

City of Gladstone Staff Report

Report Date: October 2, 2019
Meeting Date: October 8, 2019
To: Gladstone City Council
From: Jacque Betz, City Administrator, Interim Finance Director Cathy Brucker, and
Public Works Director Jim Whynot

AGENDA ITEM

Information on City of Gladstone Rights of Way Ordinance.

History/Background

At the August 13, 2019 City Council meeting, the City Council asked for staff to information regarding the City of Gladstone Rights of Way Ordinance to the October 8, 2019 agenda. On September 16, 2019, staff provided the following information to the City Council:

- Exhibit 1- League of Oregon Cities Local Focus publication, *Managing the Public Right of Way*.
- Exhibit 2 – May 24, 2016 Staff Report- Consider adopting a utility right of way ordinance to improve management of the City's rights of way.
- Exhibit 3- May 31, 2016 Staff Report- Consider adopting ordinance 1465 to improve management of the city's right of way.
- Exhibit 4- Management of Gladstone's Most Valuable Asset Frequently Asked Questions (2016)
- Exhibit 5- December 11, 2018- Approval of an ordinance amended GMC Utility Services, to update regulations.

Franchise Fees:

Previous to the adoption of the utility right of way ordinance, the city negotiated, and still currently maintains, franchise agreements with three utility companies and the city's refuse service provider. These are all collected at a rate of 5.0% of revenues:

Provider	Contract Date	Term	Budget 2019-2021
NW Natural Gas	11/10/09	20 years	\$340,000
PGE	05/14/13	10 years	\$800,000
Comcast Cable	05/09/17	10 years	\$360,000
B&B Leasing	09/27/16	10 years	\$250,000

These franchise fees are utilized by the General Fund for support of parks, public safety, fire and administrative services. Once expired, the city will have the option of renegotiating these agreements separately, or administering them within the Right of Way (ROW) code. If moved to the ROW Code, language will need to be adopted through resolution to allow general fund use.

Right of Way Utility Code:

Ordinance 1465 adopted the mechanism for Right of Way management within the city. This allowed collection of 5.0% of revenues from any utility using the city's right of way, to assist with funding of adequate maintenance and improvements. Currently, the city is billing quarterly, based on revenues earned within the city or the minimum annual ROW fee based on linear foot (whichever is greater). The city collects these revenues from:

- NCCWC
- Oak Lodge Water District
- WES
- Lake Oswego
- City of Gladstone Water, Sewer, Storm revenues

Revenues are estimated to generate **\$450,000** during the 2019-2021 Budget and utilized for right of way improvements made by the Roads & Street, Sewer, Water and Storm funds. Of these revenues, approximately \$200,000 comes from outside utilities, and the balance is generated internally from the city billings. The city billings are not a new revenue source – the ROW fee charged is included within the existing rate structure. The internal transfers assist management of the ROW maintenance and improvements.

Right of Way Telecomm Code:

Ordinance 1493 broadened the ROW code to ensure all telecommunication providers, regardless of property ownership/leasing situations, were responsible to pay 5.0% of revenues to the city, along with licensing fees. Currently, the city is receiving fees from approximately 26 providers. With little historical reference established as of this date, the estimated budget of **\$436,000** in resources may be somewhat aggressive, but revenues have been increasing over the past six months.

In summary, the city budgets (per biennium) approximately:

- \$1,750,000 from Franchise Fees for General Fund use;
- \$450,000 from water, sewer and storm lines located in the Right of Way for improvements and maintenance; and
- \$436,000 from telecomm usage of above or below ground locations in the Right of Way for improvements and maintenance.

Should the ROW ordinance be rescinded, the city could lose \$886,000 immediately from the 2019-2021 biennium budget (\$636,000 external sources, \$250,000 internal sources) less any fees earned to date. As franchise fee contracts reach expiration, separate and costly individual contracts would need to be negotiated to ensure continuation of the \$1,750,000 in resources.

Recommended Staff Action

This item is for informational purposes only.

Department Head
Signature

Date


City Administrator
Signature

10/2/19
Date



LOCAL FOCUS

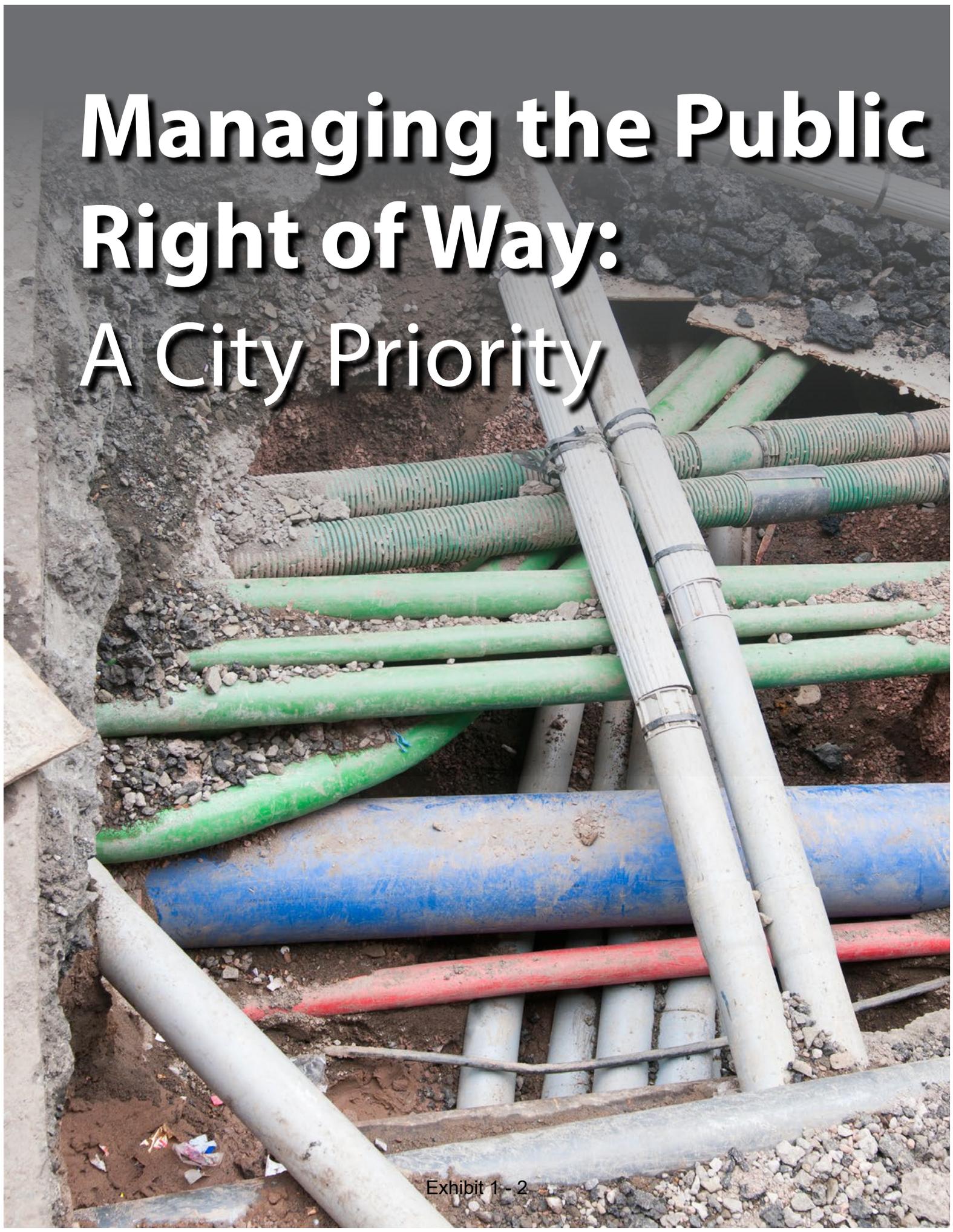
Exhibit 1

The Magazine of the League of Oregon Cities
April 2015

Managing the Public **RIGHT OF WAY**

Exhibit 1 - 1

Managing the Public Right of Way: A City Priority



Street Smarts:

What is the Right of Way and How Do Cities Acquire, Use and Dispose of It?

Rights of way surround and connect city residents and the places in which they live. Rights of way often are one of a city's largest property holdings and one of its most valuable and commonly used public assets. As a result, rights of way play a central role in a functioning city.

What is the right of way and how is it used?

The public right of way consists of the space on, above and under city streets, alleys, bike paths and sidewalks. The right of way is public property and by law is to be held in trust by the government—cities, counties or the state—for the benefit of the public. What that means is that city councils have a legal obligation to manage a city's rights of way for the benefit of every city resident.

City residents use the public right of way every day for transportation purposes as they travel to and from work, school and social gatherings on public roads and sidewalks. Utilities also use the rights of way. Electric, natural gas, water, telephone utilities, and cable and telecommunications providers use the public right of way when they place and install their equipment, such as utility poles, power lines, sewer lines and fiber optic cables, above or under public roads and sidewalks.

Because those utilities receive a special benefit in not having to negotiate with several private property owners for use of their property, and given the legal obligation to manage rights of way for the benefit of the public, cities often charge utilities a fee for use of the public's rights of way.

How does a city acquire rights of way?

A city can acquire rights of way through a variety of means, often using public money to compensate the property owner from whom the right of way is acquired. Some of the most common ways that cities acquire rights of way are:

- **Dedication:** A city can acquire rights of way from a private property owner who offers to allow the public to use his or her property. A dedication is not a complete conveyance of property to the city. Rather,

it is a conveyance of a right for the public to use the property.

Sometimes, a city might require dedication as a condition of development approval where a right of way will be needed to serve new development. In those instances, the dedication of right of way is shown on the recorded plat, which designates certain area for roads or other public purposes, or it can occur through a deed. The property owner's intent to dedicate, rather than convey the property entirely, must be clear.

- **Grant:** In contrast to a dedication, the grant of property for right of way purposes vests complete ownership in the city.
- **Condemnation:** The city can acquire rights of way by taking private property for public use and paying the private landowner just compensation for the loss of the property. The process for condemnation is provided in Chapter 35 of the Oregon Revised Statutes and is discussed in "article title here" on page XX.

Other methods of acquiring a right of way include annexation, transfer from another government entity, and prescriptive use.

What are the city's management and fiduciary responsibilities?

Managing the right of way is a core function of a city. The right of way is a public resource that the city must manage in the best interest and on behalf of its residents, while also balancing the competing needs of those who use that space.

As the demand for utility and telecommunications services increases, the amount of activity in the right of way increases, requiring cities to efficiently and effectively oversee the use of this limited public resource. As part of that process, cities often charge users of the right of way for the administrative costs of management, such as the costs associated with granting and administering permits for

(continued on page 22)

“Cities have a fiduciary obligation to seek compensation for use of this public asset.”

STREET SMARTS

work done in the right of way to install and maintain facilities and to restore public streets.

In addition to recovering those costs, cities have a fiduciary obligation to seek compensation for use of this public asset. That compensation often takes the form of franchise fees and privilege taxes imposed on utilities and cable and telecommunications providers for use of the right of way.

Franchise fees commonly are calculated as a percentage of the revenues derived from sales to consumers in the city, and those fees are among the second and third largest sources of revenue for many of Oregon's cities. The money collected is used to fund public services, such as police and fire protection, public parks, and street maintenance and construction. Local management of the right of way ensures that taxpayers receive fair compensation for use of one of the city's most valuable assets.

Can a city dispose of a right of way and when might it do so?

A city can dispose of its right of way through a process known as vacation. Vacation removes a public interest from land. A city may want to vacate a right of way for a number of reasons, such as when it no longer serves the city's needs.

Chapter 271 of the Oregon Revised Statutes provides a process for a city to vacate its interest in the right of way, which can be initiated by a petition filed by a property owner or by a city council. Generally, a city council will hold a hearing on the petition and any objections and will then determine whether the consent of certain property owners has been

obtained, whether notice has been given, and whether the public interest will be prejudiced by the vacation.

When a city vacates a right of way, it returns to private ownership. In some cases, the land may return to the original landowner, and in others, it will attach to the lands bordering the right of way. In either case, a city should consult with legal counsel to fully understand the consequences of vacating right of way. ■

On the Web

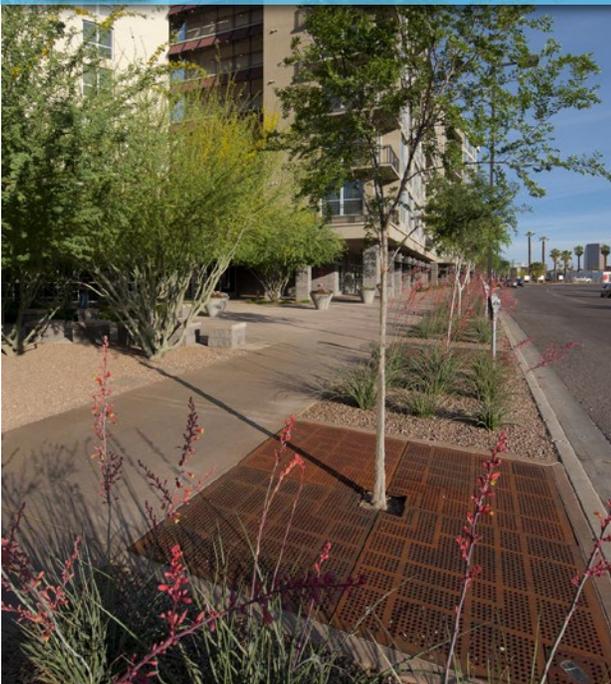
Visit the Right of Way page on the League's website (www.orcities.org), in the A-Z Index. Resources include:



- Right of Way: Protecting and Paying for the Public's Lifeline video
- Model ordinances for securing authority over rights of way, regulating the use of rights of way, easements and excavation
- Permitting information



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Franchise Agreements, Licenses and Statutes: Regulation and the Right of Way

By Nancy Werner

Right of way management is one of the most important functions of local government. Without properly managed rights of way, cities cannot ensure safe and efficient transportation, delivery of and availability of essential and competitive services. Nor can cities fulfill their fiduciary duty to protect this critical public asset. This article provides an overview of regulatory tools cities have used to manage their rights of way, as along with a brief summary of some federal and state laws that may impact right of way management.

Franchise Agreements

For more than 100 years, Oregon cities have required utilities to obtain franchise agreements prior to placing any facilities in the public rights of way. A franchise is a binding contract between a city and a utility company that governs the company's use of the right of way.¹ Cities typically grant franchises to utilities and services providers that install facilities in the rights of way, including electric, gas, telephone and cable companies.² Many cities also impose franchise fees, or fees in lieu of franchise fees, on their municipal water and sewer utilities.

Franchises generally set forth the terms for use of the right of way. For example, franchises may require a company to obtain a permit prior to working in the right of way and to provide insurance and indemnify the city for claims related to the company's operation in the city. Franchises often include the general rules on where facilities may be located in the right of way and when they need to be removed or relocated.

Franchises also require compensation to the city for the use of the right of way, which is called a franchise fee.³ Often compensation is a percentage of the gross revenue the company receives from providing service to customers in the city. Cities may also set compensation based on the lineal feet of the utilities' facilities in the right of way, a minimum annual fee, an attachment fee, or a combination of these fees.

¹ Franchises generally do not cover facilities (such as cell towers) on private property or city-owned property outside the right-of-way (such as parks).

² Cities also grant franchises to solid waste providers. Because solid waste providers do not install facilities in the rights of way, this article does not address solid waste franchises.

³ The terms "franchise fee" and "privilege tax" are often used interchangeably, though they are different. A franchise fee is the fee agreed to in a franchise agreement, whereas a privilege tax is adopted by ordinance and does not require an agreement from the provider subject to the privilege tax. Further, some cities have adopted privilege taxes for providing service in the city regardless of the use of the rights-of-way.

Licenses

More recently, some cities have adopted ordinances designed to replace franchise agreements with a licensing structure. These ordinances generally include the provisions commonly set forth in franchise agreements, including compensation through a license fee or privilege tax. Under these ordinances, utilities that are or desire to use city rights of way would apply for a license rather than negotiate a franchise. The license, if granted, authorizes the utility to use the rights of way and requires the utility to comply with the provision of the ordinance. The associated license fee or privilege tax could be established in the same manner as described with respect to franchise fees.

The license requirement typically applies to the same utilities required to obtain franchises as described above. Some cities also require their municipal water and sewer utilities to obtain licenses and/or pay the associated fees. Additionally, cities may require utilities that do not own facilities in the rights of way but provide services in the city (either through other utilities' facilities or through wireless facilities placed outside the rights of way), to pay a fee or tax.⁴

Applicable Statutes

In Oregon, cities generally have home rule authority to enact laws and regulations that are not expressly preempted by federal or state law. The most relevant laws and rules impacting city authority are summarized below.

Federal Law

Section 253 of the Telecommunications Act of 1996 ("Telecom Act"): The Telecom Act preempts any state or local law or regulation that "prohibit[s] or has the effect of prohibiting" the provision of telecommunications services (47 U.S.C. § 253(a)). In addition to this preemption, however, the Telecom Act expressly preserves local authority to manage their rights-of-way and receive compensation for use of the rights of way (See 47 U.S.C. §253(c)). The Telecom Act does not include a cap on franchise fee or privilege tax rates or other specific preemptions. Rather, it has been left to the

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⁴ The League has produced a Model Utility Rights of Way Ordinance with the license structure described above. The Ordinance includes a detailed description of the options available to cities in deciding how to implement the Ordinance and associated fees.

FRANCHISE AGREEMENTS, LICENSES AND STATUTES

courts to interpret what prohibits or effectively prohibits the provision of telecommunications services.

The Cable Act:⁵ The Cable Act includes fairly specific regulations of cable service providers and expressly requires cable service providers to obtain franchises from the local government prior to providing cable service within that jurisdiction. However, it also prohibits any state and local laws that are inconsistent with the terms of the Act. Thus, local government authority is preserved but circumscribed by the terms of the Cable Act. Among the terms that can be included in a local franchise are: franchise fees of up to five percent of gross revenues; capacity and financial support for public, educational and government access (“PEG”) channels; and customer service standards.

Internet Tax Freedom Act: The Internet Tax Freedom Act (“ITFA”) and its amendments preempt state and local taxes on internet access. The preemption in the ITFA, however, does not extend to voice service provided over the Internet, commonly known as “voice over Internet protocol” or “VoIP.” Further, the ITFA does not clearly preempt privilege taxes or similar fees imposed for the privilege of using the rights of way to provide internet access services. This interpretation of the ITFA has been affirmed by the Oregon Court of Appeals, however the Oregon Supreme Court will be reviewing the decision (See *City of Eugene v. Comcast of Oregon II, Inc.*, 263 Or. App. 116 (2014)).

State Law and Administrative Rules

ORS 221.410 et seq: ORS 221.410 through 221.515 address local authority, including authority to manage rights-of-way and regulate utilities. Generally, the provisions in ORS 221.410 et seq. affirm cities home rule authority rather than preempt cities.⁶ However, ORS 221.450 states that cities may impose a privilege tax of not more than 5 percent of gross revenues on certain utilities using the rights of way without a franchise. The preemptive effect of this language is currently the subject of litigation and will be addressed by the Oregon Supreme Court in the upcoming months (see *Northwest Natural Gas Co. v. City of Gresham*, 264 Or.App. 34 (2014)).

ORS 221.515: This statute, which applies only to certain phone companies classified as incumbent local exchange carriers (“ILECs”), caps Oregon cities’ authority to impose a privilege tax for use of the rights of way at 7 percent of revenue derived from exchange access services (which is essentially the dial tone charge). ORS 221.515 also permits ILECs to deduct from their privilege tax payment any permit fees it pays the city, but does not allow deduction of penalties for franchise or ordinance violations. This preemption does not apply to other phone providers operating in cities, which are known as “competitive local exchange carriers.” Further, the preemption only applies to taxes or fees imposed for use of the right of way;

5 What I am calling the “Cable Act” is actually several laws amending the Communications Act of 1934, including the Cable Communications and Policy Act of 1984 and the Cable Television Consumer Protection and Competition Act of 1992.

6 See, e.g., ORS 221.410: “Except as limited by express provision or necessary implication of general law, a city may take all action necessary or convenient for the government of its local affairs.” ORS 221.415: “Recognizing the independent basis of legislative authority granted to cities in this state by municipal charters, the Legislative Assembly intends by ORS 221.415, 221.420, 221.450 and 261.305 to reaffirm the authority of cities to regulate use of municipally owned rights of way”

it does not apply to taxes and fees imposed, for example, for providing services to customers in the city regardless of whether or not the provider uses the right of way.

ORS 758.025: This statute requires public bodies to notify affected utilities “as soon as reasonably practicable” of a project that would require utility relocation. Public bodies must also coordinate with affected utilities to discuss the project’s scope and schedule, which must include (among other things) a discussion of “options to minimize or eliminate costs to the public body and the utilities.” Importantly, the law expressly states that “[t]he public body is not required to avoid or minimize costs to the utilities in a way that materially affects the project’s scope, costs or schedule.” Public bodies may not prohibit a utility from seeking reimbursement of relocation costs from private parties or customers.

OAR 860-022-0046: This Oregon Administrative Rule states that when a city requires the undergrounding of existing aerial utilities, the electric and communications utilities must pass those costs through to their customers within the city. This will result in a new line item on each customer’s monthly bill listing this cost, which will be collected until the utility is repaid with interest. This rule will apply even where a franchise or license requires the utility to pay undergrounding costs.

Ms. Werner is an attorney with Beery Elsner & Hammond LLC focusing on communications law, right of way management and utility franchises. ■

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City Management of the Right of Way: How Does it Work?

By Len Goodwin

In this article, the term right of way is expanded slightly to include public utility easements (“PUE”), which are often adjacent to rights of way to meet the specific needs of utilities. A significant asset, the PUEs are held in trust by a city of all of its citizens.

A Crowded Space

While the right of way (ROW) represents a major component of the assets held by a city, it is also the physical location of the bulk of city assets. Other than public buildings, virtually every asset in a city’s control, all of its civil infrastructure, is located in a right of way.

The right of way, along with any adjoining public utility easements, is the locational choice for wastewater and stormwater collection facilities, which are typically operated by a city or a special district under Oregon law. The right of way is also home to water, electric and natural gas service facilities, which are owned by either investor-owned utilities or by municipal agencies. Finally, the right of way is home to telecommunications providers who supply telephone, television, data and Internet access services to residents and businesses alike.

All of this can make the ROW fairly crowded.

Figure 1 shows a typical street cross section, with the location of the utilities that are often present. Particularly on larger streets, like arterials and collectors, there can even be more facilities. These could include high-speed data, connections from the public-switched telephone network, cellular antennae, and transport systems for medical specimens, private business connections and the like.

Though not to scale, Figure 1 shows some examples of the size and depth of these facilities. It depicts those connections which run longitudinally down the length of a street segment. In a common setting, businesses and residents on each side of the street will need to connect to these services. As a result, there will be a plethora of lateral connections from each of the utility services shown to the properties on each side of the street.

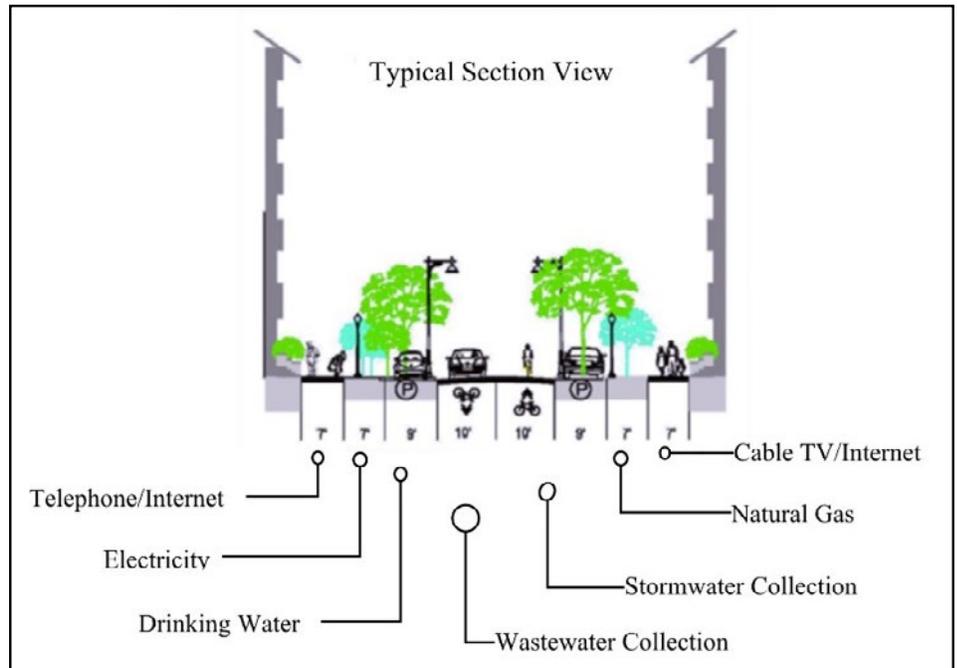


Figure 1

Street Repair and the Cost of Proper Right of Way Management

First and foremost, the surface of the right of way provides the essential transportation infrastructure for the public to move about and for goods and people to move in commerce. Without adequate street infrastructure, not only does commerce halt, but the safety of citizens is immediately placed in peril. With no effective way for police and fire services to quickly move through the community, lives are at risk. Similarly, without the security of a strong street infrastructure, the systems that collect sewage for treatment and convey stormwater back to rivers quickly fail.

As many cities can attest, however, streets are expensive. According to the city of Springfield’s transportation system plan, construction of a new collector street can range from \$500,000 to in excess of \$1 million per mile. For even the smallest cities, the replacement value of streets is millions of dollars; for larger cities, the cost can quickly rise to the hundreds of millions.

Although streets are generally engineered for a useful life of 20 years, in reality, with proper maintenance and preservation,

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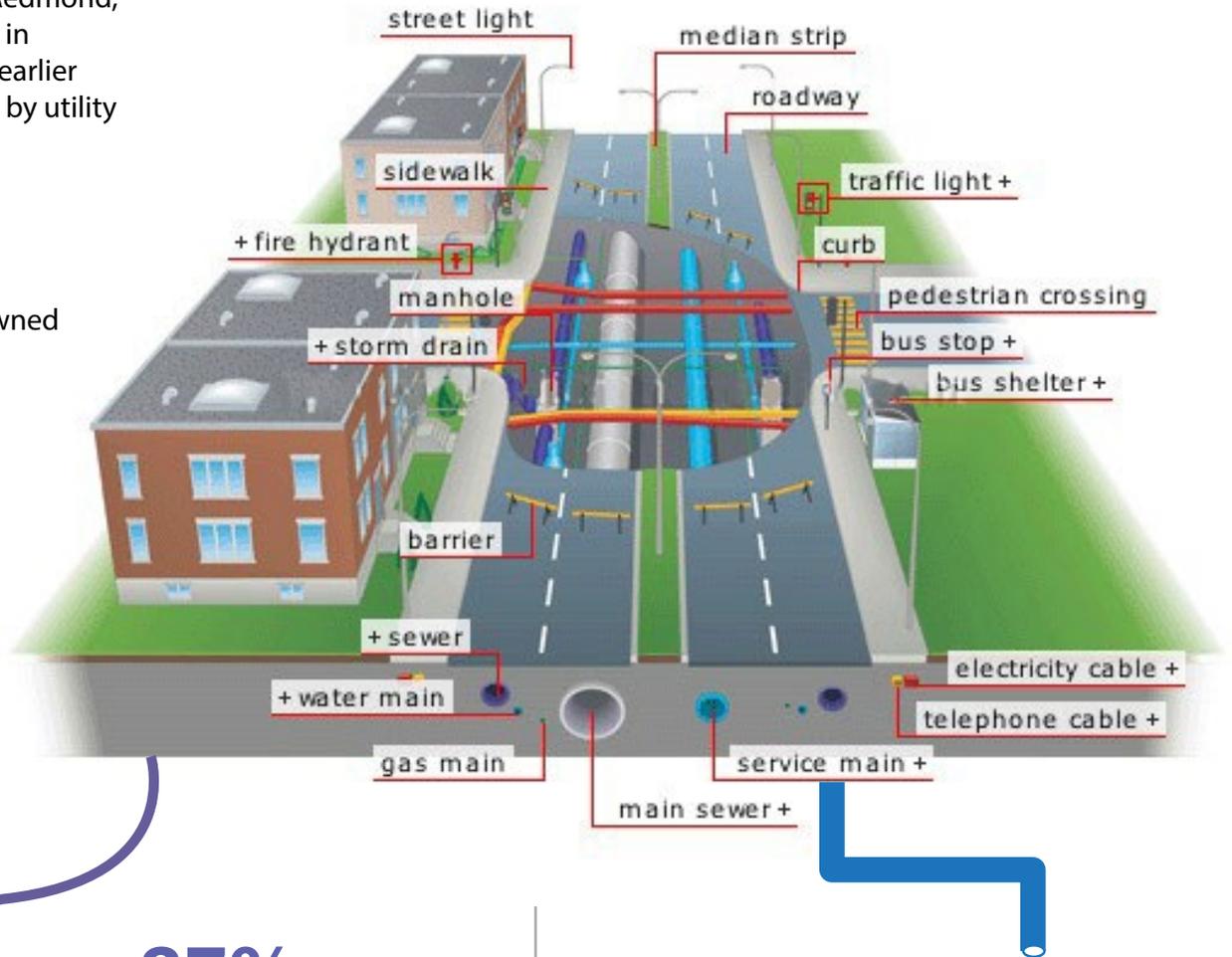
Right of Way Facts & Figures

\$240,000

amount the city of Redmond, Ore. spends per year in addressing areas of earlier degradation caused by utility cuts in the asphalt

10,934

public road miles owned by cities



31%

of Oregonians that own a basic cell phone. This is down from 54% in 2010 due to the increase use of smartphones

87%

of Oregonians use the Internet

8%

increase in cable Internet users since 2010

9%

increase in DSL Internet users since 2010

Average total miles of lines, not including laterals, for all Oregon cities:

76

water lines

58

pipel stormwater lines

68

sewer lines

19

open channels, ditches and swales

CITY MANAGEMENT OF THE RIGHT OF WAY

they can easily last 50 years, and in the cases of many local streets, with light traffic, indefinitely.

In general, there are two major factors that affect the usability of streets. Even with appropriate preservation techniques, streets will ultimately wear out and need to be reconstructed. In Oregon, and, in fact, most of the country, this reality is exacerbated by the fact that revenue sources dedicated to street maintenance and preservation have, for many years, failed to keep up with costs.

Second, disruption of the street infrastructure by the work of utilities exponentially increases the risk of failure. A 2014 report from the Federal Highway Administration (FHWA) documents the impact of street cuts on street infrastructure.

While, as the FHWA report notes, there are several short-term effects that result from utility work in the right of way, including congestion, increased air pollution, delay and interference with adjoining business, the long-term impact of premature failure is the most important.

Figure 2, above, shows a typical construction specification for paving of a local street. Note that the design specification calls for four inches of pavement over 12 inches of rock (or 18 inches in the case of work in wet conditions). Utilities placed in the ROW typically require anywhere from 30 to 48 inches of cover. Thus the location of the facility will be in the soil under the surface of the street. This means that when a street is cut there is a break in the engineered structure of the street. When the utility work is done, the utility is required to repair the street, but in many cases that means no more than replacing the rock subgrade and the paved surface with like material and sealing the crack that is left. A former public works director had a great analogy for the result:

“Suppose you bought a new car and after you left the dealer, someone offered to install a new CD system by slicing your car in half, installing the system and then welding the car back together and repainting it. Do you still have a new car?”

Simply put, there is no way the seam between the repair and the original structure can be a perfect seal. It rains in Oregon, and the water that hits the street will, at a slower or faster rate, leak through that seam and get to the dirt below. There it will ultimately erode the dirt underneath, creating a void that, when the surface above is struck by the wheel of a car, creates a pothole.

How do Cities Manage the Right of Way?

Historically, cities have managed their rights of way by requiring franchise agreements with entities that work or place things in the right of way. Cities also create detail specifications that control how streets are designed and constructed. Terms are included in franchise agreements to establish and enforce these

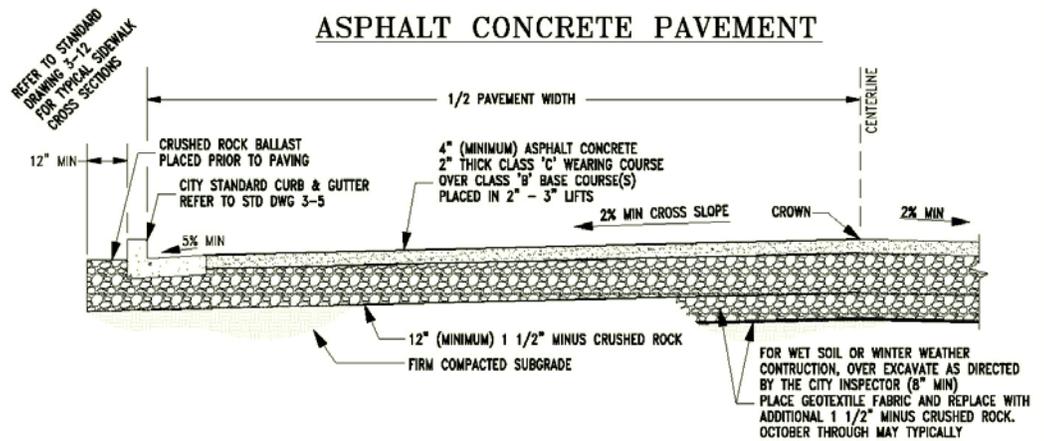


Figure 2

design standards and reinforce their ability to control and manage access. More recently, as an increasing variety of interests seek to use the right of way and technology changes how the right of way can be more efficiently managed, cities have started to include provisions in their codes which have general application. Among the most common are:

- Requiring construction in adjacent PUEs if space is available, or under sidewalks or planting strips; prohibiting construction in the travel surface unless no alternative exists;
- Imposing moratoriums on cutting streets within a certain time period after construction;
- Specifying construction techniques that minimize the risk of water intrusion or other damage to the surface;
- Requiring the use of trenchless technology to place facilities in the right of way; and
- Requiring utilities to bond the quality of the repair work or post substantial deposits to cover the cost of repair failure.

In the past, many cities permitted aerial installation of certain utility facilities to reduce the cost of installation and damage to ROW. Increasingly, this technique is falling into disuse because of the adverse effects, and aesthetic impact of aerial installation.

No matter how a city chooses to manage its rights of way, the challenges will be complex. The need to ensure the public's ability to access information, the need for safe and efficient transportation facilities, and the assurance that utilities using the public rights of way contribute to the financial welfare of cities can be a difficult balance to achieve. But for cities to prosper in today's environment these issues cannot be avoided.

Mr. Goodwin recently retired as director of development and public works for the city of Springfield, capping a 42-year career in public service, the last 20 with Springfield. Currently, he is a principal in Local Citizen, a firm providing advisory services to local governments. ■

Right of Way Condemnation: The Basics

By Carolyn Connelly and Ross Williamson

The following provides a basic overview for condemning real property for city rights of way. This is not a comprehensive guide, and the process will vary depending upon the circumstances. The article assumes the right of way condemnation is not ultimately for a private purpose.

Condemnation Authority

The authority to condemn stems from a city's power of eminent domain and chapter 223.005 of the Oregon Revised Statutes (chapter 223.105 specifically addresses rights of way). A city may "take" private property for an identified public need, such as a public road. Both the U.S. and Oregon Constitutions require that before "taking" property, a city must pay "just compensation" to the affected property owner.

While many factors affect what constitutes "just compensation," generally it equals the fair market value of the "taken" property interest. A city may condemn all or a portion of the parcel or its property interests. For example, a city could condemn just an easement, which is not total ownership, but gives someone the right to use a portion of a property without owning it.

Navigating the Condemnation Hurdles

The procedures for initiating a city's condemnation authority are found in ORS Chapter 35. Set out below are the basic steps for condemning property for a public right of way.

Get the Lay of the Land. Before starting the process, the city should step back to evaluate whether the proposed project meets, or will meet, all applicable land use and project funding requirements. Next, the city should specifically identify the property needed for the right of way, then review a preliminary title report showing all persons and entities with an interest in the property. Problematic interests in the property can include utility easements held by other governmental entities. The city should pay special attention to trust deeds or other evidence of a mortgage holder.

Next, it's important for the city to examine the property and conduct a survey. Before entering the property, if possible, actual notice should be provided to the owner. In the alternative, conspicuously posted written notice can suffice. Before taking samples or conducting tests, the city should obtain written consent from the owner or a court order.



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Condemnation Resolution. Once the property has been identified, the city council must adopt a resolution or ordinance which constitutes presumptive evidence of the public necessity for the proposed right of way. The resolution or ordinance must demonstrate:

- How the property is necessary for the project; and
- That the project is planned or located in a manner most compatible with the greatest public good and the least private injury.

Obtain Property Appraisal. While a formal appraisal is not required for property valued less than \$20,000, it is still recommended. A city must give at least 15 days' written notice in advance of any appraisal inspection to the property owner, inviting the property owner and/or the owner's designee to the appraisal inspection.

Make Written Offer to Owner. Unless an emergency poses a threat to persons or property, at least 40 days before filing for condemnation, a city must provide a written offer to pay the property's full appraised value, plus any compensable damages suffered by the remaining property. The offer must be accompanied either by the written appraisal or, if the value is lower than \$20,000, a written explanation of the bases and method by which your city calculated the property's specific valuation. A fair and accurate appraisal is critical; at trial the property owner's right to attorney fees and costs depends, in part, on the city's offer.

Upon receipt of the city's offer, the owner has at least 40 days to accept or reject it. Keep in mind, state law preserves a property owner's right to repurchase condemned property

under certain circumstances. For this reason, a city's legal counsel should draft any settlement agreement between the parties.

Head to Court. If no settlement is reached, and the total amount of compensation claimed does not exceed \$20,000, the owner may elect that compensation be determined by binding arbitration. Otherwise, the action will proceed to a jury trial in circuit court for a final determination of the just compensation owed. Payment clears the way for the city's right of way project.

Immediate Possession. Under limited circumstances, a city may take immediate possession of property prior to settling the issue of compensation. The city should consult with its legal counsel if the project requires construction to commence before a condemnation action can be resolved.

Relocation Benefits. Note: specific rules protect persons or businesses displaced by a city's acquisition of real property. Except in an emergency, no person may be displaced from any real property without first receiving 90 days' written notice. Such relocation rights are traps for the unwary, so cities should consider them carefully and early in the process.

Clearly, many hurdles face a condemning authority. Careful navigation, coupled with clear and consistent communication with property owners, will increase a city's chances of a favorable outcome.

Ms. Connelly and Mr. Williamson are partners at the Local Government Law Group, PC in Eugene. ■

**City of Gladstone
Staff Report**

Report Date: May 17, 2016
Meeting Date: May 24, 2016
To: Mayor Mersereau and Gladstone City Council
From: Eric Swanson, City Administrator

AGENDA ITEM

Consider adopting a utility right of way ordinance to improve management of the city's rights of way.

History/Background

Historically, Gladstone has managed its rights of way by granting franchises to each utility using the City's rights of way to provide service—electric, natural gas, telecommunications and cable service providers. A franchise is a legally enforceable agreement between the City and the utility that sets forth the terms of use of the right of way (for example, construction, restoration and permitting) and the franchise fee, which is the compensation paid to the City for this use.

The traditional franchising model has potential limitations, however. For example, franchises often limit the City's ability to update its right of way regulations because the franchise sets the right of way use requirements for the entire term of the agreement with change only by mutually agreed-upon amendments. This leads to a patchwork of right of way regulations that vary from utility to utility depending on when the franchise was negotiated. As another example, some utilities use the franchise negotiation process to try to unreasonably limit City home rule authority, such as by refusing to enter into an agreement unless the City pays some relocation costs—costs that under the common law are to be paid by the utility.

As an alternative to negotiating franchise agreements with each utility, the League of Oregon Cities has recommended, and many cities have adopted, a utility right of way ordinance that would provide uniform requirements for all utilities using City rights of way. This type of ordinance could be especially beneficial in Gladstone, which currently has limited Municipal Code provisions relating to utility use of the rights of way.

Proposal

The draft ordinance, which is based on the League of Oregon Cities' model ordinance for right of way management, is designed to protect City right of way management authority to the extent allowed by state and federal law. At the same time, the ordinance ensures reasonable access to the rights of way under the same terms and conditions for all utilities (once franchise agreements have expired). The ordinance replaces individually-negotiated franchise agreements with a license system that requires utilities to follow the City-established requirements for use of the rights of way. The license requires compliance with the terms of the ordinance, which in turn establishes all the requirements typically found in a franchise, including permit, restoration and relocation requirements, minimum insurance, bonding and indemnification, and payment of a right of way usage fee. The City would have the option to continue to enter into negotiated franchise agreements that vary from the terms of the ordinance, but the expectation would be that all utilities would have licenses rather than franchises once their current franchises expire.

Advantages of a utility-neutral right of way ordinance include:

- Secures the legal obligation of utilities to compensate cities for the privilege of using and benefitting from the rights of way in the city, regardless of whether or not the utility has a franchise or license.
 - If a the City discovers a utility using the rights of way without permission, the ordinance will apply, which allows the City to enforce those requirements (including the right of way usage fee) retroactively on those without a franchise or license.
- Eliminates the costs of staff and attorney time spent on franchise negotiations, which can take many months to complete.
- Allows for additional revenue from utilities not currently paying for use of the right of way, which may include competitive telecommunications carriers and competitive electric service suppliers, among others, who do not own the facilities in the right of way but benefit from use of facilities in the rights of way.
 - The revenue earned by these entities is generally not included in the franchise fee payment from the facility owner; as more services are provided through these competitors rather than the facility owner, franchise fee revenue declines and the city does not receive the compensation for utility use of the rights of way expected through franchise fees.
- Standardizes right of way requirements so that City staff would not have to apply different permitting, construction, restoration and other standards or regulations from individual franchises, but instead would apply the requirements of the ordinance to all users of the right of way (once all franchises have expired).
- Provides flexibility in responding to changes in state or federal law, new technologies or construction standards that warrant revision of the existing requirements.
 - With the right of way ordinance, such changes would be done through Code amendments that would apply immediately to all utilities, whereas with franchises the changes often do not apply unless the franchise is amended or renewed to include the new requirements.
 - This creates more consistency in repairs and restoration of the right of way because all utilities are following the same up-to-date standards rather than a variety of standards set out in each individual franchise.

Disadvantages of a utility-neutral right of way ordinance include:

- The City may be slightly more vulnerable to legal challenges to their authority to implement the regulations than they would be if the regulations were included in a mutually agreed upon franchise, but such challenges are not likely.
 - Other cities in Oregon have already adopted a license approach to right of way management, including Oregon City, Happy Valley, Beaverton, Gresham, Tigard, Sherwood, Sandy, Newberg and Grants Pass. Staff is unaware of any litigation related to their authority to manage the rights of way through licenses rather than franchises.
- Because of the issues unique to cable television, such as public, educational and government (PEG) access requirements and specific customer service obligations, the City will still have to negotiate franchises with cable operators, however, the general right of way use requirements in the ordinance will apply and the franchise can be limited to cable-specific issues.
- Initial development and enactment of the ordinance requires an investment of staff and attorney time, and implementation requires some time and training.
 - The City has entered into an IGA with Oregon City for assistance with implementing the ordinance and, based on the experiences in other cities, expects that implementation costs will be covered by additional revenue resulting from the ordinance.

Options

1. Request staff to finalize the utility right of way ordinance for Council consideration at a future meeting.
2. Maintain the status quo of negotiating franchise agreements with utilities that own facilities in the rights of way. If the Council prefers to maintain this practice, staff and the City Attorney's Office recommend the Council consider Code amendments that would include an express franchise requirement and updated right of way use requirements that apply to the extent they are not inconsistent with the franchises.

Cost Impact

Staff estimates that the cost of initial implementation of the ordinance will be considerably less than a standard franchise negotiation. In addition, staff recommends that the ordinance apply to entities currently benefitting from use of the City's rights of way without compensating the City. This application of the ordinance would result in additional revenue to offset implementation costs as well as ongoing city costs related to utility use of the rights of way.

Recommended Staff Action

Staff recommends the Council consider adopting the utility right of way ordinance, and is seeking direction on several policy options related to the proposed ordinance:

1. Application to Municipal Providers: Currently, the City and other public entities own facilities in City rights of way but do not pay a franchise fee or other compensation for this use. Other public users of the rights of way include Tri-City Service District, Clackamas County Service District No. 1, Oak Lodge Sanitary District, Oak Lodge Water District, Clackamas River Water and Clackamas Broadband Express. Including municipal providers in the scope of "utilities" subject to the ordinance would ensure that all users, whether public or private entities, follow the same standards when working in the rights of way.

A related issue is imposing the right of way use fee on municipal utilities. Many Oregon cities impose franchise fees, or fees in lieu of franchise fees, on their own municipal utilities. Some cities also impose right of way use fees on other public or municipal entities. This practice reflects the fact that municipal entities' use of the rights of way creates costs for the City and that municipalities generally are not exempt from paying rent or other compensation for use of property they do not own. While current law is unsettled with respect to whether the City could impose a tax on another municipality, we do not view the right of way use fee as a tax. Cities have clear authority to impose fees on other municipalities.

2. Scope of Right of Way Use Fee: There are several options to consider regarding which entities will be subject to the right of way use fee. (Application of the fee to municipal providers is discussed above.) One option is to apply the fee only to those entities actually using the rights of way, meaning those that own facilities in the rights of way. This approach would maintain the status quo in terms of revenue from utilities (unless rates change, as discussed below) and does not address any entities that may be providing utility services in the City, but which do not own any facilities.

Another option, which staff recommends, is to extend the right of way use fee to entities that use another utility's facilities to provide services to customers in the City. These entities derive benefits from the rights of way because they use existing facilities in the rights of way to reach their customers. But for the existence of the utility whose facilities they use, these providers would be required to construct facilities in order to reach their customers, so they rely on the rights of way in a similar manner to facility owners. In addition, existing franchise fees do not

include the revenue from customers served by these third party providers, and thus franchise fees will decline as these providers increase. The result will be that the City receives less revenue from franchise fees payments, though the costs and burdens related to the right of way remain flat or increase.

Another option to consider in addition to the right of way use fee is a tax on all utilities providing services in the City by means of the rights of way (with a deduction for any franchise fees or right of way usage fees paid). This tax would not be for use of the rights of way; it is on the provision of services to customers in the City. This option has several benefits. The primary benefit relates to telecommunications providers. State law caps the fee that can be imposed on incumbent phone companies (CenturyLink in Gladstone) for use of the rights of way at 7% of gross revenue from exchange access services, which is essentially the dial tone charge and thus a limited portion of their revenue. This law does not apply to other telecommunications providers known as competitive providers. Many cities charge competitive providers 5% of all revenue, which generally is more than 7% of the limited exchanged access services revenue paid by incumbent providers.

Rather than charge the competitive providers a lower amount—effectively extending the preemption that applies to incumbents to competitive providers—the City can ensure that incumbent and competitive providers pay comparable rates by imposing a tax on the provision of utility services (i.e., not for the use of the rights of way). The state law cap described above does not apply to a service-based tax that is not for use of the rights of way, and thus if imposed this type of tax will cover the non-exchange access revenue the City cannot include in a fee for use of the rights of way.

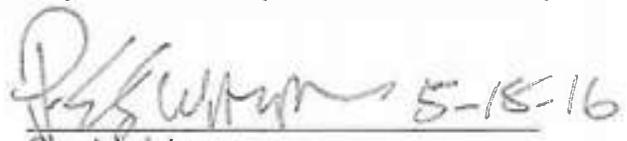
There is ongoing litigation regarding this type of tax imposed by Portland and Springfield. The cities have prevailed in both challenges to date, but CenturyLink has sought review by the Oregon Supreme Court. There is long-standing precedent holding that cities can impose this type of tax on the incumbent provider, however in that case the city included wireless carriers as well. The primary focus of the current litigation is the effort to impose the tax only on wireline, not wireless, carriers. If the Supreme Court agrees to review CenturyLink's case, it will likely be at least two years before the issue is resolved.

- Right of Way Use Fee Rates:** The City currently has franchise fee rates that are lower than those of many other Oregon cities. For example, the City charges Northwest Natural a 3.0% franchise fee and PGE a 3.5% franchise fee. Many cities impose a 5% fee on these entities. (In addition, a very recent Oregon Supreme Court opinion makes clear that cities have home rule authority to impose fees of more than 5% on these utilities.) The right of way use fee will apply to franchisees, but they may deduct from their right of way use fee payment any franchise fees paid. This would allow the City to increase the rates paid by Northwest Natural and PGE should the City decide to do so. (Note that by operation of a state Administrative Rule, these companies will pass through to Gladstone customers any fees that exceed the existing 3% or 3.5% respectively.)

Another option is to set the right of way use fee rate at the same rate as existing franchises. This would result in no additional revenue to the City from existing franchisees. If the City pursues this option, staff recommends consideration of including a 5% right of way use fee rate that would apply to competitive telecommunications providers not subject to the state law cap discussed above.

Department Head
Signature

Date



City Administrator
Signature

Date

Note to City Council: Please note the actual Ordinance will appear at the June 1st meeting.

EXHIBIT A

Chapter 12.24 UTILITY FACILITIES IN PUBLIC RIGHTS-OF-WAY

12.245.010. Title.

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

12.24.020. 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 by utilities;
- D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the city 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; and
- F. Comply with applicable provisions of state and federal law.

12.24.030. 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.

12.24.040. 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.

12.24.050. 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 Gladstone, 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 Gladstone, 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. 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) public communications systems; (5) 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 (6) 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, municipality, special district, government entity 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 sale or resale, including trade, barter or other exchange of value, directly or indirectly, to any person.

“Public communications system” means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 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.

“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 (i) that has been privately acquired by a utility operator, (ii) solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of city facilities, or (iii) where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the city.

“Public Works Director” means the Public Works Director for the City of Gladstone or any designee.

“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” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer, and/or storm sewer to or from customers within the corporate boundaries of the city, and/or the transmission or provision of any of these services through the city whether or not customers within the city are served.

“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.

12.24.060. 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 sixty (60) days of the effective date of this Chapter.

B. Annual Registration. After registering with the city pursuant to subsection 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 A of this section 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 a description of the facilities over which the utility services will be provided.

D. Registration Fee. Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the city council in an amount sufficient to fully recover all of the city's costs of administering the registration program.

E. Exception. A person with a valid franchise agreement or license from the city shall not be required to register to provide the utility services expressly permitted by the franchise agreement or license.

12.24.070. 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 sixty (60) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid franchise granted by the city, unless a new franchise is granted by the city pursuant to subsection E of this section.
3. The provisions of this section 12.24.070, do not apply to any person subject to and in compliance with the cable television franchise requirement of Chapter 5.16, except that subsection J shall apply to the extent such person provides multiple services.

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, a description of 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, as determined by the city, 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 the express provisions of 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, upgrade, repair 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 C, D and E of Section 12.24.090, 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 right-of-way use fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J(1) requires a utility operator to pay the right-of-way use fee, if any, owed to the city by another person using the utility operator's 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 right-of-way use fee 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 fulfilling all of the obligations under the license with respect to 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.

12.24.080. Construction and Restoration.

A. Construction Codes. Utility facilities shall be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the Gladstone Design and Construction Standards. 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 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. No permit is required for service drops to customer premises or routine maintenance or repairs where such drops, repairs or maintenance do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.
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 work on 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, including the Gladstone Design and Construction Standards.
 - 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. The public works director may require additional information necessary to demonstrate that the proposed location can accommodate the utility facilities.

- 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. The permittee has an adequate traffic control plan.
4. All permit applications shall 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 engineer or designee may, in his or her sole discretion, require the verification of a registered professional engineer.
 5. All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by public works director.
 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 public works director 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 public works director 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 public works director and designated 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 or corrected 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. If the permittee fails to remove or correct work as required in this subsection, the city may remove or correct the work at the expense of the permittee, after notice and opportunity to cure, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations.
 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 sixty (60) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the public works director.
- C. Performance Surety.

1. The city may require a performance bond or other form of surety acceptable to the city equal to at least one hundred and twenty-five percent (125%) of the estimated cost of the work within the rights-of-way of the city, which bond shall be provided before construction is commenced.
 2. If required, 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. If required, 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.
 4. The release of the performance bond or other surety pursuant to subsection C(1) of this section does not relieve the utility operator from its obligation to restore rights-of-way or other property as required in subsection E of this section regardless of when the failure to restore rights-of-way or other property as required by this chapter occurs or is discovered.
- D. Injury to Persons or Property. A utility operator, or any person acting on its behalf, 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 rights-of-way 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 public works director.
 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. 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 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, or such additional time agreed to in writing by the city, to restore the rights-of-way. If, after said notice, the utility

operator fails to restore the rights-of-way 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 public works director, to minimize public inconvenience, disruption, or damages.

H. Contractors. A utility operator may authorize a qualified contractor to perform any of the work authorized or required in this Chapter on the utility operator's behalf. Any contractor performing work on behalf of a utility operator shall be subject to applicable provisions of this Chapter. In the event a utility operator authorizes a contractor to perform work on its behalf, the utility operator shall remain responsible and liable for compliance with the provisions of this subchapter.

12.24.090. Location of Facilities.

A. Location of Facilities. Unless otherwise agreed to in writing by the city:

1. Utility facilities shall be installed underground in all areas of the city where there are no existing poles in the right-of-way, there is no space on existing poles in the right-of-way, or where the only poles in the right-of-way are used only for high voltage lines (as defined below). This requirement shall not apply 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.
2. 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 install all new facilities underground at no cost to the city. 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 ("high voltage lines") 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, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, 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 public works director, 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 the rights-of-way shall, at its own expense, remove the facility and restore the rights-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 twelve (12) consecutive months. 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. The city will use best efforts to provide the utility operator with notice prior to cutting or moving facilities. If prior notice is not possible, the city will provide such notice as soon as reasonably practicable after taking such action.
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 Record Drawings. The utility operator shall provide the city with two complete sets of record drawings in a form acceptable to the city upon completion of construction. The utility operator shall provide updated complete sets of as built plans upon request of the city, but not more than once per year.

12.24.100. 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 expressly prohibited by applicable law or a valid agreement between the utility operator and the lessee.

12.24.110. 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 as required in subsection A of this section, 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 consistent with applicable state and federal safety laws and regulations 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.

12.24.120. 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 using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations 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.

12.24.130. Right-of-Way Use Fee.

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the city and every person that uses utility facilities in the city to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the right-of-way use fee for every utility service provided using the rights-of-way in the amount determined by resolution of the city council.

B. A utility operator whose only facilities in the right-of-way are facilities mounted on above-ground structures within the right-of-way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the right-of-way, shall pay the attachment fee set by city council resolution for each attachment, or such other fee set forth in the license granted by the city. Unless otherwise agreed to in writing by the city, the fee shall be paid annually, in arrears, within forty-five (45) days after the end of each calendar year, and shall be accompanied by information sufficient to illustrate the 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.

C. Right-of-way use fee payments required by this section shall be reduced by any franchise fee payments received by the city, but in no case will be less than zero dollars (\$0).

D. Unless otherwise agreed to in writing by the city, the right-of-way use fee set forth in subsection A of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The utility shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

E. The calculation of the right-of-way use fee required by this section shall be subject to all applicable limitations imposed by federal or state law.

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

12.24.140. 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, right-of-way use fee, attachment fee 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. 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 right-of-way use fee, attachment fee 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 B or subsection D of Section 12.24.130 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.

12.24.150. 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. Commercial Automobile 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. If not otherwise included in the policies required by subsection a. above, maintain 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).
 - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.
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, with the exception of worker's compensation, as additional insureds the city

and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. 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 or assurance, 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 C of Section 12.24.080.

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 12.24.070 of this Chapter, or of a franchise granted by the city, shall constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. 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 in a timely manner, unless the utility operator's failure arises directly from the city's negligence or willful misconduct.

12.24.160. Compliance.

Every utility operator shall 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 entire term of any license granted under this Chapter.

12.24.170. 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, and such books, records, maps or information are clearly marked as confidential at the time of disclosure to the city (“confidential information”), the city shall take reasonable steps to protect the confidential information to the extent permitted by Oregon Public Records Laws. In the event the city receives a public records request to inspect any confidential information and the city determines that it will be necessary to reveal the confidential information, to the extent reasonably possible the city will notify the person that submitted the confidential information of the records request prior to releasing the confidential information. The city shall not be required to incur any costs to protect any confidential information, other than the city’s routine internal procedures for complying with the Oregon Public Records Law.

12.24.180. Penalties.

A. Violation of the requirements of this Chapter constitutes a Class A Infraction. Each day a violation continues shall constitute a separate offense.

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.

12.24.190. 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.

12.24.200. 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.

City of Gladstone Staff Report

Report Date: May 25, 2016
Meeting Date: May 31, 2016
To: Mayor Mersereau and Gladstone City Council
From: Eric Swanson, City Administrator

AGENDA ITEM

Consider adopting utility right of way ordinance 1465 to improve management of the city's rights of way.

History/Background

Historically, Gladstone has managed its rights of way by granting franchises to each utility using the City's rights of way to provide service—electric, natural gas, telecommunications and cable service providers. A franchise is a legally enforceable agreement between the City and the utility that sets forth the terms of use of the right of way (for example, construction, restoration and permitting) and the franchise fee, which is the compensation paid to the City for this use.

The traditional franchising model has potential limitations, however. For example, franchises often limit the City's ability to update its right of way regulations because the franchise sets the right of way use requirements for the entire term of the agreement with change only by mutually agreed-upon amendments. This leads to a patchwork of right of way regulations that vary from utility to utility depending on when the franchise was negotiated. As another example, some utilities use the franchise negotiation process to try to unreasonably limit City home rule authority, such as by refusing to enter into an agreement unless the City pays some relocation costs—costs that under the common law are to be paid by the utility.

As an alternative to negotiating franchise agreements with each utility, the League of Oregon Cities has recommended, and many cities have adopted, a utility right of way ordinance that would provide uniform requirements for all utilities using City rights of way. This type of ordinance could be especially beneficial in Gladstone, which currently has limited Municipal Code provisions relating to utility use of the rights of way.

Proposal

The draft ordinance, which is based on the League of Oregon Cities' model ordinance for right of way management, is designed to protect City right of way management authority to the extent allowed by state and federal law. At the same time, the ordinance ensures reasonable access to the rights of way under the same terms and conditions for all utilities (once franchise agreements have expired). The ordinance replaces individually-negotiated franchise agreements with a license system that requires utilities to follow the City-established requirements for use of the rights of way. The license requires compliance with the terms of the ordinance, which in turn establishes all the requirements typically found in a franchise, including permit, restoration and relocation requirements, minimum insurance, bonding and indemnification, and payment of a right of way usage fee. The City would have the option to continue to enter into negotiated franchise agreements that vary from the terms of the ordinance, but the expectation would be that all utilities would have licenses rather than franchises once their current franchises expire.

Advantages of a utility-neutral right of way ordinance include:

- Secures the legal obligation of utilities to compensate cities for the privilege of using and benefitting from the rights of way in the city, regardless of whether or not the utility has a franchise or license.
 - If a the City discovers a utility using the rights of way without permission, the ordinance will apply, which allows the City to enforce those requirements (including the right of way usage fee) retroactively on those without a franchise or license.
- Eliminates the costs of staff and attorney time spent on franchise negotiations, which can take many months to complete.
- Allows for additional revenue from utilities not currently paying for use of the right of way, which may include competitive telecommunications carriers and competitive electric service suppliers, among others, who do not own the facilities in the right of way but benefit from use of facilities in the rights of way.
 - The revenue earned by these entities is generally not included in the franchise fee payment from the facility owner; as more services are provided through these competitors rather than the facility owner, franchise fee revenue declines and the city does not receive the compensation for utility use of the rights of way expected through franchise fees.
- Standardizes right of way requirements so that City staff would not have to apply different permitting, construction, restoration and other standards or regulations from individual franchises, but instead would apply the requirements of the ordinance to all users of the right of way (once all franchises have expired).
- Provides flexibility in responding to changes in state or federal law, new technologies or construction standards that warrant revision of the existing requirements.
 - With the right of way ordinance, such changes would be done through Code amendments that would apply immediately to all utilities, whereas with franchises the changes often do not apply unless the franchise is amended or renewed to include the new requirements.
 - This creates more consistency in repairs and restoration of the right of way because all utilities are following the same up-to-date standards rather than a variety of standards set out in each individual franchise.

Disadvantages of a utility-neutral right of way ordinance include:

- The City may be slightly more vulnerable to legal challenges to their authority to implement the regulations than they would be if the regulations were included in a mutually agreed upon franchise, but such challenges are not likely.
 - Other cities in Oregon have already adopted a license approach to right of way management, including Oregon City, Happy Valley, Beaverton, Gresham, Tigard, Sherwood, Sandy, Newberg and Grants Pass. Staff is unaware of any litigation related to their authority to manage the rights of way through licenses rather than franchises.
- Because of the issues unique to cable television, such as public, educational and government (PEG) access requirements and specific customer service obligations, the City will still have to negotiate franchises with cable operators, however, the general right of way use requirements in the ordinance will apply and the franchise can be limited to cable-specific issues.
- Initial development and enactment of the ordinance requires an investment of staff and attorney time, and implementation requires some time and training.
 - The City has entered into an IGA with Oregon City for assistance with implementing the ordinance and, based on the experiences in other cities, expects that implementation costs will be covered by additional revenue resulting from the ordinance.

Options

1. Request staff to finalize the utility right of way ordinance for Council consideration at a future meeting.
2. Maintain the status quo of negotiating franchise agreements with utilities that own facilities in the rights of way. If the Council prefers to maintain this practice, staff and the City Attorney's Office recommend the Council consider Code amendments that would include an express franchise requirement and updated right of way use requirements that apply to the extent they are not inconsistent with the franchises.

Cost Impact

Staff estimates that the cost of initial implementation of the ordinance will be considerably less than a standard franchise negotiation. In addition, staff recommends that the ordinance apply to entities currently benefitting from use of the City's rights of way without compensating the City. This application of the ordinance would result in additional revenue to offset implementation costs as well as ongoing city costs related to utility use of the rights of way.

Recommended Staff Action

Staff recommends the Council adopt the utility right of way ordinance 1465.

Recommended Motion

I move to approve Ordinance 1465.

Department Head
Signature

Date

City Administrator
Signature

Date

ORDINANCE NO. 1465

AN ORDINANCE AMENDING GLADSTONE MUNICIPAL CODE TITLE 12 TO ADD CHAPTER 12.24, UTILITY FACILITIES IN PUBLIC RIGHTS-OF-WAY, AND AMENDING CHAPTER 5.04, BUSINESS LICENSES AND CHAPTER 12.02, STREET EXCAVATION REQUIREMENTS

WHEREAS, the City of has authority pursuant to its Charter and the Oregon Constitution and statutes to manage its rights-of-way and to receive compensation for use of the rights-of-way consistent with applicable state and federal law, and

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

WHEREAS, the City has determined that it can to 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 and through a right-of-way use fee; and

WHEREAS, the City has determined that it can more effectively obtain compensation from utilities that benefit from, and recover significant costs of utilities related to, the rights-of-way in the City by enacting a Right-of-Way Use Fee applicable to utilities actually using and those benefitting from the rights-of-way; and

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

NOW, THEREFORE, the City of Gladstone ordains as follows:

Section 1. Gladstone Municipal Code Chapter 5.04, Business Licenses, subsection 5.04.030(2), is amended as follows (new language appears as underlined text; deleted language appears as ~~strikethrough~~ text):

(2) In lieu of a business license and the requirement to pay related fees described in this chapter, the city will issue an exemption certificate without charge to businesses and activities described in paragraphs (a) through (g) of this subsection. Notwithstanding the foregoing, a qualifying business or activity must complete and file an initial and thereafter an annual renewal exemption certificate application. Businesses and activities qualified under this provision are:

(a) Religious, educational and charitable organizations specifically exempt from taxation under the Federal Internal Revenue Code;

(b) ~~Utilities franchised by and paying a franchise fee to the city;~~

~~(c) One-time, annual events or special events if all other applicable permits and licenses have been applied for and granted by the city;~~

(~~c~~) Any business or occupation specifically exempt from the payment of a non-regulatory business license fees under state law or federal law (any

person claiming an exemption under state or federal law has the burden of demonstrating the applicability of such an exemption);

(ed) Any household, garage or yard sale conducted in accordance with any applicable city ordinances or regulations;

(fe) Producers of farm products raised in Oregon, produced by themselves or their immediate families and sold by them or by a member of their immediate family;

(gf) No person working as a domestic in a private home if the owner or occupant of the home employs or directly pays the domestic worker.

Section 2.

Gladstone Municipal Code Chapter 12.02, Street Excavation Requirements, is amended as follows (new language appears as underlined text; deleted language appears as ~~strikethrough~~ text):

12.02.010 Installation or excavation—Permit required.

(1) No person, firm, or corporation ~~or~~ district shall engage in any excavation, grading, surfacing, or paving operation or activity, or install or construct any sanitary sewer, storm sewer, water main or pipeline, or any other public utility, service, or public improvement in the city without first securing a permit therefore from the City Administrator or his designee. Permits will be issued only upon approval by the city engineer of the plans, profiles, and specifications for the proposed construction.

(2) The city has the authority to set a fee for each permit issued under the provisions of GMC Sections 12.02.010 to 12.02.070 by resolution of the council and such fee shall be due and payable at the time of the permit. In addition to the permit fee, the city may also authorize a charge to cover the costs of plan review and inspection of the work by the city to assure compliance with city standards and specifications, an amount to be set by the city based on the estimated construction costs as determined by the city engineer or his designee as set by the city. When costs are imposed, the city shall keep accurate records of the time and costs incurred in such review and inspections, and upon completion of the project, and its acceptance by the city, any amount remaining in the inspection charge shall be refunded to the permittee. Any cost incurred by the city in excess of the amount of the inspection charge shall be billed to the permittee and shall be due and payable prior to approval and acceptance of the project by the city. Time spent in plan review and inspection shall be billed at an hourly rate to be set by the city.

(3) GMC Sections 12.02.010 to 12.02.070 shall not apply to duly franchised utilities whose operations are controlled by franchise ordinance adopted by the city, nor to utility operators with a valid license from the City pursuant to GMC 12.24.070.

(4) GMC Sections 12.02.010 to 12.02.070 shall not apply to contractors performing work under a contract let by the city. Work of such contractors shall be governed by the conditions of such contract.

12.02.020 Street contractor's license.

(1) Any person, firm, or corporation or ~~district~~ who engages in the business, operation or practice of constructing streets, sanitary sewers, storm sewers, water mains, or pipelines or any other device or structure within the right-of-way of any street dedicated to public use within the city shall obtain a city license as a street contractor prior to engaging in such work.

(2) Before being issued a license, a street contractor shall submit to the city evidence and a statement of experience to show to the satisfaction of the City Administrator, that the applicant is qualified to perform such work.

(3) A licensed street contractor shall execute and deliver to the city a dual obligee surety bond to be approved by the city in the amount of ten thousand dollars in favor of the city, conditioned that the contractor will perform all street work in conformance with the laws of the city and the requirements of other governmental agencies and that the contractor will indemnify and save the expenses, damages, costs and claims arising out of the contractor's negligence or unskillfulness in performing such work, and further guaranteeing such work against any failure or deterioration due to faulty workmanship or materials for a period of one year from the date of its acceptance by the city. This requirement shall not be applicable as to street work in a subdivision where a performance bond, irrevocable letter of credit, cash deposit, or maintenance bond is posted pursuant to the Municipal Code and to the satisfaction of the city for all required public improvements including street improvements.

(4) The licensed street contractor shall have and keep in full force and effect property damage and liability insurance in the minimum amount of one million dollars property damage, and one hundred thousand personal injury while performing any work in the city. A certificate of such insurance shall be filed with the city. Said certificate shall indicate that coverage includes street excavation and sewer excavation, including explosion, collapse, and underground exposure.

(5) The license of any street contractor may be revoked by the City Council upon presentation of evidence of his failure to comply with any and all regulations of the city.

12.02.030 Standards.

All street, sanitary sewer, storm sewer, water main and pipeline construction and any other construction within streets in the city shall be in accordance with the ~~"Standard Specifications for Public Works Construction"~~ as published by the Oregon Chapter of the American Public Works Association Gladstone Design and Construction Standards or in accordance with any special provisions established by the city engineer.

12.02.040 Street sections and construction details.

Standard street sections and standard construction details shall be as specified in city's the standard drawings in the Gladstone Design and

Construction Standards. No deviation from these standard drawings will be allowed without the approval of the city engineer.

12.02.050 Engineer's approval in phases.

Each phase, layer, or ~~source~~course of work shall be approved by the city engineer prior to the placement or construction of any subsequent phase, layer or course. Failure to comply with this section shall be cause for requiring the removal and replacement of that phase, layer, or course which was placed without approval of the preceding course.

12.02.060 Contractor—Appointment of project superintendent.

A street contractor shall employ competent and experienced ~~work~~men and ~~supervisors~~foremen and for each project or contract shall designate a project superintendent who will be responsible for coordinating with the city on all aspects of work.

12.02.070 Contractor—Submission of plans.

(1) The city may require a street contractor, or the person, firm, or corporation ~~or district~~ employing the street contractor, to be responsible for the preparation of, and submission to the city for approval, all plans and specifications covering any work in any city street.

(2) If required by the city, these plans and specifications are to be prepared by, and bear the seal of, a registered professional engineer. All grade, line, and other control stakes shall be set by this engineer or his duly authorized representative.

Section 3. Gladstone Municipal Code Chapter 12.24, Utility Facilities in Rights-of-Way, attached hereto as Exhibit A, is hereby added to Title 12 of the Gladstone Municipal Code.

Section 4. Except as herein amended, Chapters 5.04 and 12.02 of the Gladstone Municipal Code remain in full force and effect.

Section 5. This Ordinance takes effect 30 days from its adoption.

Adopted by the Gladstone City Council this 31st day of May, 2016.

ATTEST:



Thomas Mersereau, Mayor



Jolene Morishita, Assistant City Administrator

ORDINANCE 1465

Exhibit A

Chapter 12.24 UTILITY FACILITIES IN PUBLIC RIGHTS-OF-WAY

12.245.010. Title.

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

12.24.020. 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 by utilities;
- D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the city 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; and
- F. Comply with applicable provisions of state and federal law.

12.24.030. 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.

12.24.040. 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.

12.24.050. 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 Gladstone, 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 Gladstone, 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. 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) public communications systems; (5) 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 (6) 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, municipality, special district, government entity 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 sale or resale, including trade, barter or other exchange of value, directly or indirectly, to any person.

"Public communications system" means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 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.

“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 (i) that has been privately acquired by a utility operator, (ii) solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of city facilities, or (iii) where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the city.

“Public Works Director” means the Public Works Director for the City of Gladstone or any designee.

“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” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer, and/or storm sewer to or from customers within the corporate boundaries of the city, and/or the transmission or provision of any of these services through the city whether or not customers within the city are served.

“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.

12.24.060. 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 sixty (60) days of the effective date of this Chapter.

B. Annual Registration. After registering with the city pursuant to subsection 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 A of this section 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 a description of the facilities over which the utility services will be provided.

D. Registration Fee. Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the city council in an amount sufficient to fully recover all of the city's costs of administering the registration program.

E. Exception. A person with a valid franchise agreement or license from the city shall not be required to register to provide the utility services expressly permitted by the franchise agreement or license.

12.24.070. 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 sixty (60) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid franchise granted by the city, unless a new franchise is granted by the city pursuant to subsection E of this section.
3. The provisions of this section 12.24.070, do not apply to any person subject to and in compliance with the cable television franchise requirement of Chapter 5.16, except that subsection J shall apply to the extent such person provides multiple services.

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, a description of 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, as determined by the city, 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 the express provisions of 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, upgrade, repair 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 C, D and E of Section 12.24.090, 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 right-of-way use fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J(1) requires a utility operator to pay the right-of-way use fee, if any, owed to the city by another person using the utility operator's 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 right-of-way use fee 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 fulfilling all of the obligations under the license with respect to 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.

12.24.080. Construction and Restoration.

A. Construction Codes. Utility facilities shall be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the Gladstone Design and Construction Standards. 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 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. No permit is required for service drops to customer premises or routine maintenance or repairs where such drops, repairs or maintenance do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.
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 work on 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, including the Gladstone Design and Construction Standards.
 - 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. The public works director may require additional information necessary to demonstrate that the proposed location can accommodate the utility facilities.

- 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. The permittee has an adequate traffic control plan.
4. All permit applications shall 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 engineer or designee may, in his or her sole discretion, require the verification of a registered professional engineer.
 5. All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by public works director.
 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 public works director 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 public works director 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 public works director and designated 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 or corrected 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. If the permittee fails to remove or correct work as required in this subsection, the city may remove or correct the work at the expense of the permittee, after notice and opportunity to cure, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations.
 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 sixty (60) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the public works director.
- C. Performance Surety.

1. The city may require a performance bond or other form of surety acceptable to the city equal to at least one hundred and twenty-five percent (125%) of the estimated cost of the work within the rights-of-way of the city, which bond shall be provided before construction is commenced.
2. If required, 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. If required, 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.
4. The release of the performance bond or other surety pursuant to subsection C(1) of this section does not relieve the utility operator from its obligation to restore rights-of-way or other property as required in subsection E of this section regardless of when the failure to restore rights-of-way or other property as required by this chapter occurs or is discovered.

D. Injury to Persons or Property. A utility operator, or any person acting on its behalf, 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 rights-of-way 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 public works director.
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. 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 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, or such additional time agreed to in writing by the city, to restore the rights-of-way. If, after said notice, the utility

operator fails to restore the rights-of-way 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 public works director, to minimize public inconvenience, disruption, or damages.

H. Contractors. A utility operator may authorize a qualified contractor to perform any of the work authorized or required in this Chapter on the utility operator's behalf. Any contractor performing work on behalf of a utility operator shall be subject to applicable provisions of this Chapter. In the event a utility operator authorizes a contractor to perform work on its behalf, the utility operator shall remain responsible and liable for compliance with the provisions of this subchapter.

12.24.090. Location of Facilities.

A. Location of Facilities. Unless otherwise agreed to in writing by the city:

1. Utility facilities shall be installed underground in all areas of the city where there are no existing poles in the right-of-way, there is no space on existing poles in the right-of-way, or where the only poles in the right-of-way are used only for high voltage lines (as defined below). This requirement shall not apply 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.
2. 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 install all new facilities underground at no cost to the city. 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 ("high voltage lines") 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, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, 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 public works director, 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 the rights-of-way shall, at its own expense, remove the facility and restore the rights-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 twelve (12) consecutive months. 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. The city will use best efforts to provide the utility operator with notice prior to cutting or moving facilities. If prior notice is not possible, the city will provide such notice as soon as reasonably practicable after taking such action.
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 Record Drawings. The utility operator shall provide the city with two complete sets of record drawings in a form acceptable to the city upon completion of construction. The utility operator shall provide updated complete sets of as built plans upon request of the city, but not more than once per year.

12.24.100. 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 expressly prohibited by applicable law or a valid agreement between the utility operator and the lessee.

12.24.110. 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 as required in subsection A of this section, 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 consistent with applicable state and federal safety laws and regulations 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.

12.24.120. 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 using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations 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.

12.24.130. Right-of-Way Use Fee.

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the city and every person that uses utility facilities in the city to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the right-of-way use fee for every utility service provided using the rights-of-way in the amount determined by resolution of the city council.

B. A utility operator whose only facilities in the right-of-way are facilities mounted on above-ground structures within the right-of-way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the right-of-way, shall pay the attachment fee set by city council resolution for each attachment, or such other fee set forth in the license granted by the city. Unless otherwise agreed to in writing by the city, the fee shall be paid annually, in arrears, within forty-five (45) days after the end of each calendar year, and shall be accompanied by information sufficient to illustrate the 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.

C. Right-of-way use fee payments required by this section shall be reduced by any franchise fee payments received by the city, but in no case will be less than zero dollars (\$0).

D. Unless otherwise agreed to in writing by the city, the right-of-way use fee set forth in subsection A of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The utility shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

E. The calculation of the right-of-way use fee required by this section shall be subject to all applicable limitations imposed by federal or state law.

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

12.24.140. 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, right-of-way use fee, attachment fee 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. 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 right-of-way use fee, attachment fee 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 B or subsection D of Section 12.24.130 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.

12.24.150. 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. Commercial Automobile 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. If not otherwise included in the policies required by subsection a. above, maintain 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).
 - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.
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, with the exception of worker's compensation, as additional insureds the city

and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. 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 or assurance, 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 C of Section 12.24.080.

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 12.24.070 of this Chapter, or of a franchise granted by the city, shall constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. 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 in a timely manner, unless the utility operator's failure arises directly from the city's negligence or willful misconduct.

12.24.160. Compliance.

Every utility operator shall 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 entire term of any license granted under this Chapter.

12.24.170. 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, and such books, records, maps or information are clearly marked as confidential at the time of disclosure to the city ("confidential information"), the city shall take reasonable steps to protect the confidential information to the extent permitted by Oregon Public Records Laws. In the event the city receives a public records request to inspect any confidential information and the city determines that it will be necessary to reveal the confidential information, to the extent reasonably possible the city will notify the person that submitted the confidential information of the records request prior to releasing the confidential information. The city shall not be required to incur any costs to protect any confidential information, other than the city's routine internal procedures for complying with the Oregon Public Records Law.

12.24.180. Penalties.

- A. Violation of the requirements of this Chapter constitutes a Class A Infraction. Each day a violation continues shall constitute a separate offense.
- 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.

12.24.190. 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.

12.24.200. 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.

Management of Gladstone's Most Valuable Asset

Your Gladstone Rights-of-Way: The City's Most Valuable Asset!

About Rights-of-Way

Gladstone's "rights-of-way" are sections of land set aside for public benefit. These sections include streets and sidewalks as well as land set aside for water pipes, electricity lines and other utility infrastructure.

Our City's rights-of-way are our most valuable asset and include all the property and improvements on of Gladstone's streets. Gladstone coordinates right-of-way use among public and private users so that we can efficiently manage this large and complex resource.

New Ordinance

On May 31, 2016, The Gladstone City Council adopted Ordinance #1465 requiring all utilities to have a contractual agreement or a license to use the City's rights-of-way.

The goal is to accurately identify all right-of-way users and ensure fair, market rate compensation for the use of our most valuable asset.

Prior to the ordinance, four utility companies had obtained a license to operate within the City's right of way. Through these efforts, seven additional utility companies were identified and are in process of obtaining a license.

The Public Works Department manages the new Ordinance through a short term contract with Oregon City's Right-of-Way Program Manager, Lance Powlison.

Contact Lance Powlison at 503.496.1547 or lpowlison@orc.org for more information or if you wish to register.



Right-of-Way FAQ

Right-of-Way Frequently Asked Questions

Q: Why does the City charge utilities for using rights-of-way?

A: The rights-of-way are owned by the City. The responsibility to fund improvements and service for our rights-of-way ultimately rests with the taxpayers. In order to ensure a fair distribution of these costs, the City charges utility customers and others that uses the right-of-way rather than passing the costs directly to only property taxpayers.

Q: How much does the City charge for using rights-of-way?

A: The amount varies based on the kind of utility and how much facilities they use in the right-of-way.

Q: Does the City charge only private utilities or are publicly-owned utilities charged as well?

A: The City charges any user whether they are private (such as Portland General Electric) or public (such as the Tri-City Wastewater Treatment Plant and even the City's own utilities).

Q: Is it common for cities to charge these fees?

A: Yes. Most cities in Oregon have some kind of right-of-way management policy and charge fees for its use. The [League of Oregon Cities](#) has provided model right-of-way ordinances for cities to use and the Gladstone Ordinance is based on that model. Many other local governments in the area, such as West Linn, Oregon City and Clackamas County, charge right-of-way fees to users.

Q: How does this affect me?

A: Before the new ordinance, each utility company had an individual negotiated contract. Now the requirements and fees are fixed, which eliminates City staff and legal time, thus increasing efficiency. The Ordinance also helps the City coordinate right-of-way use so that improvements and construction happens more efficiently.

Q: Why a new policy?

A: Gladstone has aging infrastructure and is aware that careful coordination of its rights-of-way has become a necessary part of responsible management.

Q: Can these fees be negotiated?

A: Generally no. The fees are set by a resolution of the City Council. However, Gladstone staff has been in touch with cable utility users to negotiate their fees as required by federal law.

Maintenance and Improvements in Rights-of-Way

The City of Gladstone is excited to let you know that we'll be doing some maintenance and improvements in your rights-of-way, parks, and other public property throughout Gladstone.

UPCOMING MAINTENANCE AND IMPROVEMENTS

For decades Gladstone has charged franchise fees to utilities for use of the public rights-of-way. A few months ago the franchise fee was put into the Code for increased efficiency, transparency, and equality between users.

The franchise fee, now called the Right-of-Way usage fee, helps cover the costs of maintenance, improvements, and management of your public facilities. This fee fairly distributes the costs among utilities that use the rights-of-way, so that Gladstone residents don't have to shoulder the entire burden.

The recently changed PGE and NW Natural Right-of-Way usage fee now brings these utilities in line with other cities in Clackamas County, as well as the fees other utilities pay in Gladstone.

To learn more, here are some FAQ's.

FAQs:

Q: What's going to be different?

A: Utilities will be charged a user fee (like a rent) when they use City-owned lands in Gladstone. These fees help the City repair and maintain your public rights-of-way and other spaces. Utilities can pass these costs along to ratepayers. Under the new policy, the fee is collected from all users of the rights-of-way, including service districts and utilities. This means that the burden is shared by all users, and not just Gladstone taxpayers.

Q: How will my bill be affected?

A: The new policy spreads costs to utility companies who use the public rights-of-way rather than just all taxpayers. Changes to your bill will be affected by your utility use. Generally, any increases should be about the cost of a cup of coffee each month. Check your own utility bills for exact amounts.

Q: This is labeled a "Privilege Tax" on my customer notice. But Gladstone is calling it a "fee". So which is it?

A: The Oregon Supreme Court has recognized that a "Privilege Tax is not necessarily "tax" as opposed to a fee. PGE and NW Natural are choosing to label it a "privilege tax" for their purposes. Contact PGE and NW Natural to learn more about their billing language.

Q: How will the City spend the money collected from these fees?

A: The right-of-way user fees will go through the City's general fund. The Gladstone Council will ultimately decide how and where the money is spent.

Q: Why is the City doing this now?

A: Several larger cities in Oregon already have this kind of policy in place. Recently, Gladstone has determined that careful coordination of our rights-of-way have become a necessary part of responsible management.

Q: How is this fairer to ratepayers?

A: Even without this fee structure in place, Gladstone pays for costs associated with the management, upkeep, and repair of our rights-of-way and public lands. Without a policy to regulate rights-of-way users, utility companies were using the ROW for free, forcing the City to choose between forgoing certain maintenance or pass the costs along to all taxpayers.

For more information online, check out
[Right of Way: Protecting and Paying for the Public's Lifeline](#)
Final from MetroTV on Vimeo at <http://vimeo.com/70434712>

City of Gladstone Staff Report

Report Date: December 4, 2018
Meeting Date: December 11, 2018
To: Mayor Stempel and City Council
From: Jacque Betz, City Administrator. Reba Crocker, ROW Manager

AGENDA ITEM

Approval of an Ordinance amending GMC 12.24 Utility Services.

History/Background

In May of 2016, the Council adopted Ordinance 1465, which enacted a new Chapter 12.24 of the GMC entitled "Utility Facilities in Public Rights-of-Way." This program was managed through an Intergovernmental Agreement (IGA) with Oregon City.

In 2017 Oregon City terminated the IGA, as Oregon City no longer had the capacity to assist Gladstone.

In October of 2018 the City of Milwaukie and Gladstone entered into an IGA to perform ROW management services.

Since adoption in 2016, several pieces of legislation have been enacted. Along with changes in technology and standards.

Proposal

GMC 12.24 has been effective since 2016. Due to changes in industry, technology and legislation, staff has received input for other municipalities (with a similar ROW code), and utility providers. Staff recommends updating the GMC chapter 12.24 and ROW usage fees.

Updates include:

- Updates to definitions and terms.
- Language fixes, duplications, typos and such.
- License requirement modifications.
- Updates to enforcement procedures.
- Updates to ROW licensing procedures and costs.

These updates will allow Gladstone to more closely match Milwaukie's code, easing the burden on staff and Utility Operators and Providers.

Options

Reject the updates.

Cost Impact

Recommended updates will increase understanding and clarity for the Utility Operators and Providers. This increased understanding will also increase compliance and revenue. Additionally, the updates will reduce staff labor costs.

Recommended Staff Action

Staff recommends the Council adopt the updates, with the understanding that more updates will be required in the future as new legislation is enacted, technology evolves, and precedents are set.

Department Head
Signature

Date

City Administrator
Signature

Date

ORDINANCE NO. 1493

***AN ORDINANCE AMENDING GLADSTONE MUNICIPAL CODE TITLE 12,
CHAPTER 12.24, UTILITY SERVICES***

WHEREAS, the City of has authority pursuant to its Charter and the Oregon Constitution and statutes to manage its rights-of-way and to receive compensation for use of the rights-of-way consistent with applicable state and federal law, and

WHEREAS, the City adopted GMC, title 12, chapter 12.24 in 2016; and

WHEREAS, the City has determined that amendments are required; and

WHEREAS, the City finds it is in the public interest to enact the updates to the Gladstone Municipal Code as set forth in this Ordinance; and

NOW, THEREFORE, the City of Gladstone ordains as follows:

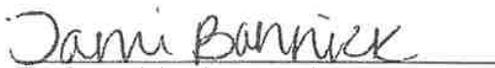
Section 1. Gladstone Municipal Code Chapter 12.24, Utility Facilities in Public Rights-of-Way, is amended as shown on exhibit A (new language appears as underlined text; deleted language appears as ~~striketrough~~ text).

Section 3. This Ordinance takes effect 30 days from its adoption.

Adopted by the Gladstone City Council this 11th day of December 2018.

ATTEST:


Tammy Stempel, Mayor


Tami Bannick, City Recorder

ORDINANCE 149365
Exhibit A

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Chapter 12.24 UTILITY SERVICES FACILITIES IN PUBLIC RIGHTS-OF-WAY

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Comment [RC1]: Changed for clarity

12.245.010. Title.

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

Comment [RC2]: Expanded for clarity. This Ordinance covers all utility services provided using the City's ROW, not just facility owners.

12.24.020. 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 cityCity for utility purposes and conserve the limited physical capacity of those rights-of-way held in trust by the cityCity consistent with applicable state and federal law;

B. Assure that the cityCity'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 cityCity and its residents for permitting use of the rights-of-way by utilities persons who generate revenue by placing, owning, using or operating facilities therein or charging residents for services delivered.

Comment [RC3]: Expanded for clarity

D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the cityCity comply with the ordinances, rules and regulations of the cityCity;

E. Assure that the cityCity can continue to fairly and responsibly protect the public health, safety and welfare of its citizens residents; and

F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City by:

1. Allow the City to enter into other agreements with Utility Providers and Operators, if the public's interest is served, and to amend the requirement of this chapter as new technology is developed;

2. Allow the City to be resilient and adaptive to changes in technology; and

Comment [RC4]: Added to be clear the City encourages advancements and the best possible service for its residents

G. Comply with applicable provisions of state and federal law.

12.24.030. Jurisdiction and Management of the Public Rights-of-way.

A. The eCity has jurisdiction and exercises regulatory management over all rights-of-way within the eCity under authority of the eCity eCharter and Oregon state law.

B. The eCity has jurisdiction and exercises regulatory management over each right-of-way whether the eCity 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 eCity is not official acceptance of the right-of-way, and does not obligate the eCity 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.

12.24.040. 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 Ceity charges, including but not limited to: any permit fee, or any other generally applicable fees, tax, or charge on business, occupations, property, or income as may be levied, imposed, or due from a utility operator, utility provider or licensee, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.

B. The eCity 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.

12.24.050. 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 not defined herein shall be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, and the Telecommunications Act. If not defined in those statutes, the words shall be given their common and ordinary meaning. 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 Act” means the Cable Communications Policy Act of 1987, 47 U.S.C., Section 521, et seq., as now and hereafter amended.

“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.

Comment [RC5]: Definitions are added and updated to reflect current standards and updated language throughout the Chapter

"Calendar year" means January 1 to December 31, unless otherwise noted.

"City" means the city of Gladstone, 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 Gladstone, Oregon.

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

"City standards" means the Gladstone Public Works and Engineering Standards, in effect at the time of any work, is subject to this Chapter.

"City property" means and includes all real property owned by the City, other than public right-of-way and utility easement as those are defined herein, and all property held in proprietary capacity by the City.

"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 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) public communications systems; (5) 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 (6) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

"Construction" means any activity in the public right-of-way resulting in physical change thereto, including excavation or placement of structures.

"Control" means actual working control over utility facilities in whatever manner exercised.

"Days" mean calendar days unless otherwise specified.

"Emergency" means a circumstance in which immediate work or action is necessary to restore lost service or prevent immediate harm to persons or property.

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

"Gross Revenue" means any and all amounts, of any kind, nature or form, without deduction for expense, less net uncollectable, derived from the operation of utility facilities in the City and the provision of utility service in the City, subject to all applicable limitations in federal or state law.

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

"Licensee" means any person that has a valid Right-of-Way license issued by the City.

"Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, municipality, special district, government entity 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 sale or resale, including trade, barter or other exchange of value, directly or indirectly, to any person.

"Public communications system" means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 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.

"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 (i) that has been privately acquired by a utility operator, (ii) solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of city facilities, or (iii) where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the City.

"Public Works Director" means the Public Works Director for the City of Gladstone or any designee.

"Right-of-way", "Rights-of-Way", "Public right-of-way", or "ROW" 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.

"Right-of-Way License" or "ROW License", or "License" means the authorization granted by the City to a utility provider or utility operator pursuant to this Chapter.

"State" means the state of Oregon.

“Structure” mean any facility a Utility Provider or Utility Operator places in the ROW, including but not limited to poles, vaults or manholes, hand holds, or junction boxes, conduit, direct bury cable, wires, pedestals, aerial cables or wires and transformers.

“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.) and as hereafter amended.

“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, ~~controls~~, operates or maintains a utility facility within the ~~city~~City.

“Utility provider” or “Provider” means any person who provides utility service to customers within the City limits, whether or not any facilities in the ROW are owned by such provider.

“Utility service” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer, and/or storm sewer to or from customers within the ~~corporate boundaries of the city~~City limits, and/or the transmission or provision of any of these services through the ~~City~~City whether or not customers within the ~~City~~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.

12.24.060. Registration Business License

~~A. Registration Business License~~ Required. Every person that desires to provide utility services to customers within the ~~e~~City shall register with the ~~city~~City, prior to providing any utility services to any customer in the ~~e~~City, ~~in compliance with Municipal Code section 5.04~~. Every person providing utility services to customers within the ~~e~~City as of the effective date of this Chapter shall ~~register~~ obtain a Business License within sixty ~~(60)~~thirty (30) days of the effective date of this Chapter. ~~Every person subject to this Chapter shall renew and maintain a Business License as required in Gladstone’s Municipal Code, heretofore or hereafter amended, at all times that the person provides and/or operates a utility services, to customers within the City, or controls a utility facility~~

~~B. Annual Registration—After registering with the city pursuant to subsection 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 A of this section 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 a description of the facilities over which the utility services will be provided.~~

~~D. Registration Fee. Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the city council in an amount sufficient to fully recover all of the city's costs of administering the registration program.~~

~~E. Exception. A person with a valid franchise agreement or license from the city shall not be required to register to provide the utility services expressly permitted by the franchise agreement or license.~~

Comment [RC6]: This is redundant and is covered in GMC under business licenses

Comment [RC7]: Section updated to include all operator and providers of services

12.24.070. Right-of-Way Licenses.

A. License Required.

1. Except those utility operators and utility providers with a valid franchise or other valid agreement from the city, every person shall obtain a ROW license from the city prior to conducting any work in or use of the ROW the rights-of-way.
2. Every person that owns or controls or uses utility facilities in the rights-of-way as of the effective date of this Chapter shall apply for a ROW license from the city within ~~sixty (60)~~ thirty (30) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid franchise agreement granted by the city, unless a new franchise agreement is granted by the city pursuant to subsection E of this section, or (3) for a person that is not a utility operator, providing utility services within the City.
3. The provisions of this section 12.24.070, do not apply to any person subject to and in compliance with the cable television franchise requirement of Chapter 5.16, except that subsection J shall apply to the extent such person provides multiple services.

Comment [RC8]: Private communication systems

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 ~~or the City, in the City's sole discretion,~~ 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, a description of 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 ~~City Council.~~

Comment [RC9]: The fee doesn't cover the City's expenses

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. ROW Licensing Fee. If the City determines a license shall be issued, the applicant shall, within thirty (30) days of notification, submit the license fee set by resolution of the City Council. Such ROW license fee shall only apply to those licenses issued, by the City, after January 12, 2019.

Comment [RC10]: The licensing fee of \$250.00 doesn't begin to cover the City costs. However, this matches other neighboring Cities

F. Changes to information contained on the license application. Within thirty (30) days of a change to the information contained in the application, the Licensee shall notify the City in writing of such change(s).

Comment [RC11]: The licensee needs to communicate with the City on changes in services provided and personnel changes. The City needs to have contact information

GF. Franchise Agreements. If the public interest warrants, as determined by the eCity in its sole discretion, the eCity and utility operator or utility provider 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 eCity eCouncil. The franchisee shall be subject to the provisions of this Chapter to the extent such provisions are not in conflict with the express provisions of any such franchise. In the event of a conflict between the express provisions of a franchise and this Chapter, the franchise shall control.

F. Rights Granted.

1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the eCity codes and other applicable provisions of state or federal law, in effect and as may be subsequently amended, to construct, place, maintain, upgrade, repair and operate utility facilities in the rights-of-way for the term of the license for the provision of utility service(s) authorized in the license. In the event the licensee offers different service(s) than those authorized in the license, the licensee shall inform the City of such changes no later than thirty (30) days after the change.
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.

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, including without limitation, the police power or regulatory power of the eCity, in existence at the time the license is issued or thereafter obtained.

~~2. 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 be effective as of the date it is issued by the City or the date services began, whichever comes first, and will have a term of five (5) calendar years beginning: (1) January 1st of the year in which the license took effect for licenses that took effect between January 1st and June 30th; or (2) January 1st of the year after the license took effect for licenses that become effective between July 1st and December 31st.

Comment [RC12]: Added language for equitable treatment.

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 eCity expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the eCity'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 eCity from grading, paving, repairing and/or altering any rights-of-way, constructing, laying down, repairing, relocating or removing eCity 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 C, D and E of Section 12.24.090, in a manner acceptable to the eCity and consistent with City standards, 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 right-of-way ROW use fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J(1) requires a utility operator to pay the right-of-way ROW use fee, if any, owed to the city City by another person using the utility operator's facilities.
2. A utility operator that provides or transmits more than one utility service to customers in the City over its facilities may not be required to obtain a separate license or franchise for each utility service, but is required to file separate remittance forms and submit any ROW usage fees due for each, provided that it gives notice to the city City of each utility service provided or transmitted and pays the applicable right-of-way usage fee due for each utility service, provided.

K. Transfer or Assignment. To the extent permitted by applicable state and federal laws, the licensee shall obtain the written consent of the eCity prior to the transfer or assignment of the license. The license shall not be transferred or assigned unless;

1. The proposed transferee or assignee is authorized under all applicable laws to own or operate the utility facilities and/or provide the utility service authorized under the license; and

~~2. The transfer or assignment is approved by all 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.~~

~~The provider requesting the transfer or assignment must cooperate with the City and provide requested documentation, as the City deems necessary, in the City's sole discretion, at no cost to the City, to sufficiently understand the transferee's ability to perform under the license.~~

~~If the City approves such transfer or assignment, the transferee or assignee shall become responsible for fulfilling all obligations under the license. A transfer or assignment of a license does not extend the term of the license.~~

~~4. If a license is transferred or assigned, the transferee or assignee shall become responsible for fulfilling all of the obligations under the license with respect to 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)~~ thirty (30) days, but no more than one hundred ~~eighty (180)~~ twenty (20) 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~~ City, including all information required in subsection B of this section and the application fee required in subsection C of this section. The ~~city~~ 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~~ City determines that the licensee is in violation of the terms of this Chapter at the time it submits its application, the ~~city~~ 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~~ City, before the ~~city~~ City will consider the application and/or grant the license. If the ~~city~~ City requires the licensee to cure or submit a plan to cure a violation, the ~~city~~ 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.

Comment [RC13]: Time lines changed to ease burden on City Staff and Industry

M. Termination.

1. Revocation or Termination of a License. The ~~city~~ City eCouncil 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~~ City after final determination ~~by the City~~ 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.

Comment [RC14]: Added for clarity

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~~ ROW licensee's history of compliance; and/or
 - e. The ~~utility operator's~~ ROW licensee's cooperation in discovering, admitting and/or curing the violation.

3. ~~Notice and Cure.~~ The city ~~City~~ shall give the ~~utility operator~~ ROW licensee written notice of any apparent violations before terminating a ROW 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~~ licensee to demonstrate that the ~~utility operator~~ licensee has remained in compliance, that the ~~utility operator~~ licensee 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~~ licensee is in the process of curing a violation or noncompliance, the ~~utility operator~~ licensee must demonstrate that it acted promptly and continues to actively work on compliance. If the ~~utility operator~~ licensee does not respond or if the ~~city manager~~ City Administrator or designee determines that the ~~utility operator's~~ licensee's response is inadequate, the ~~city manager~~ City Administrator or designee shall refer the matter to the ~~City~~ City Council, which shall provide a duly noticed public hearing to determine whether the license shall be terminated or revoked ~~and if any penalties or sanctions will be imposed.~~

4. ~~Termination by licensee.~~ If a licensee ceases to use the ROW, as defined under this Chapter, the licensee may terminate its license, with a thirty (30) day notice to the City. Licensee may reapply for a ROW license at any time. No refunds or credits will be given for licenses terminated by the licensee or the City.

- a. Within forty-five (45) days of surrendering a ROW license, the licensee shall file a final remittance form with the City stating "final remittance" and shall pay all utility fees.

Comment [RC15]: Added to allow the licensee the option to be released from ROW license requirements

12.24.080. Construction and Restoration.

A. Construction Codes. Utility facilities shall be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the Gladstone ~~Design and Construction~~ City Standards, ~~in effect at the time of the work.~~ When a utility operator, ~~utility provider or licensee,~~ 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~~ City consistent with applicable city codes, rules and regulations, ~~in effect at the time of the work.~~ A utility operator, ~~utility provider, licensee~~ 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(s), 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~~City shall not issue a permit for the construction, installation, maintenance or repair of utility facilities unless the utility operator of the facilities has applied for and received ~~the a valid license, franchise agreement or other valid agreement (if applicable),~~ required by this Chapter, ~~or has a current franchise with the city~~City, and all applicable fees have been paid. No permit is required for ~~service drops to customer premises or routine maintenance or repairs to customer service drops~~ where such ~~drops, repairs or maintenance~~ do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.
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~~City, provided that, to the extent reasonably feasible, it attempts to notify the ~~city~~City prior to commencing the emergency work and in any event applies for a permit from the ~~city~~City as soon as reasonably practicable, but not more than ~~forty-eight (48) hours~~ 1:00pm PST of the next business day after commencing the emergency work. ~~As used in this subsection, "emergency" means a circumstance in which immediate work on facilities is necessary to restore lost service or prevent immediate harm to persons or property.~~
3. Applications for permits ~~to construct~~ perform work on utility facilities ~~within the~~ ROW shall be submitted upon forms to be provided by the ~~city~~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, including the ~~Cladstone Design and Construction~~City Standards.
 - 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. The ~~public works director~~City may require additional information necessary to demonstrate that the proposed location can accommodate the utility facilities, as determined by the City. A cross-section shall be provided showing the applicant's new and existing utility facilities in relation to the street, curb, sidewalk, or ROW.
 - 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 ~~and, if deemed necessary by the City, methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the ROW.~~
 - e. ~~The permittee~~ applicant has an adequate traffic control plan.

3. All permit applications shall 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~~City ~~engineer or designee~~ may, in his or her ~~its~~ sole discretion, require the verification of a registered professional engineer ~~or other licensed profession,~~ at no cost to the City.
4. ~~5.~~ All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by ~~public works director~~the City.
5. ~~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~~City Council. In addition to the requirements of this Chapter, the applicant shall, at all times comply with all other City requirements.
6. ~~7.~~ If satisfied that the applications, plans and documents submitted comply with all requirements of this Chapter, the ~~public works director~~City shall issue a permit authorizing construction of the utility facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as ~~the City~~they may deem necessary or appropriate.
7. ~~8.~~ Except in the case of an emergency, the permittee shall notify the ~~public works City director~~ not less than two (2) working days in advance of any excavation or construction in the rights-of-way.
8. ~~9.~~ All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the utility facilities ~~that have been "Approved for Construction" by the City. The public works director and designated~~ The City and its representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.
9. ~~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 or corrected at the sole expense of the permittee. ~~The city~~City is authorized to stop work in order to ~~assure~~ensure compliance with the provision of this Chapter. If the permittee fails to remove or correct work as required in this subsection, the ~~city~~City may remove or correct the work at the expense of the permittee, after notice and opportunity to cure, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations.

10. The permittee shall be responsible for providing correct and complete information. If the City believes the permittee misrepresented, misstated, or omitted any material facts in its permit application, the City may deny or revoke the permit. The City may at any time require the permit holder to take additional measures to protect the health, safety, and welfare of the public. The permit holder shall be responsible for and pay all costs for such measures.

12. 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 sixty (60) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the public works director.

11. Traffic Control Plan. The permittee shall protect the work area with sufficient traffic controls reviewed and accepted by the City before work begins. The permittee shall at all times ensure the presence of such workers, tools and materials, flaggers, barricades, and other safety devices as may be necessary to properly protect bicyclists, pedestrians, construction personnel, and vehicular traffic upon the roadway, and to warn and safeguard the public against injury or damage resulting from the work.

12. Any supervision or control exercised by the City shall not relieve the permittee or utility operator of any duty to the general public nor shall such supervision or control relieve the permittee or utility operator from any liability for loss, damage, or injury to persons or property.

C. Performance Surety.

1. The cityCity may require a performance bond or other form of surety acceptable to the cityCity equal to at least one hundred and twenty-five percent (125%) of the estimated cost of the work within the rights-of-way of the cityCity, which bond shall be provided before construction is commenced.

~~2.~~ 3. If required, the performance bond or other form of surety acceptable to the cityCity shall remain in force until sixty (60) days after substantial completion of the work, as determined in writing by the cityCity, including restoration of rights-of-way and other property affected by the construction.

3. If required, the performance bond or other form of surety acceptable to the cityCity shall guarantee, to the satisfaction of the cityCity:

- 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 cityCity;
- 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.

4. 4.—The release of the performance bond or other surety pursuant to subsection C(1) of this section does not relieve the utility operator from its obligation to restore rights-of-way or other property as required in subsection E of this section regardless of when the failure to restore rights-of-way or other property as required by this chapter occurs or is discovered.

D. Injury to Persons or Property. A utility operator, or any person acting on its behalf, 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 rights-of-way 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, in effect at the time of the work unless otherwise directed by the cityCity and as determined by the public works director.

2. If weather or other conditions beyond the utility operator's control do not permit the complete restoration required by the cityCity, the utility operator shall temporarily restore the affected rights-of-way. 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 cityCity.

3. If the utility operator fails to restore rights-of-way as required in this Chapter, the cityCity 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, or such additional time agreed to in writing by the cityCity, to restore the rights-of-way. If, after said notice, the utility operator fails to restore the rights-of-way as required in this Chapter, the cityCity shall cause such restoration to be made at the expense of the utility operator. If the City determines a threat to public safety exists, the City shall provide necessary temporary safeguards, at the utility operators' sole expense. If such threat exists, the utility operator shall have twenty-four (24) hours to commence restoration. If work is not commenced in twenty-four (24) hours, the City, at its sole option, may commence restoration at the utility operator's sole expense.

F. **Inspection.** Every utility operator's facilities shall be subject to the right of periodic inspection by the ~~city~~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~~City in permitting the inspection of utility facilities upon request of the ~~city~~City. The utility operator shall perform all testing, or permit the ~~city~~City to perform any testing at the utility operator's expense, required by the ~~city~~City to determine that the installation of the utility operator's facilities and the restoration of the ~~right-of-way~~ROW 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~~City and other users of the rights-of-way.

~~1.~~ 1. Prior to January 1st of each year, utility operators shall provide the ~~city~~City with, a ~~written~~ schedule of known proposed construction activities for that year in, around or that may affect the rights-of-way.

~~2.~~ 2. Utility operators shall ~~may~~ meet with the ~~city~~City annually, or as determined by the ~~city~~City, ~~in its sole discretion~~, to schedule and coordinate construction in the rights-of-way.

~~3.~~ 3. All construction locations, activities and schedules within the rights-of-way shall be coordinated ~~as may be~~ ordered by the ~~City~~, to minimize public inconvenience, disruption, or damages.

H. **Contractors.** A utility operator may authorize a qualified contractor to perform any of the work authorized or required in this Chapter on the utility operator's behalf. Any contractor performing work on behalf of a utility operator shall be subject to applicable provisions of this Chapter. In the event a utility operator authorizes a contractor to perform work on its behalf, the utility operator shall remain responsible and liable for compliance with the provisions of this subchapter.

12.24.090. Location of Facilities.

A. **Location of Facilities.** Unless otherwise agreed to in writing by the ~~city~~City:

1. Utility facilities shall be installed underground in all areas of the ~~city~~City where there are no existing poles in the ~~right-of-way~~ROW, there is no space on existing poles in the ~~right-of-way~~ROW, or where the only poles in the ~~right-of-way~~ROW are used only for high voltage lines (as defined below). 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 antennas, pedestals, cabinets or other above-ground equipment of any utility operator for which the utility operator has written authorization to place above-ground.~~

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

2. Whenever any existing electric utilities, cable facilities or communications facilities are located underground within ~~the~~ ~~a~~ ~~right-of-way~~ROW of the ~~city~~City, the utility operator

with permission to occupy the same right-of-way ROW shall install all new facilities underground at no cost to the cityCity. 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 ("high voltage lines") or to antennas, pedestals, cabinets or other above-ground equipment of any utility operator. The cityCity reserves the right to require written approval of the location of any such above-ground equipment in the right-of-way ROW.

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 cityCity, by the general public or by other persons authorized to use or be present in or upon the rights-of-way. Utility facilities shall not be located in area of restricted sight distance nor interfere with the proper function of traffic control signs, signals, lighting, or other devices that affect traffic operation. All use of the rights-of-way shall be consistent with City codes, ordinances, rules and regulations in effect and as may be subsequently amended.

C. Relocation of Utility Facilities.

1. A utility operator shall, at no cost to the cityCity, temporarily or permanently remove, relocate, change or alter the position of any utility facility within thea right-of-way ROW, including relocation of aerial facilities underground, when requested to do so in writing by the cityCity.

a. If relocation is required by the City, the City shall bear no responsibility or incur any costs to provide or in any way secure alternate locations.

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 cityCity 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 cityCity and by the date reasonably established by the cityCity, the utility operator shall pay all costs incurred by the cityCity due to such failure, including but not limited to costs related to project delays, and the cityCity may cause, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, 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 cityCity, the utility operator shall reimburse the cityCity for the costs the cityCity incurred within thirty (30) days.

4. The City shall coordinate the schedule for relocation of utility facilities and based on such effort 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, change, alter or underground any utility facility as requested by the City by the date reasonably established by the City, the utility operator shall pay all costs incurred by

Comment [RC16]: Added to ease burden on Providers/Operators and to be consistent with Milwaukee

the City due to such failure, including but not limited to costs related to project delays, and the City may cause, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, the utility facilities to be removed, relocated, altered, or undergrounded at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, this utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

5. The City will cooperate with the utility operator in securing alternate locations within the ROW. The City shall bear no responsibility to obtain, compensate, or otherwise assist the utility operator in relocation of its facilities to location not in the control of the City.

D. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the public works director City, within thirty (30) days following written notice from the cityCity or such other time agreed to in writing by the cityCity, a utility operator and any other person that owns, controls, or maintains any abandoned or unauthorized utility facility within the rights-of-way shall, at its own expense, remove the facility and restore the rights-of-way as provided in section 12.24.080

1+2. A utility system or facility is unauthorized under any of the following circumstances:

- a. The utility facility, or any portion of the facility, is outside the scope of authority granted by the cityCity 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 cityCity has provided written authorization for abandonment in place.
- b. The facility has been abandoned and the cityCity 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 twelve (12) consecutive months. 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 cityCity sending written notice of such violation, unless the cityCity extends such time period in writing.

E. Removal by City.

1. The cityCity retains the right and privilege to cut or move ~~the any utility~~ facilities of any utility operator or similar entity located within the rights-of-way of the cityCity, without notice, as the cityCity may determine to be necessary, appropriate or useful in response to a public health or safety emergency. The cityCity will use qualified personnel or contractors consistent with applicable state and federal safety laws and regulations to the

extent reasonably practicable without impeding the eCity's response to the emergency. The eCity will use best efforts to provide the utility operator with notice prior to cutting or moving facilities. If prior notice is not possible, the eCity will provide such notice as soon as reasonably practicable after ~~taking such action.~~ resolution of the emergency.

2. If the utility operator fails to remove any facility when required to do so under this Chapter, the eCity 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 eCity in removing the facility and obtaining reimbursement. Upon receipt of a detailed invoice from the eCity, the utility operator shall reimburse the eCity for the costs the eCity incurred within thirty (30) days. The obligation to remove shall survive the termination of the license or franchise.

3. The eCity shall not be liable to any utility operator for any damage to utility facilities, or for any incidental or consequential losses resulting directly or indirectly therefrom, by the eCity 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 eCity's negligence or willful misconduct.

F. Engineering Record Drawings. The utility operator shall provide the eCity with two complete sets of record drawings in a form acceptable to the eCity showing the location of all its utility facilities in the ROW after initial construction if such plan changed during construction, upon completion of construction. The utility operator shall provide updated complete sets of as built plans upon request of the eCity, but not more than once per year.

G. Utility operator, Utility provider and ROW Licensee shall provide, at no cost to the City, a comprehensive map showing the location of any facility in the City. Such map shall be provided in a format acceptable to the City, with accompanying data sufficient enough for the City to determine the exact location of facilities, currently in Shapefile or Geodatabase format. The City may not request such information more than once per year.

Comment [RC17]: As first responders, the City MUST have this information.

12.24.100. Leased Capacity.

A utility operator may lease capacity on or in its ~~systems~~ facilities to others, provided that, upon request, the utility operator provides the eCity with the name and business address of any lessee. A utility operator is not required to provide such information if disclosure is expressly prohibited by applicable law. A utility operator shall require that all leases have obtained proper authority, in the form of a permit, license or franchise from the City before leasing capacity on or in its facilities, or a valid agreement between the utility operator and the lessee.

Comment [RC18]: The City has the right to know this information

12.24.110. 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 cityCity of the need for repair or maintenance as required in subsection A of this section, a utility operator fails to repair and maintain facilities as requested by the cityCity and by the date reasonably established by the cityCity, the cityCity may perform such repair or maintenance using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations at the utility operator's sole expense. Upon receipt of a detailed invoice from the cityCity, the utility operator shall reimburse the cityCity for the costs the cityCity incurred within thirty (30) days.

12.24.120. Vacation.

If the cityCity vacates any right-of-wayROW, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the right-of-wayROW unless the cityCity reserves a public utility easement, which the cityCity shall make a reasonable effort to do provided that there is no expense to the cityCity, 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-wayROW is vacated, or as otherwise directed or agreed to in writing by the cityCity, the cityCity may remove the facilities using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations at the utility operator's sole expense. Upon receipt of an invoice from the cityCity, the utility operator shall reimburse the cityCity for the costs the cityCity incurred within thirty (30) days.

12.24.130. Right-of-Way Use Fee.

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the cityCity and every person that uses utility facilities in the cityCity to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the right-of-wayROW use fee for every utility service provided using the rights-of-way in the amount determined by resolution of the eCity eCouncil.

B. A utility operator whose only facilities in the right-of-wayROW are facilities mounted on above-ground structures within the right-of-wayROW, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the right-of-wayROW (other than equipment necessary to operate the mounted facilities that has been expressly approved by the City to be placed in the ROW), shall pay the attachment fee set by eCity eCouncil resolution for each attachment, or such other fee set forth in the license granted by the eCity. Unless otherwise agreed to in writing by the eCity, the fee shall be paid annually/quarterly, in arrears, within forty-five (45) days after the end of each calendar year/and quarter and shall be accompanied by information sufficient to illustrate the 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.~~

C. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable.

DE. Right-of-way use fee 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).

Comment [RC19]: Must remain to impose on PGE and NW Natural

ED. Unless otherwise agreed to in writing by the eCity, the right-of-wayROW use fee set forth in subsection A of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable (a remittance form may be provided by the City). The City may request and will be provided at no cost to the City, any additional reports or information it deems necessary, in its sole discretion, to ensure compliance by the utility provider, utility operator or licensee. Such information may include, but is not limited to: chart of accounts, total revenues by categories and dates, list of products and services, narrative documenting calculation, details on number of customers within the City limits, or any other information needed for the City to easily verify compliance. The utility shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

EE. The calculation of the right-of-wayROW use fee required by this section shall be subject to all applicable limitations imposed by federal or state law in effect and as may be subsequently amended.

EF. The eCity reserves the right to enact other fees and taxes applicable to the utility providers, utility operators and licensee subject to this Chapter. Unless expressly permitted by the eCity 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 right-of-wayROW use fee or any other fees required by this Chapter.

12.24.135 Penalties and Interest on Right-of-Way Usage Fee

A. Prior to February 1, 2019 ROW Usage fees not received by the City on or before the due date are subject to interest of nine percent (9%) per year.

Comment [RC20]: Simpler way of calculating late fees for the City and User

Comment [RC21]: To match effective date of updated code

B. After February 1, 2019 the following penalties will be imposed.

Penalties and interest imposed by this section are in addition to any penalties that may be assessed under other sections or chapters of the Gladstone Municipal Code.

1. Any person who has not submitted the required remittance forms or remitted the correct fees when due as provided in Section 12.24.130 shall pay a penalty listed below in addition to the amount due:

a. First occurrence during any one calendar year: Ten percent (10%) of the amount owed, or Twenty-five dollars (\$25.00), whichever is greater.

b. Second occurrence during any one calendar year: Fifteen percent (15%) of the amount owed, or Fifty dollars (\$50.00), whichever is greater.

c. Third occurrence during any one calendar year: Twenty percent (20%) of the amount owed, or Seventy-five dollars (\$75.00), whichever is greater.

d. Fourth occurrence during any one calendar year: Twenty-five percent (25%) of the amount owed, or One hundred dollars (\$100.00), whichever is greater.

2. If the City determines that the nonpayment of any remittance due under this section is due to fraud or intent to evade the provisions hereof, an additional penalty of twenty-five percent (25%) of the amount owed, or Five hundred dollars (\$500.00), whichever is greater, shall be added thereto in addition to other penalties stated in 12.24.135.
3. In addition to the penalties imposed, any person who fails to remit any fee when due as provided in Section 12.24.130 shall pay interest at the rate of 1.5% per month or fractions thereof, without proration for portions of a month, on the total amount due (including penalties), from the date on which the remittance first became delinquent, until received by the City.
4. Every penalty imposed, and such interest as accrues under the provision of this section, shall be merged with, and become part of, the fee required to be paid.

The City Administrator or designee, in their sole discretion, shall have the authority to reduce or waive the penalties and interest due under this subsection 12.24.135

12.24.140. Audits.

A. Within thirty (30) days of a written request from the cityCity, or as otherwise agreed to in writing by the cityCity:

1. Every licensee, utility operator and utility provider of utility service shall furnish the cityCity, at no cost to the City, with information sufficient to demonstrate that the provider licensee 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-business license fee, ROW licensing fee, right-of-wayROW use fee, attachment fee or franchise fee.
2. Every utility operator, provider and licensee shall make available for inspection by the cityCity 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. Access shall be provided within the cityCity unless prior arrangement for access elsewhere has been made with the cityCity.

B. If the cityCity's audit of the books, records and other documents or information of the licensee utility operator or utility service-provider demonstrate that the licensee, utility operator or utility provider has underpaid the right-of-wayROW use fee, licensing fee, attachment fee or franchise fee or any other fee or payment by three percent (3%) or more in any one (1) year, the licensee, utility operator, or utility provider shall reimburse the cityCity for the cost of the audit,

in addition to any interest owed pursuant to ~~subsection B or subsection D~~ of Section 12.24.130 or as specified in ~~other agreements or franchises~~ with the City.

C. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) days of the ~~city~~City's notice to the utility service provider of such underpayment.

~~D. The Licensee, Utility Provider or Utility Operator is not required to maintain records for more than six (6) years. The City is not required to maintain records beyond the State retention schedules.~~

12.24.150. 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~~City, as well as the ~~city~~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. Commercial Automobile 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. If not otherwise included in the policies required by subsection a. above, maintain 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).
 - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.
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, with the exception of worker's compensation, as additional insureds the city and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the city, and the certificate of insurance shall include such an endorsement.~~ 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~~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 off-line~~, or keep in force a self-insured retention plus insurance, for any or all of the above coverage.

1. The utility operator shall maintain on file with the cityCity a certificate of insurance, or proof of self-insurance acceptable to the cityCity, certifying the coverage required above.

B. Financial Assurance. Unless otherwise agreed to in writing by the cityCity, 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 or assurance, in a form acceptable to the cityCity, 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 cityCity pays or incurs because of any failure attributable to the utility operator to comply with the codes, ordinances, rules, regulations or permits of the cityCity. This obligation is in addition to the performance surety required by subsection C of Section 12.24.080.

C. Indemnification.

1. Each utility operator shall defend, indemnify and hold the cityCity 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 12.24.070 of this Chapter, or of a franchise granted by the cityCity, shall constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. Upon notification of any such claim the cityCity shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

1.2. Every utility operator shall also indemnify the cityCity for any damages, claims, additional costs or expenses assessed against or payable by the cityCity 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 in a timely manner, unless the utility operator's failure arises directly from the cityCity's negligence or willful misconduct.

12.24.160. Compliance.

Every licensee, utility operator and utility provider shall 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 cityCity, heretofore or hereafter adopted or established during the entire term of any license granted under this Chapter.

12.24.170. Confidential/Proprietary Information.

If any person is required by this Chapter to provide books, records, maps or information to the cityCity that the person reasonably believes to be confidential or proprietary, and such books, records, maps or information are clearly marked as confidential at the time of disclosure to the cityCity ("confidential information"), the cityCity shall take reasonable steps to protect the confidential information to the extent permitted by Oregon Public Records Laws. In the event the cityCity receives a public records request to inspect any confidential information and the cityCity determines that it will be necessary to reveal the confidential information, to the extent reasonably possible the cityCity will notify the person that submitted the confidential information of the records request prior to releasing the confidential information. The cityCity shall not be required to incur any costs to protect any confidential information, other than the cityCity's routine internal procedures for complying with the Oregon Public Records Law.

12.24.180. Penalties.

~~A. Violation of the requirements of this Chapter constitutes a Class A Infraction. Each day a violation continues shall constitute a separate offense. Any person found in violation of any of the provision of this Chapter or the Right-of-WayROW license shall be subject to a penalty of not less than one hundred fifty dollars (\$150), nor more than twenty-five hundred dollars (\$2,500) for each offense. A violation shall be deemed to exist separately for each and every day during which a violation exists.~~

B. Nothing in this Chapter shall be construed as limiting any judicial or other remedies the cityCity may have at law or in equity, for enforcement of this Chapter.

12.24.190. 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 cityCity.

12.24.200. 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 cityCity.

ORDINANCE 1493
Exhibit A

Chapter 12.24 UTILITY SERVICES

12.245.010. Title.

The ordinance codified in this Chapter shall be known and may be referenced as the utility service ordinance.

12.24.020. 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 by persons who generate revenue by placing, owning, using or operating facilities therein or charging residents for services delivered;

D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the City 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 residents;

F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City by;

1. Allow the City to enter into other agreements with Utility Providers and Operators, if the public's interest is served, and to amend the requirement of this chapter as new technology is developed;

2. Allow the City to be resilient and adaptive to changes in technology; and

G. Comply with applicable provisions of state and federal law.

12.24.030. 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 Oregon 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.

12.24.040. 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, including but not limited to: any permit fee, or any other generally applicable fees, tax, or charge on business, occupations, property, or income as may be levied, imposed, or due from a utility operator, utility provider or licensee, 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.

12.24.050. 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 not defined herein shall be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, and the Telecommunications Act. If not defined in those statutes, the words shall be given their common and ordinary meaning. 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 Act" means the Cable Communications Policy Act of 1987, 47 U.S.C., Section 521, et seq., as now and hereafter amended.

"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.

"Calendar year" means January 1 to December 31, unless otherwise noted.

“City” means the city of Gladstone, 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 Gladstone, Oregon.

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

“City standards” means the Gladstone Public Works and Engineering Standards, in effect at the time of any work, is subject to this Chapter.

“City property” means and includes all real property owned by the City, other than public right-of-way and utility easement as those are defined herein, and all property held in proprietary capacity by the City.

“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 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) public communications systems; (5) 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 (6) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

“Construction” means any activity in the public right-of-way resulting in physical change thereto, including excavation or placement of structures.

“Control” means actual working control over utility facilities in whatever manner exercised.

“Days” mean calendar days unless otherwise specified.

“Emergency” means a circumstance in which immediate work or action is necessary to restore lost service or prevent immediate harm to persons or property.

“Federal Communications Commission” or “FCC” means the federal administrative agency, or its lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

“Gross Revenue” means any and all amounts, of any kind, nature or form, without deduction for expense, less net uncollectable, derived from the operation of utility facilities in the City and the provision of utility service in the City, subject to all applicable limitations in federal or state law.

“License” or “ROW license” means the authorization granted by the City to a utility operator or utility provider pursuant to this Chapter.

“Licensee” means any person that has a valid Right-of-Way licensed issued by the City.

“Person” means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, municipality, special district, government entity 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 sale or resale, including trade, barter or other exchange of value, directly or indirectly, to any person.

“Public communications system” means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 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.

“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 (i) that has been privately acquired by a utility operator, (ii) solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of city facilities, or (iii) where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the City.

“Public Works Director” means the Public Works Director for the City of Gladstone or any designee.

“Right-of-way” , “Rights-of-Way”, “Public right-of-way”, or “ROW” 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.

“Right-of-Way License” , “ROW License”, or “Licensee” means the authorization granted by the City to a utility provider or utility operator pursuant to this Chapter.

“State” means the state of Oregon.

“Structure” mean any facility a Utility Provider or Utility Operator places in the ROW, including but not limited to poles, vaults or manholes, hand holds, or junction boxes, conduit, direct bury cable, wires, pedestals, aerial cables or wires and transformers.

“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.) and as hereafter amended.

“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, controls, operates or maintains a utility facility within the City.

“Utility provider” or “Provider” means any person who provides utility service to customers within the City limits, whether or not any facilities in the ROW are owned by such provider.

“Utility service” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer, and/or storm sewer to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions

“Work” means the construction, demolition, installation, replacement, repair, maintenance or relocation of any utility facility, including but not limited to any excavation and restoration required in association with such construction, demolition, installation, replacement, repair, maintenance or relocation.

12.24.060. Business License

Business License 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, in compliance with Municipal Code section 5.04. Every person providing utility services to customers within the City as of the effective date of this Chapter shall obtain a Business License within thirty (30) days of the effective date of this Chapter. Every person subject to this Chapter shall renew and maintain a Business License as required in Gladstone’s Municipal Code, heretofore or hereafter amended, at all times that the person provides and/or operates a utility services, to customers within the City, or controls a utility facility

12.24.070. Right-of-Way License.

A. License Required.

1. Except those utility operators and utility providers with a valid franchise or other valid agreement from the City, every person shall obtain a ROW license from the City prior to conducting any work in or use of the ROW.
2. Every person that owns or controls, or uses utility facilities in the rights-of-way as of the effective date of this Chapter shall apply for a ROW license from the City within thirty (30) days of the later of: (1) the effective date of this Chapter, or (2) the expiration of a valid agreement granted by the City, unless a new agreement is granted by the City pursuant to subsection E of this section or (3) for a person that is not a utility operator, providing utility services within the City.
3. The provisions of this section 12.24.070, do not apply to any person subject to and in compliance with the cable television franchise requirement of Chapter 5.16, except that subsection J shall apply to the extent such person provides multiple services.

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 or the City, in the City's sole discretion, 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, a description of 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.

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. ROW Licensing Fee. If the City determines a license shall be issued, the applicant shall, within thirty (30) days of notification, submit the license fee set by resolution of the City Council. Such ROW license fee shall only apply to those licenses issued, by the City, after January 12, 2019.

F. Changes to information contained on the license application. Within thirty (30) days of a change to the information contained in the application, the Licensee shall notify the City in writing of such change(s).

G. Franchise Agreements. If the public interest warrants, as determined by the City in its sole discretion, the City and utility operator or utility provider 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 the express provisions of any such franchise. In the event of a conflict between the express provisions of a franchise and this Chapter, the franchise shall control.

F. Rights Granted.

1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the City codes and other applicable provisions of state or federal law, in effect and as may be subsequently amended, to construct, place, maintain, upgrade, repair and operate utility facilities in the rights-of-way for the term of the license for the provision of utility service(s) authorized in the license. In the event the licensee offers different service(s) than those authorized in the license, the licensee shall inform the City of such changes no later than thirty (30) days after the change.
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.

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, including without limitation, the police power or regulatory power of the City, in existence 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 be effective as of the date it is issued by the City or the date services began, whichever comes first, and will have a term of five (5) calendar years beginning: (1) January 1st of the year in which the license took effect for licenses that took effect between January 1st and June 30th; or (2) January 1st of the year after the license took effect for licenses that become effective between July 1st and December 31st.

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 C, D and E of Section 12.24.090, in a manner acceptable to the City and consistent with City standards, 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 ROW use fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J(1) requires a utility operator to pay the ROW use fee, if any, owed to the City by another person using the utility operator's facilities.
2. A utility operator that provides or transmits more than one utility service to customers in the City may not be required to obtain a separate license or franchise for each utility service, but is required to file separate remittance forms and submit any ROW usage fees due for each utility service provided.

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;

1. The proposed transferee or assignee is authorized under all applicable laws to own or operate the utility facilities and/or provide the utility service authorized under the license; and
2. 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.

The provider requesting the transfer or assignment must cooperate with the City and provide requested documentation, as the City deems necessary, in the City's sole discretion, at no cost to the City, to sufficiently understand the transferees' ability to perform under the license.

If the City approves such transfer or assignment, the transferee or assignee shall become responsible for fulfilling all obligations under the license. A transfer or assignment of a license does not extend the term of the license.

L. Renewal. At least thirty (30) days, but no more than one hundred twenty (120) 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 by the City, 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 ROW licensee's history of compliance; and/or
 - e. The ROW licensee's cooperation in discovering, admitting and/or curing the violation.

3. Notice and Cure. The City shall give the ROW licensee written notice of any apparent violations before terminating a ROW 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 Licensee to demonstrate that the Licensee has remained in compliance, that the Licensee 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 Licensee is in the process of curing a violation or noncompliance, the Licensee must demonstrate that it acted promptly and continues to actively work on compliance. If the Licensee does not respond or if the City Administrator or designee determines that the Licensee's response is inadequate, the City Administrator 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 and if any penalties or sanctions will be imposed.

4. Termination by licensee. If a licensee ceases to use the ROW, as defined under this Chapter, the licensee may terminate its license, with a thirty (30) day notice to the City.

Licensee may reapply for a ROW license at any time. No refunds or credits will be given for licenses terminated by the licensee or the City.

- a. Within forty-five (45) days of surrendering a ROW license, the licensee shall file a final remittance form with the City stating, "final remittance" and shall pay all usage fees.

12.24.080. Construction and Restoration.

A. Construction Codes. Utility facilities shall be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the Gladstone City Standards, in effect at the time of the work. When a utility operator, utility provider or licensee, 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, in effect at the time of the work. A utility operator, utility provider, licensee 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(s), 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 applied for and received a valid license, franchise agreement or other valid agreement (if applicable), required by this Chapter, and all applicable fees have been paid. No permit is required for routine maintenance or repairs to customer service drops where such, repairs or maintenance do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.
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 5:00pm PST of the next business day after commencing the emergency work.
3. Applications for permits perform work on utility facilities within the ROW 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, including City Standards.
 - 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. The City may require additional information necessary to demonstrate that the proposed location can accommodate the utility facilities, as determined by the City. A cross-section shall be provided showing the applicant's new and existing utility facilities in relation to the street, curb, sidewalk, or ROW.
 - 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 and, if deemed necessary by the City, methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the ROW.
 - e. The applicant has an adequate traffic control plan.
3. All permit applications shall 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 its sole discretion, require the verification of a registered professional engineer or other licensed profession, at no cost to the City.
 4. All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by the City.
 5. In addition to the requirements of this Chapter, the applicant shall, at all times comply with all other City requirements.
 6. If satisfied that the applications, plans and documents submitted comply with all requirements of this Chapter, the City shall issue a permit authorizing construction of the utility facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as the City may deem necessary or appropriate.
 7. Except in the case of an emergency, the permittee shall notify the City not less than two (2) working days in advance of any excavation or construction in the rights-of-way.
 8. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the utility facilities that have been "Approved for Construction" by the City. The City and its representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.
 9. 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 or corrected at the sole expense of the permittee. The City is authorized to stop work in

order to ensure compliance with the provision of this Chapter. If the permittee fails to remove or correct work as required in this subsection, the City may remove or correct the work at the expense of the permittee, after notice and opportunity to cure, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations.

10. The permittee shall be responsible for providing correct and complete information. If the City believes the permittee misrepresented, misstated, or omitted any material fact(s) in its permit application, the City may deny or revoke the permit. The City may at any time require the permit holder to take additional measures to protect the health, safety, and welfare of the public. The permit holder shall be responsible for and pay all costs for such measures
 12. The permittee shall promptly complete all construction activities so as to minimize disruption of the rights-of-way and other public and private property. All construction work within the rights-of-way, including restoration, must be completed within sixty (60) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the City.
 11. Traffic Control Plan. The permittee shall protect the work area with sufficient traffic controls reviewed and accepted by the City before work begins. The permittee shall at all times ensure the presence of such workers, tools and materials, flaggers, barricades, and other safety devices as may be necessary to properly protect bicyclists, pedestrians, construction personnel, and vehicular traffic upon the roadway, and to warn and safeguard the public against injury or damage resulting from the work.
 12. Any supervision or control exercised by the City shall not relieve the permittee or utility operator of any duty to the general public nor shall such supervision or control relieve the permittee or utility operator from any liability for loss, damage, or injury to persons or property.
- C. Performance Surety.
1. The City may require a performance bond or other form of surety acceptable to the City equal to at least one hundred and twenty-five percent (125%) of the estimated cost of the work within the rights-of-way of the City, which bond shall be provided before construction is commenced.
 3. If required, 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. If required, 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.
4. The release of the performance bond or other surety pursuant to subsection C(1) of this section does not relieve the utility operator from its obligation to restore rights-of-way or other property as required in subsection E of this section regardless of when the failure to restore rights-of-way or other property as required by this chapter occurs or is discovered.

D. Injury to Persons or Property. A utility operator, or any person acting on its behalf, 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 rights-of-way 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, in effect at the time of the work unless otherwise directed by the City.
2. If weather or other conditions beyond the utility operator's control do not permit the complete restoration required by the City, the utility operator shall temporarily restore the affected area. 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 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, or such additional time agreed to in writing by the City, to restore the rights-of-way. If, after said notice, the utility operator fails to restore the rights-of-way as required in this Chapter, the City shall cause such restoration to be made at the expense of the utility operator. If the City determines a threat to public safety exists, the City shall provide necessary temporary safeguards, at the utility operators' sole expense. If such threat exists, the utility operator shall have twenty-four (24) hours to commence restoration. If work is not commenced in twenty-four (24) hours, the City, at its sole option, may commence restoration at the utility

operator's sole expense.

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 ROW 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 written schedule of known proposed construction activities for that year in, around or that may affect the rights-of-way.
2. Utility operators may meet with the City annually, or as determined by the City, in its sole discretion, 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 may be ordered by the City, to minimize public inconvenience, disruption, or damages.

H. Contractors. A utility operator may authorize a qualified contractor to perform any of the work authorized or required in this Chapter on the utility operator's behalf. Any contractor performing work on behalf of a utility operator shall be subject to applicable provisions of this Chapter. In the event a utility operator authorizes a contractor to perform work on its behalf, the utility operator shall remain responsible and liable for compliance with the provisions of this subchapter.

12.24.090. Location of Facilities.

A. Location of Facilities. Unless otherwise agreed to in writing by the City:

1. Utility facilities shall be installed underground in all areas of the City where there are no existing poles in the ROW, there is no space on existing poles in the ROW, or where the only poles in the ROW are used only for high voltage lines (as defined below). 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 antennas, pedestals, cabinets or other above-ground equipment of any utility operator for which the utility operator has written authorization to place above-ground.
2. Whenever any existing electric utilities, cable facilities or communications facilities are located underground within the ROW of the City, the utility operator with permission to occupy the same ROW shall install all new facilities underground at no cost to the City. 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 (“high voltage lines”) or to antennas, 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 ROW.

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. Utility facilities shall not be located in area of restricted sight distance nor interfere with the proper function of traffic control signs, signals, lighting, or other devices that affect traffic operation. All use of the rights-of-way shall be consistent with City codes, ordinances, rules and regulations in effect and as may be subsequently amended.

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 the ROW, including relocation of aerial facilities underground, when requested to do so in writing by the City.
 - a. If relocation is required by the City, the City shall bear no responsibility or incur any costs, to provide or in any way secure alternate locations.
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, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, 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.
4. The City shall coordinate the schedule for relocation of utility facilities and based on such effort 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, change, alter or underground any utility facility as requested by the City 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, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, 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, this utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

5. The City will cooperate with the utility operator in securing alternate locations within the ROW. The City shall bear no responsibility to obtain, compensate, or otherwise assist the utility operator in relocation of its facilities to location not in the control of the City.

D. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the City, within thirty (30) days following written notice from the City or such other time agreed to in writing by the City, a utility operator and any other person that owns, controls, or maintains any abandoned or unauthorized utility facility within the rights-of-way shall, at its own expense, remove the facility and restore the rights-of-way as provided in section 12.24.080
2. A utility system or facility is unauthorized under any of the following circumstances:
 - a. The utility facility, or any portion of the 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 twelve (12) consecutive months. 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 any utility facilities located within the rights-of-way, 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. The City will use best efforts to provide the utility operator with notice prior to cutting or moving facilities. If prior notice is not possible, the City will provide such notice as soon as reasonably practicable after resolution of 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 incidental or 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 Record Drawings.** The utility operator shall provide the City with two complete sets of record drawings in a form acceptable to the City showing the location of all its utility facilities in the ROW after initial construction if such plan changed during construction. The utility operator shall provide updated complete sets of as built plans upon request of the City, but not more than once per year.

G. Utility operator, Utility provider and ROW Licensee shall provide, at no cost to the City, a comprehensive map showing the location of any facility in the City. Such map shall be provided in a format acceptable to the City, with accompanying data sufficient enough for the City to determine the exact location of facilities, currently in Shapefile or Geodatabase format. The City may not request such information more than once per year.

12.24.100. Leased Capacity.

A utility operator may lease capacity on or in its facilities 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 expressly prohibited by applicable law. A utility operator shall require that all leases have obtained proper authority, in the form of a permit, license or franchise from the City before leasing capacity on or in its facilities.

12.24.110. 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 as required in subsection A of this section, 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 consistent with applicable state and federal safety laws and regulations 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.

12.24.120. Vacation.

If the City vacates any ROW, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the ROW 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 ROW is vacated, or as otherwise directed or agreed to in writing by the City, the City may remove the facilities using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations 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.

12.24.130. Right-of-Way Use Fee.

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the ROW use fee for every utility service provided using the rights-of-way in the amount determined by resolution of the City Council.

B. A utility operator whose only facilities in the ROW are facilities mounted on above-ground structures within the ROW, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the ROW (other than equipment necessary to operate the mounted facilities that has been expressly approved by the City to be placed in the ROW), shall pay the attachment fee set by City Council resolution for each attachment, or such other fee set forth in the license granted by the City. Unless otherwise agreed to in writing by the City, the fee shall be paid quarterly, in arrears, within forty-five (45) days after the end of each calendar quarter and shall be accompanied by information sufficient to illustrate the calculation of the amount payable.

C. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable.

D. Right-of-way use fee 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).

E. Unless otherwise agreed to in writing by the City, the ROW use fee set forth in subsection A of this section shall be paid quarterly, in arrears, within forty-five (45) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable (a remittance form may be provided by the City). The City may request and will be provided at no cost to the City, any additional reports or information it deems necessary, in its sole discretion, to ensure compliance by the utility provider, utility operator or licensee. Such information may include, but is not limited to: chart of accounts, total revenues by categories and dates, list of products and services, narrative

documenting calculation, details on number of customers within the City limits, or any other information needed for the City to easily verify compliance.

F. The calculation of the ROW use fee required by this section shall be subject to all applicable limitations imposed by federal or state law in effect and as may be subsequently amended.

G. The City reserves the right to enact other fees and taxes applicable to the utility providers, utility operators and licensee 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 ROW use fee or any other fees required by this Chapter.

12.24.135 Penalties and Interest on Right-of-Way Usage Fee

A. Prior to February 1, 2019 ROW Usage fees not received by the City on or before the due date are subject to interest of nine percent (9%) per year.

B. After February 1, 2019 the following penalties will be imposed.

Penalties and interest imposed by this section are in addition to any penalties that may be assessed under other sections or chapters of the Gladstone Municipal Code.

1. Any person who has not submitted the required remittance forms or remitted the correct fees when due as provided in Section 12.24.130 shall pay a penalty listed below in addition to the amount due:
 - a. First occurrence during any one calendar year; Ten percent (10%) of the amount owed, or Twenty-five dollars (\$25.00), whichever is greater.
 - b. Second occurrence during any one calendar year; Fifteen percent (15%) of the amount owed, or Fifty dollars (\$50.00), whichever is greater.
 - c. Third occurrence during any one calendar year; Twenty percent (20%) of the amount owed, or Seventy-five dollars (\$75.00), whichever is greater.
 - d. Fourth occurrence during any one calendar year; Twenty-five percent (25%) of the amount owed, or One hundred dollars (\$100.00), whichever is greater.
2. If the City determines that the nonpayment of any remittance due under this section is due to fraud or intent to evade the provisions hereof, an additional penalty of twenty-five percent (25%) of the amount owed, or Five hundred dollars (\$500.00), whichever is greater, shall be added thereto in addition to other penalties stated in 12.24.135.
3. In addition to the penalties imposed, any person who fails to remit any fee when due as provided in Section 12.24.130 shall pay interest at the rate of 1.5% per month or fractions thereof, without proration for portions of a month, on the total amount due (including penalties), from the date on which the remittance first became delinquent, until received by the City.
4. Every penalty imposed, and such interest as accrues under the provision of this section, shall be merged with, and become part of, the fee required to be paid.

The City Administrator or designee, in their sole discretion, shall have the authority to reduce or waive the penalties and interest due under this subsection 12.24.135

12.24.140. 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 licensee, utility operator and utility provider shall furnish the City, at no cost to the City, with information sufficient to demonstrate compliance with all the requirements of this Chapter and its franchise agreement, if any, including but not limited to payment of any applicable business license fee, ROW licensing fee, ROW use fee, attachment fee or franchise fee.
2. Every utility operator, provider and licensee 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. 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 licensee utility operator or utility provider demonstrate that the licensee, utility operator or utility provider has underpaid the ROW use fee, licensing fee, attachment fee or franchise fee or any other fee or payment by three percent (3%) or more in any one (1) year, the licensee, utility operator, or utility provider shall reimburse the City for the cost of the audit, in addition to any interest owed pursuant to Section 12.24.130 or as specified in other agreements or franchises with the City.

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.

D. The Licensee, Utility Provider or Utility Operator is not required to maintain records for more than six (6) years. The City is not required to maintain records beyond the State retention schedules.

12.24.150. 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. Commercial Automobile 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. If not otherwise included in the policies required by subsection a. above, maintain 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).
 - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.
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, with the exception of worker's compensation, as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City, and the certificate of insurance shall include such an endorsement. 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 or assurance, 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 C of Section 12.24.080.

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 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 12.24.070 of this Chapter, or of a franchise granted by the City, shall constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. 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 in a timely manner, unless the utility operator's failure arises directly from the City's negligence or willful misconduct.

12.24.160. Compliance.

Every licensee, utility operator and utility provider shall 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 entire term of any license granted under this Chapter.

12.24.170. 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, and such books, records, maps or information are clearly marked as confidential at the time of disclosure to the City ("confidential information"), the City shall take reasonable steps to protect the confidential information to the extent permitted by Oregon Public Records Laws. In the event the City receives a public records request to inspect any confidential information and the City determines that it will be necessary to reveal the confidential information, to the extent reasonably possible the City will notify the person that submitted the confidential information of the records request prior to releasing the confidential information. The City shall not be required to incur any costs to protect any confidential information, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

12.24.180. Penalties.

A. Any person found in violation of any of the provision of this Chapter or the ROW license shall be subject to a penalty of not less than one hundred fifty dollars (\$150), nor more than twenty-five hundred dollars (\$2,500) for each offense. A violation shall be deemed to exist separately for each and every day during which a violation exists.

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.

12.24.190. 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.

12.24.200. 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.