

ORDINANCE NO. 1399-17

AN ORDINANCE RELATING TO UTILITY FACILITIES IN THE RIGHTS-OF-WAY;
ADDING NEW TUALATIN MUNICIPAL CODE CHAPTER 3-6 AND REPEALING
TUALATIN MUNICIPAL CODE CHAPTER 10-1 (TELECOMMUNICATIONS)

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

WHEREAS, the City has traditionally used the individually-negotiated franchise process to allow each utility using the City's rights-of-way to provide utility service;

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

WHEREAS, new Tualatin Municipal Code (TMC) Chapter 3-6 is intended govern the City's management of its rights-of-way;

WHEREAS, as a result of this Ordinance, TMC 10-1 is no longer needed; and

WHEREAS, the City finds it is in the public interest to enact the changes to the TMC as set forth in this Ordinance.

THE CITY OF TUALATIN ORDAINS AS FOLLOWS:

Section 1. Tualatin Municipal Code Chapter 3-6 is added to the Tualatin Municipal Code as follows:

3-6-010 Purpose and Intent.

The purpose and intent of this Chapter is to:

- (1) Permit and manage reasonable access to the City's rights-of-way for utility purposes and conserve the limited physical capacity of those rights-of-way, which are held in trust by the City, consistent with applicable state and federal law;
- (2) Assure the City is fully compensated for the City's costs of granting access to, and regulating the use of rights-of-way, from the persons seeking access and causing such costs;
- (3) Secure fair and reasonable compensation for the City and its residents, who have invested millions of dollars in public funds to build and maintain the rights-of-way, from persons who generate revenue from the placing of facilities in the City's rights-of-way and charging the public for services delivered by those facilities in the City's rights-of-way;

(4) Assure all utility companies, persons, and other entities owning or operating facilities, or providing services within the City, register and comply with City ordinances, rules, and regulations;

(5) Assure the City can continue to fairly and responsibly protect the public health, safety, and welfare of its residents, and the structural integrity of its rights-of-way, when a primary cause for the early and excessive deterioration of the rights-of-way is the frequent excavation by persons whose facilities are located within the City's rights-of-way;

(6) Enhance the safety and aesthetics in the City's rights-of-way; and

(7) Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City.

3-06-020 Jurisdiction and Management of the Public Rights-of-Way.

(1) Under authority of the City Charter and state law, the City has jurisdiction of, and exercises regulatory management over, all rights-of-way within the City, whether acquired by fee, easement, or other legal interest, and whether the legal interest was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure, or other means.

(2) The exercise of jurisdiction and regulatory management of the rights-of-way by the City is not official acceptance of the rights-of-way, and does not obligate the City to maintain or repair any part of the rights-of-way.

(3) The provisions of this Chapter are subject to and will be applied consistent with applicable state and federal laws, rules and regulations. To the maximum extent practicable all regulatory and judicial interpretations of this Chapter must be interpreted to be consistent with such laws, rules, and regulations.

3-06-030 Regulatory Fees and Compensation Not a Tax.

(1) All City fees and costs charged under this Chapter are separate from, and in addition to, any and all other federal, state, local and City charges, including any permit fee, or any other generally applicable fee, tax, or charge on the business, occupation, property, or income, as may be levied, imposed or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.

(2) The City has determined that any fee provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11(b) of the Oregon Constitution. These fees are not imposed on property or property owners.

3-06-050 Definitions.

Unless the context requires otherwise, the following words and phrases mean:

(1) "Cable service" 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 and is to be defined consistent with federal laws

(2) "City" means the City of Tualatin, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.

(3) "City Council" means the elected governing body of the City of Tualatin, Oregon.

(4) "City facilities" means City or publicly-owned structures or equipment located within the rights-of-way or public easement used for governmental purposes.

(5) "City Manager" means the City Manager for the City of Tualatin, or designee.

(6) "Communications services" means any service provided for the purpose of transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications services includes all forms of telephone services, voice, video, data, or information transport, but does not include: (a) cable service; (b) open video system service, as defined in 47 C.F.R. 76; (c) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; (d) public communications systems; and (e) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

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

(8) "Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, local service district, governmental entity, or other organization, including any natural person or any other legal entity.

(9) "Public communications system" means any system owned or operated by a government entity or entities for their exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 190.240 and 283.140. "Public communications system" does not include any system used for sale or resale, including trade, barter, or other exchange of value, of communications services or capacity on the system, directly or indirectly, to any person.

(10) "Public utility easement" means the space in, upon, above, along, across, over, or under an easement for the construction, reconstruction, operation, maintenance, inspection, or repair of utility facilities. "Public utility easement" does not include any of the following: (i) an easement that has been privately acquired by a utility operator; (ii)

an easement acquired solely for the construction, reconstruction, operation, maintenance, inspection, and repair of City facilities; and an easement granted to the City where its terms do not allow, or is inconsistent with, the proposed use by the utility operator.

(11) "Rights of way" means and includes, but is not limited to, the space in, upon, above, along, across, over, or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, bridges, trails, paths, sidewalks, bicycle lanes, public utility easements, and all other public ways or areas, including the subsurface under and air space over these areas, but does not include parks, parkland, or other City property not generally open to the public for travel. This definition applies only to the extent of the City's right, title, interest, and authority to grant a license to occupy and use such areas for utility facilities.

(12) "State" means the state of Oregon.

(13) "Utility facility" or "facility" means any physical component of a system, including but not limited to the poles, pipes, mains, conduits, ducts, junction boxes, vaults, structures cables, wires, transmitters, plants, equipment, and other facilities, located within, under, or above the rights-of-way, any portion of which is used or designed to be used to deliver, transmit, or otherwise provide utility service.

(14) "Utility operator" or "operator" means any person who owns, places, operates, or maintains a utility facility or utility service within the City.

(15) "Utility service" means the provision, by means of utility facilities located within, under, or above the rights-of-way, whether or not such facilities are owned by the service provider of electricity, natural gas, communications services, cable services, water, sewer, or storm sewer to or from customers within the corporate boundaries of the City, or the transmission of any of these services through the City, whether or not customers within the City are served by those transmissions.

(16) "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.

3-6-100 Rights-of-Way Fee.

(1) A Rights-of-Way Fee, as determined by resolution of the Council, must be paid by:

(a) Every person that owns utility facilities in the City's rights-of-way; and

(b) Every person that uses utility facilities in the City's rights-of-way to provide utility service, regardless of whether or not the person owns the utility facilities used to provide the utility services, and regardless of whether or not customers

within the City are served by those facilities.

(2) Unless otherwise agreed in writing by the City, the Rights-of-Way Fee must be paid quarterly, in arrears, for each quarter during the term of the license. Payment must be received by the City within 45 days after the end of each calendar quarter, and must be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable.

(3) In the event the Rights-of-Way Fee is not received by the City on or before the due date or is underpaid, the utility operator must pay interest from the due date until full payment is received by the City at a rate equal to nine percent (9%) per annum, compounded daily, or the maximum interest rate allowed by law.

(4) The calculation of the Rights-of-Way Fee required by this section is subject to all applicable limitations imposed by federal or state law.

(5) The Rights-of-Way Fee payments required by this section will be reduced by any franchise fee payments received by the City, but in no case will the Rights-of-Way Fee be less than zero dollars (\$0).

(6) The City reserves the right to enact other fees and taxes applicable to the utility operators subject to this Chapter. Unless expressly permitted by the City in enacting such fee or tax, or required by applicable state or federal law, no utility operator may deduct, offset or otherwise reduce or avoid the obligation to pay any lawfully enacted fees or taxes based on the payment of the Rights-of-Way Fee or any other fees required by this Chapter.

3-6-120 Attachment Fee.

(1) A utility operator must pay an Attachment Fee, as set by resolution of the Council, for each attachment if:

(a) The utility operator only has facilities in the rights-of-way that are mounted on structures within the rights-of-way;

(b) The structures on which the facilities are mounted are owned by another person; and

(c) The utility operator does not have any facilities strung between such structures or otherwise within, under, or above the rights-of-way.

(2) Unless otherwise agreed in writing by the City, the Attachment Fee must be paid annually, in arrears, for each year during the term of the license within thirty (30) days after the end of each calendar year, and must be accompanied by information sufficient to illustrate the calculation of the amount payable. The utility operator must pay interest at a rate of nine percent (9%) per year for any payment made after the due date.

(3) Payment of the Attachment Fee does not authorize an attachment to be located on a structure without the structure owner's consent. Separate consent must be negotiated with the owner of the structure, regardless of whether the owner is a private or public entity.

3-6-200 Business License Required.

Every person who wants to provide utility services to customers within the City must acquire a business license from the City, as provided in TMC 9-01. In addition to the information required to be submitted for a business license, a person who wants to provide utility service, must also provide a description of the type, or types, of utility services to be provided.

3-6-205 Rights-of-Way Licenses.

(1) **Rights-of-Way License Required.** Every person must obtain a rights-of-way license from the City prior to conducting any work in the rights-of-way or placing any utility facilities in the rights-of-way.

(2) **License Application.** The license application must be on a form provided by the City and contain the following:

- (a) The name, address, and telephone number of the person seeking a license;
- (b) The corporate governing structure, including all parent and subsidiary businesses, along with all "doing business as" names.
- (c) Whether the person is a corporation, partnership, limited liability company, or other legal status of the person;
- (d) A description of the type of utility services provided or to be provided;
- (e) The authorization to do business in Oregon,
- (f) A list of facilities and their locations within the City, in a manner acceptable to the City;
- (g) Any other documents or information required by the City to identify the person, its legal status, its authorization to do business in Oregon, its facilities, or to determine the applicant's ability to comply with the terms of this Chapter;
- (h) Payment of the nonrefundable license application fee.

(3) License Application Fee

Each application for a rights-of-way license must be accompanied by a nonrefundable license fee, in an amount to be determined by resolution of the Council, sufficient to fully recover all of the City's costs of administering the license program.

3-6-210 License Determination by City.

(1) The City will evaluate the license application 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.

(2) Within 90 days of receipt of a completed application, the City must issue a written determination granting or denying the license in whole or in part. If the license is denied, the written determination must include the reasons for denial.

(3) If the City determines that an applicant is in violation of the terms of this Chapter at the time it submits its application, the City may require the applicant to cure the violation or submit a detailed plan to cure the violation before the City will consider the application or grant the license.

(4) If the City requires the applicant to cure or submit a plan to cure a violation, the City will grant or deny the license application within 90 days of confirming that the violation has been cured or of accepting the applicant's plan to cure the violation.

3-6-220 Rights Granted to Licensee.

(1) A license granted under this Chapter authorizes and permits the licensee to construct, place, maintain, and operate utility facilities in the rights-of-way for the term of the license, subject to the provisions of City code, including any amendments which may be enacted during the term of the license, and other applicable provisions of state and federal law.

(2) Each license granted under this Chapter authorizes only those utility facilities or services applied for and approved by the City. The City may approve the provision of multiple services in one license.

(3) A license granted under this Chapter may not be assigned or transferred, except as permitted by this Chapter.

(4) A license granted under this Chapter does not grant, convey, create, or vest in a licensee any real property interest in land, including any fee, leasehold interest, or easement, and does not convey equitable or legal title in the rights-of-way.

(5) The issuance of a license does not constitute a waiver or bar to the City's exercise of any governmental right or power, including without limitation the City's police powers and regulatory powers, regardless of whether such powers existed before or after the license is issued.

3-6-225 Term of License. A license granted under this Chapter will remain in effect for a term of five years, unless sooner terminated as provided in this Chapter.

3-6-230 License Nonexclusive.

(1) A license granted under this Chapter does not 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.

(2) A license granted under this Chapter 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.

3-6-240 Reservation of City Rights.

(1) The City reserves all rights, title, and interest in its rights-of-way. A license granted under this Chapter does not prevent the City from exercising any of its rights, including but not limited to grading, paving, repairing, or altering any rights-of-way, constructing, laying down, repairing, relocating, or removing City facilities, or establishing any other public work, utility, or improvement of any kind, including repairs, replacement, or removal of any City facilities.

(2) If a licensee's utility facility interferes with the construction, repair, replacement, alteration, or removal of any rights-of-way, public work, City use of the rights-of-way, City utility, City improvement, or City facility, except those providing utility services in competition with a licensee, licensee's facilities must be removed or relocated as provided in this Chapter, in a manner acceptable to the City and consistent with City and industry engineering standards, environmental laws and regulations, and safety laws and regulations.

3-6-245 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 Rights-of-Way Fee 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 for each utility service, provided the license granted by the City authorizes the multiple utility services provided and the utility operator pays the applicable Rights-of-Way fee for each utility service provided.

(3) A utility operator may lease capacity on or in its systems to third parties, provided the utility operator provides the City with the name and business address of any third party lessee. A utility operator is not required to provide such information if disclosure is prohibited by applicable law.

(4) A utility operator is not required to pay the license or Rights-of-Way Fee owed to the City by the third party that leases capacity of the utility operator's facilities.

3-6-250 Transfer or Assignment.

(1) A licensee must obtain the written consent of the City prior to the transfer or assignment of a license, unless state or federal law specifically prohibits the City from requiring its prior written consent.

(2) A transfer or assignment will only be authorized if the proposed transferee or assignee is authorized under all applicable federal, state, and local 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, state, and local to approve such transfer or assignment.

(3) Upon a license being transferred or assigned, the transferee or assignee immediately becomes responsible for fulfilling all obligations under the license, including all facilities.

3-6-260 Rights-of-Way License Renewal.

(1) **License Renewal.** At least 120 days before the expiration of a license, a licensee seeking renewal of its rights-of-way license must submit a rights-of-way license renewal application on forms provided by the City and provide the following:

- (a) The name, address, and telephone number of the person seeking a license;
- (b) The corporate governing structure, including all parent and subsidiary businesses, along with all "doing business as" names.
- (c) Whether the person is a corporation, partnership, limited liability company, or other legal status of the person;
- (d) A description of the type of utility services provided or to be provided;
- (e) The authorization to do business in Oregon,
- (f) A list of facilities and their locations within the City;
- (g) Any other documents or information required by the City to identify the person, its legal status, its authorization to do business in Oregon, its facilities, or to determine the applicant's ability to comply with the terms of this Chapter;
- (h) Payment of the nonrefundable license renewal application fee.

(2) **License Renewal Application Fee.** Each renewal application for a rights-of-way license must be accompanied by a nonrefundable license renewal fee, in an amount to be determined by resolution of the Council.

(3) **Renewal Criteria.** The City will evaluate the license renewal application 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.

(4) Renewal Determination by City. Within 90 days of receipt of a completed application, the City must issue a written determination granting or denying the license renewal in whole or in part. If the license renewal is denied, the written determination must include the reasons for denial.

(5) Requirement to Cure Violations. If the City determines that a licensee is in violation of the terms of this Chapter at the time it submits its renewal application, the City may require the applicant to cure the violation or submit a detailed plan to cure the violation before the City will consider the renewal application or grant the license renewal.

(6) Determination after Violation Cured. 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 90 days of confirming that the violation has been cured or of accepting the applicant's plan to cure the violation.

3-6-265 Revocation or Termination of a License.

(1) The Council may terminate or revoke the license granted under this Chapter for any of the following reasons:

- (a) Violation of any of the provisions of this Chapter;
- (b) Any violation of local, state, or federal law, including but not limited to Clean Water Services regulations;
- (c) Violation of any provision of the license;
- (d) Fraud or misrepresentation to a City official, including but not limited to in a license application, permit application, or other document submitted to the City;
- (e) Failure to pay taxes, compensation, fees, or costs due the City after final determination of the taxes, compensation, fees, or costs;
- (f) Failure to restore the rights-of-way, as required by this Chapter or other applicable federal, state, and local laws, ordinances, rules, and regulations;
- (g) Failure to comply with technical, safety, and engineering standards related to work in the rights-of-way; or
- (h) Failure to obtain or maintain any and all licenses, permits, certifications, and other authorizations required by local, state, or federal law for the placement, maintenance, or operation of the utility facilities.

(2) In determining whether to terminate, revoke, or impose a sanction, the Council must consider the following factors:

- (a) Whether the violation was intentional, knowing, reckless, or negligent;
- (b) The seriousness of the violation;
- (c) The harm caused;
- (d) The compliance history of the utility operator; and
- (e) The utility operator's cooperation in discovering, informing the City, admitting to, and curing the violation.

(3) Before terminating a license, the City must give the utility operator written notice of any apparent violations and an opportunity to cure. The notice must include a clear and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time of not to exceed 30 days, or other period of time the City determines is reasonable, 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.

(4) 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.

(5) If the utility operator does not respond to the notice of violation or does not cure the violation within the reasonable time allowed, the City Manager will refer the matter to the Council, which must provide a duly noticed public hearing to determine whether the license should be terminated or revoked.

3-6-270 Franchise Agreements.

(1) If the public interest warrants, the City may enter into a written franchise agreement with a utility operator.

(2) The franchise terms may clarify, enhance, expand, waive, or vary the provisions of this Chapter, consistent with applicable state and federal law. Unless specifically modified or waived by the terms of a franchise, the provisions of this Chapter control.

(3) All franchise agreements must be reviewed and approved by Council by special ordinance.

3-6-300 Construction and Restoration Activities.

(1) **Construction Codes.** Utility facilities must be constructed, installed, operated, and maintained in accordance with all applicable federal, state, and local codes, rules, and

regulations, including without limitation the National Electrical Code, the National Electrical Safety Code, state building code, state plumbing code, state fire code, the City's Public Works Construction Code, Clean Water Services Design and Construction standards, Occupational Safety and Health laws, the Americans with Disabilities Act requirements, and state utility locate requirements.

(2) **Construction Permits.** No person may perform any work on utility facilities within the rights-of-way without first obtaining all required permits. The City cannot 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.

(3) **Emergency.** In the event of an emergency, a utility operator with a license granted under this Chapter, or its authorized 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 Manager prior to commencing the emergency work and in any event initiates a permit application as soon as reasonably practicable, but not later than 12:00 noon of the next business day after commencing the emergency work. As used in this subsection, "emergency" means a circumstance in which immediate work is necessary to restore lost service or prevent immediate harm to persons or property.

(4) **Applications for Permits.** Applications for permits to construct utility facilities must be submitted on forms provided by the City and must be accompanied by drawings, plans, and specifications in sufficient detail to demonstrate:

(a) That the facilities will be constructed in accordance with all applicable ordinances, codes, rules, and regulations to the satisfaction of the City.

(b) The location and route of all utility facilities to be installed and, if the utility operator owns the existing utility poles, a comprehensive summary, including ownership, of any and all infrastructure currently attached to the pole. Unless approved in writing by the City, the construction of new utility poles is prohibited. An existing utility pole that is damaged or failing may be repaired or replaced with a new utility pole of substantially similar dimensions and materials.

(c) The location and route of all utility facilities on or in the rights-of-way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route that are within the rights-of-way. Applicant's existing utility facilities must be differentiated on the plans from new construction. A vertical profile along the proposed utility section must be provided showing new and existing utility facilities in relation to the street, curb, sidewalk, and rights-of-way.

(d) The construction methods to be employed for protection of existing structures, fixtures and facilities within or adjacent to the rights-of-way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.

(e) All permit applications must be accompanied by the verification of a qualified and duly authorized representative of the applicant that the drawings, plans, and specifications submitted with the application comply with applicable technical codes, rules, and regulations. The City may, in the City's sole discretion, require the verification of a registered professional engineer.

(f) All permit applications must be accompanied by a written construction schedule, which must include an estimated start date and completion date of construction. The construction schedule is subject to approval by the City.

(g) Prior to issuance of a construction permit, the applicant must pay a construction permit fee in the amount determined by resolution of the Council.

(h) If satisfied that the application, plans and documents submitted comply with all requirements of this Chapter, the City will 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 deemed necessary or appropriate.

(i) Except in the case of an emergency, the permittee must notify the City not less than two (2) business days in advance of any excavation or construction in the rights-of-way.

(j) All construction practices and activities must be in accordance with the permit and approved final plans and specifications for the utility facilities. The City must be provided access to the work site and such further information as may be required to ensure compliance with such requirements.

(k) All construction activities must comply with the work hours and noise regulations of the Public Works Construction Code.

(l) All work that does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Chapter, must be removed or corrected at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provisions of this Chapter.

(m) The permittee must 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 120 days of the date of issuance of the construction

permit unless an extension or an alternate schedule has been approved by the City.

3-6-305 Performance Surety for Construction Activities.

(1) Before construction is commenced, a performance bond, or other form of surety acceptable to the City, equal to at least 125% of the estimated cost of the work within the rights-of-way of the City must be provided to the City. The performance bond or other form or surety must guarantee, to the satisfaction of the City:

(a) Timely completion of the work;

(a) That the work is performed in compliance with applicable ordinances, plans, permits, technical codes, and standards;

(b) Proper location of the facilities as specified by the City;

(d) Restoration to City standards of the rights-of-way and other property affected by the work; and

(e) Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.

(2) The performance bond, or other form of surety acceptable to the City, must remain in force until substantial completion of the work, including restoration of rights-of-way and other property affected by the construction, as determined by the City.

(3) The provisions of this Section do not apply if a franchise agreement is in place with the City, or the City otherwise agrees to a different arrangement in writing.

3-6-310 Injury to Persons or Property.

(1) A utility operator must preserve and protect from injury or damage the public using the rights-of-way, other utility operators' facilities in the rights-of-way, and any adjoining property, and take other necessary measures to protect life and property, including but not limited to sidewalks, streets, buildings, walls, fences, trees, and facilities that may be subject to damage from the permitted work.

(2) A utility operator must use suitable barricades, flags, flagging attendants, lights, flares, and other measures as required for the safety of all members of the general public and must comply with all applicable Americans with Disabilities Act requirements and the requirements of the Manual on Uniform Traffic Control Devices (MUTCD).

(3) A utility operator is 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, regardless of whether the work is performed by a utility operator or

performed by an independent contractor performing the work on behalf of the utility operator.

3-6-315 Restoration Required.

(1) Any utility operator performing work in or affecting the rights-of-way must, at its sole expense, promptly restore all rights-of-way and property impacted by the work to the same or better condition as existed before the work was undertaken, unless otherwise directed by the City. All work must be in accordance with applicable federal, state, and local laws, codes, ordinances, rules, and regulations, including the most recent Americans with Disabilities Act standards.

(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 must temporarily restore the affected rights-of-way or property. Such temporary restoration must be at the utility operator's sole expense and the utility operator must 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 is 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 will give the utility operator written notice and provide a period of time not less than 10 days and not exceeding 30 days, to restore the rights-of-way or property. If, after the notice is provided, the utility operator fails to restore the rights-of-way or property as required in this Chapter, the City must cause such restoration to be made at the expense of the utility operator. In cases where the City believes that an emergency or threat to public safety exists, it may act without notice to and at the expense of the utility operator. Upon receipt of an invoice from the City, the utility operator must reimburse the City within 30 days for the costs the City incurred.

(4) The utility operator is responsible for compliance with the provisions of this section, regardless of whether the work is performed by a utility operator or performed by an independent contractor performing the work on behalf of the utility operator.

3-6-320 Inspection by City.

Every utility operator's facilities is 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 must cooperate with the City in permitting the inspection of its utility facilities upon request of the City. The utility operator must perform all testing, or permit the City to perform any testing at the utility operator's expense, required by the City to determine that the installation of the utility operator's facilities and the restoration of the rights-of-way comply with the terms of this Chapter and applicable federal, state, and local codes, ordinances, rules, and regulations.

3-6-325 Coordination of Construction.

(1) All utility operators are required to make a good faith effort to cooperate and coordinate construction schedules with the City and other users of the rights-of-way.

(2) Prior to March 1 of each year, utility operators must provide the City with a schedule of known proposed construction activities for that year that may affect the rights-of-way.

(3) At the City's request, utility operators must meet with the City annually, or as determined by the City, to schedule and coordinate construction activities in the rights-of-way.

(4) All construction locations, activities, and schedules within the rights-of-way must be coordinated as ordered by the City to minimize public inconvenience, disruption or damages.

3-6-330 Undergrounding of Facilities Required.

(1) Unless otherwise agreed to in writing by the City, whenever any existing electric utilities, cable facilities or communications facilities are located underground within a right of way of the City, a utility operator with permission to occupy the same right of way must locate its facilities underground at its own expense.

(2) Whenever all new or existing electric utilities, cable facilities or communication facilities are located or relocated underground within a public right of way of the City, a utility operator that currently occupies the same public right of way must relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the public rights-of-way, absent extraordinary circumstances or undue hardship as determined by the City and consistent with applicable state and federal law.

3-6-335 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 must be consistent with City codes, ordinances, rules, and regulations.

3-6-340 Relocation of Utility Facilities.

(1) When requested to do so in writing by the City, a utility operator must, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any utility facility within a right of way, including relocation of aerial facilities underground.

(2) Nothing in this section precludes a utility operator from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs, or agreements. However, the utility operator must timely comply with the requirements of this section regardless of whether it has requested or received reimbursement or compensation.

(3) The City will coordinate the schedule for relocation of utility facilities and will provide written notice of the time by which the utility operator must remove, relocate, change, alter, or underground its facilities. If a utility operator fails to remove, relocate, change, alter, or underground any utility facility by the date reasonably established by the City, the utility operator must pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays. In addition, the City may cause the utility facility to be removed, relocated, changed, altered, or undergrounded and charge the utility operator for all expenses incurred. The City will use qualified workers in the field and in accordance with applicable state and federal laws and regulations. Upon receipt of a detailed invoice from the City, the utility operator must reimburse the City within 30 days for the costs incurred by the City.

(4) The obligation to remove survives the termination of the license or franchise.

3-6-345 Removal of Abandoned and Unauthorized Facilities.

(1) A utility operator and any other person that owns, controls, or maintains any abandoned or unauthorized utility facility within a right of way must, at its own expense, remove the facility and restore the rights-of-way to City standards. The City will provide written notice of any known abandoned or unauthorized facilities and require compliance within 30 days after written notice is sent, or such other time as is reasonable under the circumstances.

(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;

(b) The utility facility was never licensed or franchised;

(c) The utility facility was once licensed or franchised, but the license or franchise has expired or been terminated.

(d) The utility facility is abandoned. Abandoned means that the utility facility is not in use and is not planned for further use. A facility will be presumed abandoned if it is not used for a period of one (1) year. A utility operator may attempt to overcome this presumption by presenting plans for future use of the facility to the City, which will determine application of the presumption in its sole discretion.

(e) The utility facility is improperly constructed or installed or is in a location not permitted by the construction permit, license, franchise, or this Chapter.

(f) The utility operator is in violation of a material provision of this Chapter and fails to cure such violation within 30 days of the City sending written notice of such violation, unless the City extends such time period in writing.

(3) The City's written authorization is required to abandon utility facilities in place, which the City may deny in its sole discretion.

3-6-350 Emergency Removal by City. 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. If the City cuts or moves a utility operator's facility as a result of a public health or safety emergency, the City will notify the utility operator as soon as reasonably practical what facilities were cut or moved.

3-6-355 No City Liability.

(1) The City is not liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly from any damage, caused by the City's actions, or its contractor, in removing, relocating, altering, or undergrounding the facilities, unless such damage arises directly from the City's negligence or willful misconduct.

(2) The City is not liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly from any damage, resulting from a utility operator's failure to remove, relocate, alter, or underground its facilities as required by this Chapter, unless such damage arises directly from the City's negligence or willful misconduct.

3-6-360 Engineering Designs and Plans.

(1) The utility operator must provide the City with two complete sets of as-built plans, in a form acceptable to the City, showing the location of its utility facilities in the rights-of-way and must provide an update of its as-builts if the utility operator's engineered plans materially changed during construction.

(2) Each January, upon request from the City, the utility operator must provide two updated complete sets of as-built plans showing all of its utility facilities in the right of way.

3-6-365 Maintenance.

(1) Every utility operator must install and maintain all facilities in a manner that complies with applicable federal, state, and local laws, rules, regulations, and policies. The utility operator must, at its own expense, repair and maintain facilities from time to time as may be necessary to accomplish this purpose.

(2) If a utility operator fails to repair and maintain facilities, the City may provide written notice of the failure to repair or maintain and establish a date upon which such repair or maintenance must occur. If the utility operator fails to cause the repair or maintenance to occur within the date established by the City, the City may perform such repair or maintenance using qualified personnel or contractors and charge the utility operator for

the City's costs. The utility operator must reimburse the City for the costs the City incurred within thirty 30 days of receipt of an invoice from the City.

3-6-370 Vacation of Rights-of-Way.

(1) If the City vacates any rights-of-way, or portion thereof, that a utility operator uses, the utility operator must, at its own expense, remove its facilities from the rights-of-way unless:

(a) the City reserves a public utility easement, which the City must make a reasonable effort to do provided that there is no expense to the City; or

(b) the utility operator obtains an easement for its facilities.

(2) If the utility operator fails to remove its facilities within 30 days after a right of way is vacated, or as otherwise directed or agreed to in writing by the City, the City may remove the facilities using qualified workers in accordance with state and federal laws and regulations, and charge the utility operator for the City's costs. The utility operator must reimburse the City for the costs the City incurred within thirty 30 days of receipt of an invoice from the City.

3-6-375 Insurance.

(1) All utility operators must 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, employees, and agents:

(a) Comprehensive general liability insurance with limits of not less than:

(i) \$3,000,000.00 for bodily injury or death to each person;

(ii) \$3,000,000.00 for property damage resulting from any one accident;
and

(iii) \$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 \$1,000,000.00 for each person and \$3,000,000.00 for each accident;
and

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

(2) The limits of the insurance are subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon.

(3) The insurance provided must be without prejudice to coverage otherwise existing and must name the City, its officers, employees, and agents as additional insureds. The coverage must apply to claims between insureds on the policy. The utility operator must

provide the City 30 days prior written notice of any cancellation or material alteration of insurance. If the insurance is canceled or materially altered, the utility operator must 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 in accordance with Oregon law.

(4) The utility operator must maintain on file with the City sufficient proof of insurance or self-insurance acceptable to the City, certifying the coverage required.

3-6-380 Financial Assurance.

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

3-6-385 Indemnification.

(1) To the fullest extent permitted by law, each utility operator must defend, save, hold harmless, and indemnify the City, its officers, employees, and agents from and against any and all claims, suits, actions, losses, damages, liabilities, costs and, expenses of any nature whatsoever, including attorneys' fees at trial and on appeal, resulting from, arising out of, or relating to the activities of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees, including from any 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. This includes, but is not limited to, the construction, operation, maintenance, repair, or removal of a utility operator's 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 this Chapter constitutes an agreement by the applicant to this requirement.

(2) The City will promptly notify the utility operator upon receipt of any claim made and provide the utility operator with an opportunity to provide defense regarding any claim.

(3) Every utility operator must 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.

3-6-390 Compliance with Laws. Every utility operator must comply with all applicable federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all applicable ordinances, resolutions, rules, and regulations of the City, heretofore or hereafter adopted or established during the term of any license granted under this Chapter.

3-6-395 Confidential and 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 will take reasonable steps to protect the confidential or proprietary nature of the books, records, maps or information to the extent permitted by the Oregon Public Records Law, provided that all documents are clearly marked as confidential by the person at the time of disclosure to the City. The City will not be required to incur any costs to protect such documents, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

3-6-400 Open Books and Records. Upon providing a utility operator with five business days' prior notice, the City has the right to inspect, at any time during normal business hours, all books, records, maps, plans, income tax returns, financial statements, service complaint logs, performance test results, record of requests for service, and other like materials, whether in paper, electronic, or other form, of the utility operator which relate to the operation under the Rights-of-Way License and compliance with this Chapter. Access to the aforementioned records must not be denied by the licensee on the basis that said records contain "proprietary" information.

3-6-405 Audits.

(1) The City may audit any utility operator at any time. The City will make a written request for information and the utility operator must comply with the request within 30 days of receipt of the City's written request, or such other time as agreed in writing.

(2) Every utility operator must furnish the City with information sufficient to demonstrate that the provider is in compliance with all the requirements of this Chapter and its franchise agreement, if any, including but not limited to payment of any applicable registration fee, rights-of-way fee, or franchise fee.

(3) Every utility operator must 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 must be provided within the City unless prior arrangement for access elsewhere has been agreed with the City.

(4) If the City's audit of the books, records, and other documents or information of the utility operator or utility service provider demonstrates that the utility operator or provider has underpaid the rights-of-way fee or franchise fee by three percent (3%) or more in any one (1) year, the utility operator must reimburse the City for the cost of the audit, in

addition to any interest owed as provided by this Chapter or as specified in a franchise agreement.

(5) Any underpayment, including any interest or audit cost reimbursement, must be paid within 30 days of the City's notice to the utility operator.

3-6-410 Severability and Preemption. The provisions of this Chapter must be interpreted to be consistent with applicable federal and state law, and must be interpreted, to the extent possible, to cover only matters not preempted by federal or state law. If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this Chapter must not be affected thereby but must be deemed as a separate, distinct, and independent provision, and such holding must not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter must 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 must be preempted only to the extent required by law and any portion not preempted must survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision must thereupon return to full force and effect and must thereafter be binding without further action by the City.

3-6-420 Application to Existing Agreements. This Chapter applies to any and all franchise agreements existing on the date this Chapter is enacted and any subsequent franchise agreements to the extent this Chapter is not in direct conflict with and can be implemented consistent with such franchise agreements.

3-6-500 Violations

(1) Prior to issuing a violation citation, the City will give the utility operator written notice of any violations and provide at least 30 days, or such other reasonable amount of time, for the utility operator to remedy the violation.

(2) Any person who violates any provision of this Chapter commits a civil infraction and is subject to a fine of up to \$1,000. Each violation, and each day that a violation continues, is a separate civil infraction.

(3) The civil infraction procedures in Tualatin Municipal Code Chapter 7-01 apply to the prosecution of any violation of this Chapter.

(4) Any civil penalties assessed are in addition to, and not in lieu of, other remedies available by law to the City and are in addition to other remedies provided by this Chapter.

Section 2. TMC 10-1 (Telecommunications) is repealed in its entirety.

Section 3. Severability. Each section of this ordinance, and any part thereof, is severable. If any part of this ordinance is held invalid by a court of competent jurisdiction, the remainder of this ordinance remains in full force and effect.

Section 4. This Ordinance becomes effective 30 days after adoption.

ADOPTED by the City Council this 22 day of May, 2017.

CITY OF TUALATIN OREGON

BY 
Mayor

APPROVED AS TO LEGAL FORM

BY 
City Attorney

ATTEST
BY 
City Recorder



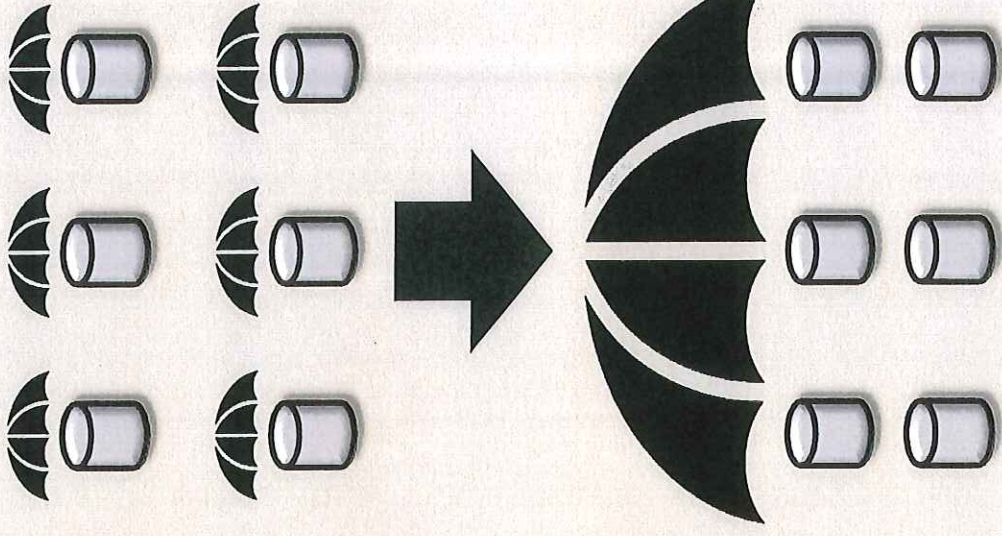
City of Tualatin

Rights of Way Ordinance



Process

- **Draft Ordinance**
 - Tualatin's Telecommunications Ordinance
 - Existing Franchise Agreements
 - Regionally Adopted Ordinances
 - Council Direction
- **Draft Provided to Franchises for comment and consideration**





Feedback based Changes

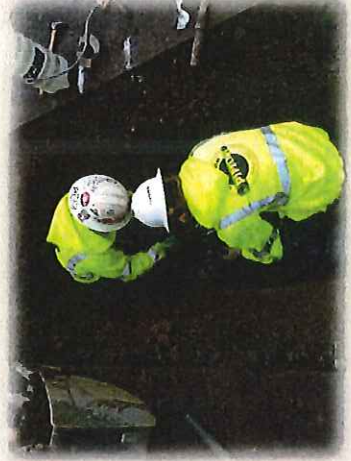
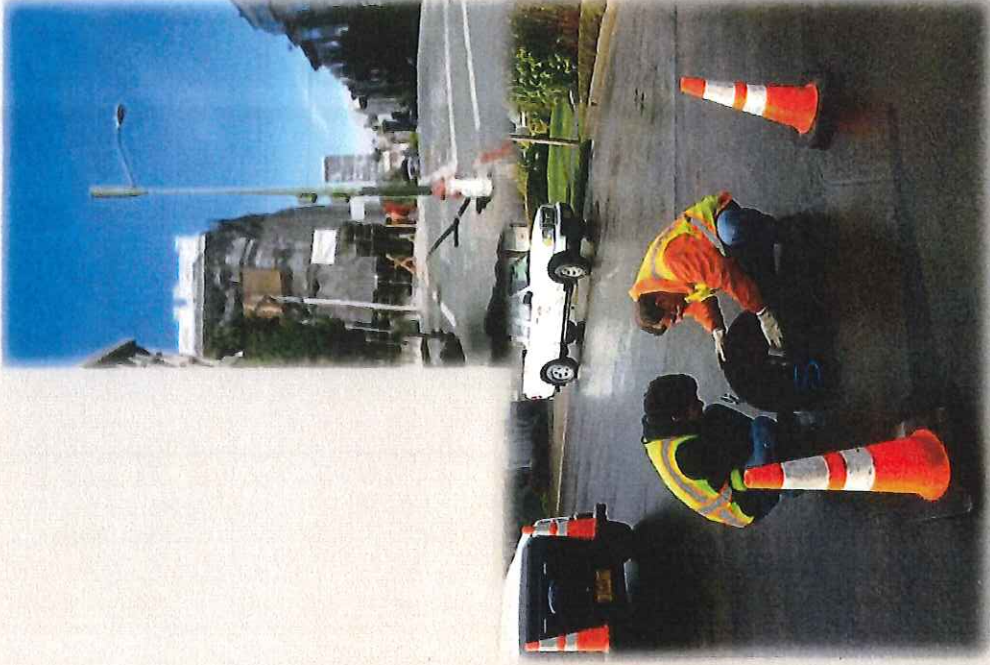
- **Eliminate the Registration Component**
 - Business License reference
- **Longer remittance periods**
 - 30 days to 45 days
- **Delayed Construction Coordination Schedule**
 - January to March





Feedback not included

- **Items that limit our ability to**
 - **Know who, what, when, and where**
 - **Understand the types of services being provided**
 - **Mitigate impacts to traffic**
 - **Coordinate Projects that impact structural integrity of the roads**
 - **Make policy decisions now and in the future**





Draft Components- Major Components

Component	Duration
Business License	1 year
License	5 year
Construction Permit	Each Project
Right of Way Use	Quarterly
Attachment	Annually





Next Steps

- **Development of Forms/ Setting up Data Bases**
 - **Licensing**
 - **Permitting/ Notification**
- **Policy Decisions & Stakeholder Involvement**
 - **Public Works Construction Code**
 - **Resolutions on fees associated with use of Rights of Way**