A. A record of all complaints received regarding interruptions or degradation of Cable Service shall be maintained for one (1) year.
- B. A full and complete set of plans, records and strand maps showing the location of the Cable System.

12.3 Inspection of Records. Grantee shall permit any duly authorized representative of the Franchising Authority, upon receipt of advance written notice to examine during normal business hours and on a nondisruptive basis any and all records as is reasonably necessary to ensure Grantee's compliance with the Franchise. Such notice shall specifically reference the subsection of the Franchise that is under review so that the Grantee may organize the necessary books and records for easy access by the Franchising Authority. The Grantee shall not be required to maintain any books and records for Franchise compliance purposes longer than three (3) years, except for service complaints, which shall be kept for one (1) year as specified above. The Grantee shall not be required to provide Subscriber information in violation of Section 631 of the Cable Act. The Franchising Authority agrees to treat as confidential any books; records or maps that constitute proprietary or confidential information to the extent Grantee make the Franchising

Authority aware of such confidentiality. If the Franchising Authority believes it must release any such confidential books or records in the course of enforcing this Franchise, or for any other reason, it shall advise Grantee in advance so that Grantee may take appropriate steps to protect its interests. Until otherwise ordered by a court or agency of competent jurisdiction, the Franchising Authority agrees that, to the extent permitted by state and federal law, it shall deny access to any of Grantee's books and records marked confidential, as set forth above, to any Person.

SECTION 13 **Community Programming**

13.1 Service to Schools and Buildings. The Grantee shall maintain, without charge, one outlet to each Public School, located in the Service Area served by the Cable System and will provide free Basic Cable, for so long as the Cable System remains in operation in the Service Area. Any such school may install, at its expense, such additional outlets for classroom purposes as it desires, provided that such installation shall not interfere with the operation of Grantee's Cable System, and that the quality and manner of installation of such additional connections shall have been approved by the Grantee and shall comply with all local, State and federal laws and regulations. In addition, the Grantee shall furnish to the Franchising Authority, without installation or monthly charges, one outlet to each Police and Fire Station, and to the administration building of the Franchising Authority.

13.2 Limitations on Use. The Cable Service provided pursuant to this Section shall not be used for commercial purposes and such outlets shall not be located in areas open to the public. The Franchising Authority shall take reasonable precautions to prevent any use of the Grantee's Cable System that results in the inappropriate use thereof or any loss or damage to the Cable System. The Franchising Authority shall hold the Grantee harmless from any and all liability or

claims arising out of the provision and use of Cable Service required by subsection 13.1 above. The Grantee shall not be required to provide an outlet to any such building where a standard drop of more than 150 feet is required, unless the Franchising Authority or building owner/occupant agrees to pay the incremental cost of any necessary extension or installation.

SECTION 14
Enforcement Or Revocation

14.1 Notice of Violation. If the Franchising Authority believes that the Grantee has not complied with the terms of the Franchise, the Franchising Authority shall first informally discuss the matter with Grantee. If these discussions do not lead to resolution of the problem, the Franchising Authority shall notify the Grantee in writing of the exact nature of the alleged noncompliance.

14.2 Grantee's Right to Cure or Respond. The Grantee shall have thirty (30) days from receipt of the notice described in subsection 14.1 to (i) respond to the Franchising Authority, contesting the assertion of noncompliance, or (ii) to cure such default, or (iii) if, by the nature of default, such default cannot be cured within the thirty (30) day period, initiate reasonable steps to remedy such default and notify the Franchising Authority of the steps being taken and the projected date that they will be completed.

14.3 Public Hearing. If the Grantee fails to respond to the notice received from the Franchising Authority pursuant to the procedures set forth in subsection 14.2, or if the default is not remedied within the cure period set forth above, the Board shall schedule a public hearing if it intends to continue its investigation into the default. The Franchising Authority shall provide the Grantee at least twenty (20) days prior written notice of such hearing, which specifies the time, place and purpose of such hearing, notice of which shall be published by the Clerk of the

Franchising Authority in a newspaper of general circulation within the Franchising Authority in accordance with subsection 15.5 hereof.

14.4 Enforcement. Subject to applicable federal and state law, in the event the Franchising Authority, after the hearing set forth in subsection 14.3 above, determines that the Grantee is in default of any provision of the Franchise, the Franchising Authority may:

- A. Seek specific performance of any provision, which reasonably lends itself to such remedy, as an alternative to damages; or
- B. Commence an action at law for monetary damages or seek other equitable relief; or
- C. In the case of a substantial default of a material provision of the Franchise, seek to revoke the Franchise itself in accordance with subsection 14.5 below.

14.5 Revocation.

- A. Prior to revocation or termination of the Franchise, the Franchising Authority shall give written notice to the Grantee of its intent to revoke the Franchise on the basis of a pattern of noncompliance by the Grantee, including one or more instances of substantial noncompliance with a material provision of the Franchise. The notice shall set forth the exact nature of the noncompliance. The Grantee shall have sixty (60) days from such notice to either object in writing and to state its reasons for such objection and provide any explanation or to cure the alleged noncompliance. If the Franchising Authority has not received a satisfactory response from Grantee, it may then seek to revoke the Franchise at a public hearing. The Grantee shall be given at least thirty (30) days prior written notice of such public hearing, specifying the time and place of such hearing and stating its intent to revoke the Franchise.

B. At the hearing, the Board shall give the Grantee an opportunity to state its position on the matter, present evidence and question witnesses, after which it shall determine whether or not the Franchise shall be revoked. The public hearing shall be on the record and a written transcript shall be made available to the Grantee within ten (10) business days. The decision of the Board shall be made in writing and shall be delivered to the Grantee. The Grantee may appeal such determination to an appropriate court, which shall have the power to review the decision of the Board *de novo*.

SECTION 15
Miscellaneous Provisions

15.1 Force Majeure. The Grantee shall not be held in default under, on in noncompliance with the provisions of the Franchise, nor suffer any enforcement or penalty relating to noncompliance or default, where such noncompliance or alleged defaults occurred or were caused by circumstances reasonably beyond the ability of the Grantee to anticipate and control. This provision includes work delays caused by waiting for utility providers to service or monitor their utility poles to which Grantee's Cable System is attached, as well as unavailability of materials and/or qualified labor to perform the work necessary.

Furthermore, the parties hereby agree that it is not the Franchising Authority's intention to subject the Grantee to penalties, fine, forfeitures or revocation of the Franchise for violations of the Franchise where the violation was a good faith error that resulted in no or minimal negative impact on the Subscribers within the Franchise territory, or where strict performance would result in practical difficulties and hardship to the Grantee which outweighs the benefit to be derived by the Franchising Authority and/or Subscribers.

15.2 Action of Parties. In any action by the Franchising Authority or the Grantee that is mandated or permitted under the terms hereof, such party shall act in a reasonable, expeditious and timely manner. Furthermore, in any instance where approval or consent is required under the terms hereof, such approval or consent shall not be unreasonably withheld.

15.3 Notices. All notices from Grantee to the Franchising Authority pursuant to this Franchise shall be to the Clerk of the Franchising Authority. Grantee shall maintain with the Franchising Authority, throughout the term of this Franchise, an address for service of notices by mail.

15.4 Public Notice. Minimum public notice of any public meeting relating to this Franchise shall be by publication at least once in a newspaper of general circulation in the area at least ten (10) days prior to the meeting and a posting at the administrative buildings of the Franchising Authority.

15.5 Severability. If any section, subsection, sentence, clause, phrase, or portion of this Franchise is, for any reason, held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions of this Franchise.

15.6 Entire Agreement. This Franchise sets forth the entire agreement between the parties respecting the subject matter hereof. All agreements, covenants, representations and warranties, express and implied, oral and written, of the parties with regard to the subject matter hereof are contained herein. No other agreements, covenants, representations or warranties, express or implied, oral or written, have been made by any party to another with respect to the matter of this Franchise. All prior and contemporaneous conversations, negotiations, possible and alleged agreements, representations, covenants and warranties with respect to the subject matter hereof are waived, merged herein and therein and superseded hereby and thereby.

15.7 Effective Date. The Effective Date of this Franchise shall be thirty (30) days after an authorized representative of Grantee has affixed his/her signature hereto, pursuant to the provisions of applicable law. This Franchise shall expire on the 5th of JUNE, 2019, unless extended by the mutual agreement of the parties.

Considered and approved this 3rd day of May, 2004.

City of Falls City, OR:

Signature: Kirby Frink

Print Name: Kirby Frink

Date: 5/3/04

Accepted this 5th day of JUNE, 2004, subject to applicable federal, state and local law.

**Falcon Cable Systems Company II, L.P.,
d/b/a Charter Communications:**

Signature: Eric P. Brown

Print Name: Eric P. Brown

Title: SVP of Operations

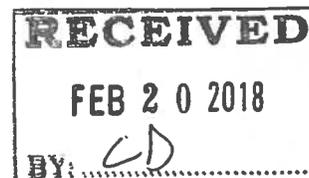
Date: 6/5/04

Charter

COMMUNICATIONS

February 08, 2018

OR0190
CITY OF FALLS CITY OR (FRAN FEES)
Attn: City Administrator
299 Mill Street
Falls City, OR 97344



RE: Annual Franchise Fee Payment

Dear Sir or Madam:

This letter is a summary for the ACH payment of franchise fees covering the period from January 1, 2017 to December 31, 2017, for Charter Communications ("Charter"). This franchise fee computation has been prepared in accordance with the terms and conditions of our local cable television franchise agreement, or if Charter is operating under a state issued franchise in your community, in accordance with the requirements of the state franchising law. This payment specifically complies with all of Charter's contractual and/or statutory duties, and includes the required percentage, flat rate, or per sub payment, and includes all required categories or revenue.

This payment was calculated as follows:

Franchise Fee Base	\$111,029.48
Franchise Fee (as defined in Agreement):	5%
Fee Adjustment (see detail)	<u>\$0.00</u>
Fee Due	<u>\$5,551.48</u>

Please contact your Government Relations representative or send an email directly to CharterFranchiseNotices@chartercom.com for any address updates or corrections.

Charter Communications is proud to serve your community and our customers with cable television service.

Please feel free to contact our office Corp_mm_franchise_fees@chartercom.com if any additional information is required.

Sincerely,

A handwritten signature in black ink that reads "Steve Lottmann".

Steve Lottmann
Divisional Controller

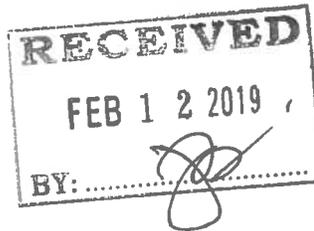
1202 - 00149318 - 83415

Enclosure

ATTACHMENT CONTAINS TRADE SECRET INFORMATION AND IS CONFIDENTIAL & PROPRIETARY
- NOT FOR PUBLIC DISCLOSURE

314 288 3103
www.charter.com

12405 Powerscourt Drive
St. Louis, Missouri 63131-3764



Adam E. Falk
Senior Vice President
State Government Affairs
Senior Vice President
State Government Affairs

January 31, 2019

City of Falls City
299 Mill St.
Falls City, Oregon 97344

Re: Notice

To Whom It May Concern:

This letter provides notice that in March 2019, Charter Communications, Inc. ("Charter") will complete the final steps of an internal corporate reorganization. As a result, the cable franchise in your community will be held by Spectrum Pacific West, LLC, a wholly owned, indirect subsidiary of Charter. There will be no change of control of the cable franchisee, and there will be no change in the service that Charter provides to your community.

No action on your part is required. All of us at Charter are excited to continue to serve your community. If you have any questions, please give me a call at 202.621.1910, send an email to adamfalk-gvt@charter.com, or send a fax to 202.733.5960.

Sincerely,

A handwritten signature in cursive script, appearing to read "Adam E. Falk".

Adam E. Falk
Senior Vice President, State Government Affairs
Charter Communications

GENERAL PROVISIONS

§ 91.01 PUBLIC RIGHTS-OF-WAY.

(A) Definitions. For the purpose of this section, the following definitions shall apply

unless the context clearly indicates or requires a different meaning. CITY. The City of Falls City, Oregon.

PERSON. Individual, corporation, association, firm, partnership, joint stock company, and similar entities.

PUBLIC RIGHTS-OF-WAY. Include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and all other public ways or

areas, including subsurface and air space over these areas. WITHIN THE CITY. Territory over which the city now has or acquires jurisdiction for the exercise of its powers.

(B) Jurisdiction. The city has jurisdiction and exercises regulatory control over all

public rights-of-way within the city under the authority of the City Charter and state law. Falls City, OR Code of Ordinances

(C) Scope of regulatory control. The city has jurisdiction and exercises regulatory

control 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 control over 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.

(D) City permission requirement. 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 by franchises, licenses, and permits.

(E) Obligations of the city. The exercise of jurisdiction and regulatory control over 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.

(Ord. 97-465, passed 4-7-1997)

System Development Charges

Basic Principles

Forward



This document contains general principles that local governments may want to consider when enacting system development charges. The principles contained herein are compiled from Oregon Revised Statute, published articles from various sources, and presentations by James C. Nicholas, a leading authority on impact fees. The circumstances and needs of each community will influence the particulars of their SDC program. Local governments should consult with their municipal attorneys when enacting and revising their system development charges to ensure that their system development charges are appropriate for their community.

Should A City Enact SDCs?

SDCs are *a* tool to finance infrastructure needed as a result of growth.

How much growth a city has, plans and expects should be contained in the city's comprehensive plan.

Some communities may want to consider alternatives to SDCs.

BEFORE You Enact SDCs:

 ORS 223.309: “Prior to the establishment of a system developmental charge by ordinance or resolution, a governmental unit shall prepare a capital improvement plan, public facilities plan, master plan or comparable plan that includes a list of the capital improvements that the governmental unit intends to fund, in whole or in part, with revenues from an improvement fee and the estimated cost, timing and percentage of costs eligible to be funded with revenues from the improvement fee for each improvement.

- A Plan (preferably coordinated with your land use plan) and a list of SDC eligible projects

To SDC or Not to SDC?

That is the question.

Is there new development in the city that will use up or require an increase in your facility capacity?

YES

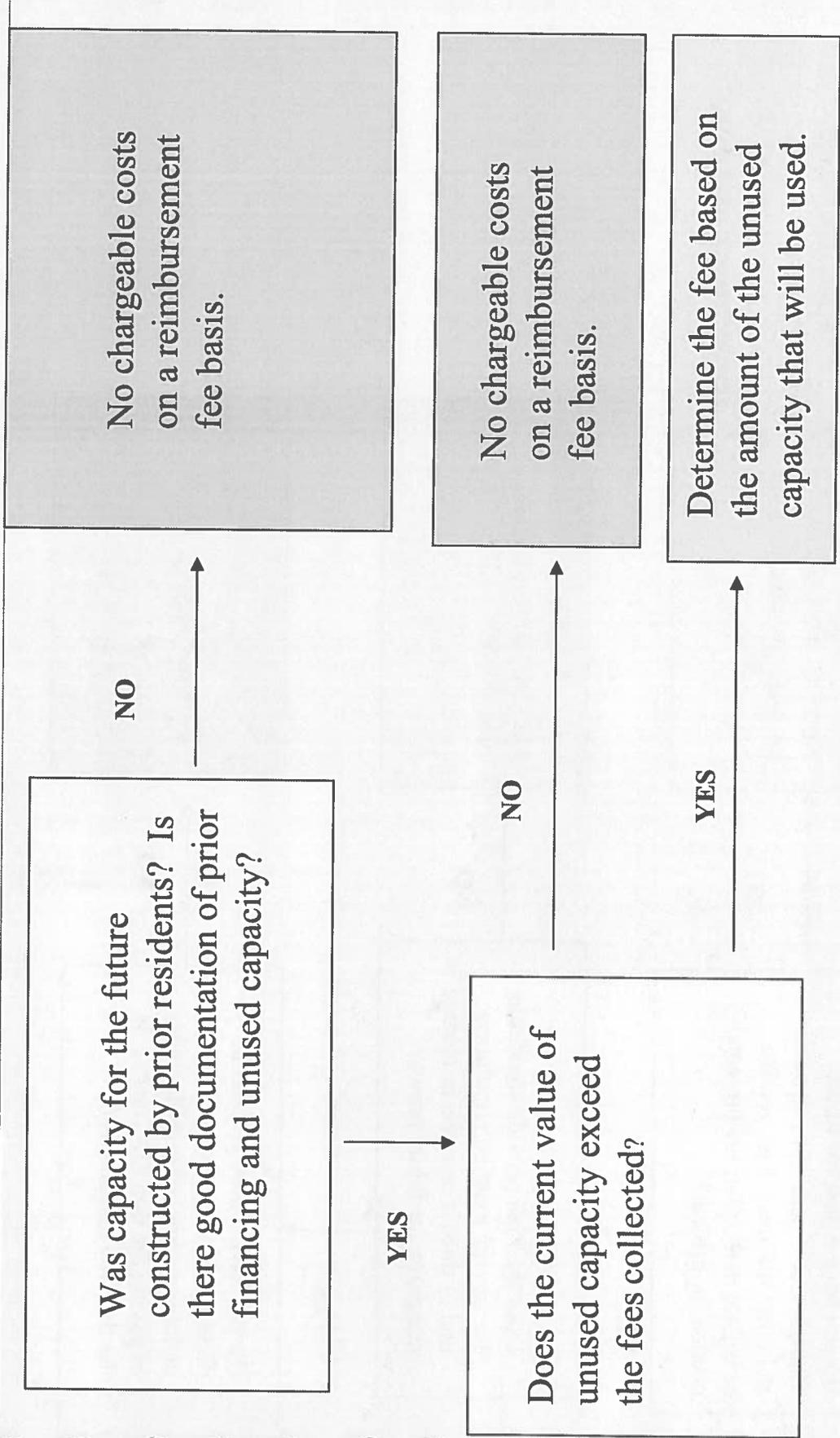
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NO



No SDC. No increase in use.

Sample Decision Matrix: Reimbursement Fee



Sample Decision Matrix: Improvement Fee

No SDC. No planning basis for improvement fee.

NO

Do you have a plan for future improvements needed by growth and other reasons? Can you list and isolate in the plan the projects needed for growth?

YES

No SDC. Documentation is inadequate.

NO

Does the Plan provide standards for serving existing population and/or does it increase or change standards for future growth?

YES

No SDC. Too speculative.

NO

Do you have a time horizon in mind for future construction, including some reasonable hope of paying the non SDC costs? Is the timeline reasonable?

YES

Determine Improvement Fee based on plans, projects, estimated costs, equitable financing shares related to development.

Alternatives to SDCs

 Development Exactions

 Reimbursement/Recoupment Contracts

 Local Improvement Districts

 Tax Increment Financing (Urban Renewal)

 General Obligation Bonds

 Revenue Bonds

 Public Purpose Lenders (State or Federal grants/low interest loans)

Improvement Fee

 “A fee for costs associated with capital improvements to be constructed.” ORS 223.299
(2)

 “Improvement fees must be established or modified by ordinance or resolution that is available for public inspection and *demonstrates consideration of:*

- Projected cost of improvements identified in plan and list;
- The need for increased capacity in system to which the fee is related that will ...serve demands ...by future system users.

Combined Fees

- You can't charge development twice for the same capacity
 - "A GU may establish or impose a SDC that is a combination...if the methodology demonstrates that the charge is not based on providing the same system capacity." (ORS 223.304 (3))

Reimbursement Fee

 “A fee for costs associated with capital improvements already constructed or under construction when the fee is established, for which the GU determines that capacity exists” ORS 223.299 (3)

 “...must be established or modified by ordinance or resolution setting forth a methodology that, when applicable, is based on:

- *Rate making principles*
- *Prior contributions by existing users*
- *Gifts and grants*
- *The value of unused capacity available to future system users*
- *The cost of the facility (ORS 223.304 (1))*

Reimbursement Fee (cont.)

 The methodology must: “Promote the objective of future system users contributing no more than an equitable share to the cost of existing facilities.”

ORS 223.304 (1)(A)

General Principles

 SDCs calculate the equalization of relative financial burden

- Taxes and charges of existing residents should not increase because of new development
- New development should not be charged to the extent that the taxes and charges of residents decrease

- Bottom line: PROPORTIONATE SHARE

General Principles (Continued)

Reasonable Relationship

- There must be a reasonable connection between the need for additional facilities and the growth generated by new development;
- There must be a reasonable connection between the expenditure of the fee collected and the benefits received by the development paying the fee.

General Principles (Continued)

Equalization of Relative Financial Burden

- The charges or fees imposed on new development should be no more than a PROPORTIONATE SHARE of the local government's cost of new facilities needed to serve such new development.

General Principles (Continued)

 SDCs must be based on a Plan

- The plan must precede the SDC;
- Comprehensive plan, capital improvement plan, etc.;
- The plan should be consistent with the comprehensive plan, which is a blueprint of the growth the community anticipates - helps to show that SDC financed improvements are needed to accommodate new development;
- If the Plan is a mess, the SDCs will be, too.

General Principles (Continued)

SDCs Must Be Implemented

- If a city is collecting improvement fees for a facility, the facility needs to be built.
- However, if the basis for the facility changes, you can amend the plan.
- Periodic updates are necessary.

General Principles (Continued)

SDCs Must Fit With Broader System & Facilities

- Standards -- translate the plan's growth and development projections into improvements;
- Apply the same standards to existing development;
- SDC revenue cannot be used to remediate existing facility deficiencies.

General Principles (Continued)

 Justifiable SDCs must be:

- Rational - developed through a rational, fair and open process;
- Empirical - based on real data, not speculation;

Establishing the Cost of Improvements

- After standards have been established and improvements have been linked to plans, establish the cost and timing of the improvements.

Cost Estimates Must Be Supportable

- Follow engineering and other professional standards when estimating costs;
- Those making estimates should be qualified to do so;
- Estimates should be reasonable and consistent;
- If data is shaky, cost estimates should be low, and data should be updated as estimates become firmer.

Establishing the Cost of Improvements (Continued)

- Q: How much should be paid by new development?
- A: Whatever is reasonable

7 Factors for Determining the Cost of

Improvements:

- What is the cost of *existing* facilities?
- How were existing facilities paid for?
- To what extent has development already paid these costs (e.g. property taxes on undeveloped land, etc.)

Establishing the Cost of Improvements (Continued)

7 Factors for Determining the Cost of

Improvements (continued):

- To what extent will Development pay in the future (through property taxes, bond levies, etc.) -- development cannot be charged twice for the same thing.
- To what extent have extraordinary costs been considered?
- To what extent has consideration been given of prime price differentials inherent in the fair comparison of amounts paid at different times? (Present Value)

Calculating Improvement Fees

Determine Existing Facility Standards (!)

- Examples:
 - Acres of Park Land per 1,000 population
 - Sewage Treatment - Gallons per day per 1,000 population
 - Geographic considerations/standards.
- (You don't have to be stuck with deficient facilities)
 - You may consider remediating existing facilities to get them up to the standards being imposed on new development, provided that SDC revenues are not used to do so. There should be a **logical strategy** to remediation.

Calculating Improvement Fees (Continued)

 Determine the Quantities of Facilities Needed to Accommodate New Development

– Standards X Growth Assumptions in plan = Quantities

 Determine Total Cost of Facilities Needed to Accommodate New Development

– Costs must be reasonable and defensible, not arbitrary

Calculating Improvement Fees (Continued)

 Determine What Revenue Will Be Available

– Facility Cost minus Available Non-Local Revenues = Net Cost of Facility to Local Government.

– Discount the cost of the facility by the amount of Federal and other non-local government funds needed to pay for it.

Calculating Improvement Fees (Continued)

 Break the net cost of the facility into Individual Demand Units

- Single family residence, etc.
- Use previously developed standards:
 - A city of 50,000 has 75 acres of parkland (1.5 acres per 100,000);
 - A single family residence has 2.5 persons (per US census);
 - So one home requires 0.1875 acres (816 square feet) of parks.

Calculating Improvement Fees (Continued)

 Determine what the facility will cost per unit or facility.

- e.g. Cost of park acquisition and development per acre.

 Where does the cost data come from?

- Public Works Department;
- Historic records;
- Catalogues;
- RFPs, designed and prototyped facilities

 Keep copies of this data.

Credits for Qualified Public Improvements



Statute requires that municipalities provide for a credit against improvement fees for the construction of a “qualified public improvement”:

- A capital improvement required as a condition of development approval and not located on or contiguous to the development; or
- Located in whole or in part on or contiguous to the development and required to be built with greater capacity than needed to serve the particular development.



Credits for cost of that portion that exceeds the minimum standard facility size or capacity needed to serve the particular development.



Credits may be carried forward to subsequent phases of the development.

Calculating Reimbursement Fees

Reimbursement Fees are simpler:

- The cost of the facility being (partially) recovered is already known - math takes over.
- RFs should be based on the actual cost incurred by the local government to build the facility.
 - If local government did not incur a particular cost to build a facility, local government should not be recovering for it.

Implementing the SDC

 Whatever you implement has to be administered

- Keep it simple, or at least rational

 Ordinance

- Sample Ordinance - adopted ordinance needs to be customized and specific.

 Notice

- Notice requirements, ORS 223.304 (6)

Implementing the SDC (Cont.)

Ordinance (continued)

- Define specific terms and examples;
- Do not make the ordinance discretionary (change “may” to “shall”, etc.);
- Name the planning document on which the SDC is based;
- Consider including a penalty for failure to obtain required permits;
- Consider including a local process for challenging calculation.

Implementing the SDC (Cont.)

Waiving the SDC?

- Exempt nothing, not even city facilities
 - Low income housing, city owned facilities, etc. have an impact on infrastructure.
 - Subsidize them some other way (GF).

Implementing the SDC (Cont.)

Writ of Review

- Requires the establishment of a written record
 - Prove that the SDC is an equalization of relative financial burden and how the city arrived at the calculations and conclusions.
- A challenge to methodology must be filed within 60 days of establishment/adoption of the SDC
 - But the city can be challenged for up to 2 years on SDC expenditures.
- Document, Document Document!
 - Save supporting data in case of challenges

Implementing the SDC (Cont.)

Writ of Review (continued)

– SDCs may be overturned when a municipality:

- Exceeds its jurisdiction;
- Fails to follow procedure;
- Makes a finding or order not supported by substantial evidence in the whole record;
- Improperly interpreted the applicable law; or
- Renders a decision that is unconstitutional.

Implementing the SDC (Cont.)

Challenges

- Consider “independent calculation” provision
 - Gives the developer an opportunity to submit an independent study and calculations if they “don’t fit”.
 - Make sure the ordinance specifies that it’s done using professional standards.
- Beware of Exceptions - everybody will want one.

Implementing the SDC (Cont.)

Increases to Charges

- Inflation factor (when incorporated into methodology/ordinance) is okay- this is not a change to methodology
 - Must be a factor developed by a recognized, independent source
- Addition of a project to the list that increases a charge = provide notice prior to adoption. Hold hearing if requested (ORS 223.309(2)).

Implementing the SDC (Cont.)

Expenditures

- Improvement fee revenue may be spent on:
 - Projects that increase facility capacity;
 - Projects that benefit the development; and
 - Projects that comply with statute (water, sewer, stormwater, parks, transportation); and
 - Projects that are related to your plan;
- Reimbursement fee revenue may be spent on:
 - Paying down debt incurred for building facilities that benefit new development; and
 - Repaying accounts which fronted money for such facilities.

Implementing the SDC (Cont.)

📄 Expenditures (continued)

- If facility has already been constructed, SDC can be used for debt reduction (RF), or for capacity expansion (IF).
- SDC Revenue should not be used to remediate existing deficiencies.

– SDC Revenues should be spent on infrastructure.

📄 SDC Expenditures can be challenged:

- If a GU expends SDC revenues in violation of limits of ORS 223.307, \$\$ must be replaced from another source (ORS 223.302(1)).

Implementing the SDC (Cont.)

Annual Accounting

- By Jan. 1 of each year
- Include from the previous year:
 - Total amount of SDC revenues collected for each type of SDC (by project);
 - List of each project funded in whole or in part with SDC revenues, by project; and
 - Amount of SDC revenues spent on each project.
 - Cost of administration and compliance with statute.

The End

 A League of Oregon Cities Production

