Chapter 15.06 UTILITY SERVICES IN PUBLIC RIGHTS-OF-WAY

Sections:

15.06.010 Short Title

This chapter will be known and referred to as the Utility Service in Public Rights-of-Way Ordinance. (Ord. 18-24 §1)

15.06.020 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, or operating facilities therein;

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

E. Assure that the city can continue to fairly and responsibly protect the public health, safety and welfare of its residents, and assure the structural integrity of its rights-of-way when a primary cause for the early and excessive deterioration of the rights-of-way is their frequent excavation by persons whose facilities are located therein;

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

G. Comply with applicable provisions of state and federal law. (Ord. 18-24 §1)

15.06.030 Jurisdiction

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, will be interpreted to be consistent with such laws, rules, and regulations. (Ord. 18-24 §1)

15.06.040 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 fee, tax or charge on the business, occupation, property or income, as may be levied, imposed or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery or transmission of utility services.

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. (Ord. 18-24 §1)

15.06.050 Definitions.

For the purpose of this chapter the following terms, phrases, words and their derivations have the meaning given herein. When not inconsistent with the context, words not defined herein have 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 will 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 word "will" is mandatory and "may" is permissive.

"Cable Act" means the Cable Communications Policy Act of 1984, 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: (1) video programming; or (2) 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 Tigard, 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 Tigard, Oregon.

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

"City property" means and includes all real property owned by the city, other than public

rights-of-way and utility easements, as those are defined herein; all property held in proprietary capacity by the city.

"City standards" means the applicable engineering and public improvement design standards in effect at the time of any work subject to this chapter.

"Communications services" means any service provided for the purpose of transmission of information including, but not limited to, voice, video or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications services includes all forms of telephone services 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) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; (4) public communications systems; and (5) 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.

"Days" means calendar days, unless otherwise specified.

"Emergency" means a circumstance in which immediate repair to damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.

"Gross revenue" means any and all amounts, of any kind, nature, or form, without deduction for expense, less net uncollectables, 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 state and federal law.

"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, local service district, governmental 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 their 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 construction, reconstruction, operation, maintenance, inspection and repair of utility facilities. "Public utility easement" does not include an easement: (1) that has been privately acquired by a utility operator; (2) solely for the construction, reconstruction, operation, maintenance, inspection and repair of city

facilities; or (3) where the proposed use by the utility operator is inconsistent with the terms of another easement granted to the city that applies to the same location.

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

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

"State" means the State of Oregon.

"Telecommunications Act" means the Communications Act of 1934, as amended by subsequent enactments including the Telecommunication 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 or network, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plants, antennas, 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 provider" or "provider" means any person who provides utility service to customers within the city limits, whether or not any facilities in the right-of-way 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, or storm sewer, to or from customers within the corporate boundaries of the city, or the transmission of any of these services through the city whether or not customers within the city are served by those transmissions.

"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. (Ord. 18-24 §1)

15.06.060 Registration

Every person who desires to provide utility services to customers within the city must register with the city prior to providing any utility services to any person in the city or using any facilities, in compliance with Tigard Municipal Code Chapter 5.04. (Ord. 18-24 §1)

15.06.070 Licenses

A. License Required.

1. Except those utility operators and providers with a valid franchise agreement from the city, every person must obtain a license from the city prior to conducting any work in or using 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 must apply for a license from the city within 45 days of the later of: (a) the effective date of this chapter, or (b) the expiration of a valid franchise from the city, unless a new franchise is granted by the city pursuant to subsection E of this section.

B. License Application. The license application will be on a form provided by the city, and must 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, the facilities and ownership of 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. If the applicant is proposing to attach to facilities other than city-owned infrastructure, the applicant must include an authorization from the facility owner. In the event the information submitted on the application changes after the issuance of a license, the licensee must notify the city of such changes within 30 days of the change.

C. License Application Fee. The application must be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council.

D. Determination by City. The city will 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 will include the reasons for denial. The license will be evaluated based upon the provisions of this chapter, the continuing capacity of the rights-of-way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.

E. Franchise Agreements. If the public interest warrants, the city and utility operator or 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 the City Council. The franchise will be subject to the provisions of this chapter to the extent such provisions are not in conflict with any such franchise. In the event of a conflict between the express provisions of a franchise and this chapter, the franchise will control.

F. Rights Granted.

1. The license granted hereunder authorizes and permits the licensee, subject to the provisions of the city code and other applicable provisions of state or federal law, to construct, place, maintain and operate utility facilities in the rights-of-way for the term of the license 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 will inform the city of such changes no longer than 30 days after the change.

2. Any license granted pursuant to this chapter does 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 constitutes 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, as it 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 calendar years beginning: (1) January 1st of the year in which the license took effect for licenses that become effective 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 confers 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 grants, conveys, creates, or vests in licensee a real property interest in land, including any fee, leasehold interest or easement.

I. Reservation of City Rights. Nothing in the license prevents the city from grading, paving, repairing or altering any rights-of-way, constructing, laying down, repairing, relocating or removing city facilities or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any city facilities. 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 will be removed or relocated as provided in TMC 15.06.090, in a manner acceptable to the city and consistent with industry standard engineering and safety codes.

J. Multiple Services.

1. A utility provider 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 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 license, registration or right-of-way fee requirements owed to the city by a third party using the utility operator's facilities.

2. A utility provider that provides or transmits more than one utility service to customers in the city 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 rights-of-way fee for each utility service.

K. Transfer or Assignment. To the extent allowed by applicable state and federal laws, the licensee must obtain the written consent of the city prior to the transfer or assignment of the license; such consent will not be unreasonably withheld. The license may not be transferred or assigned unless the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility facilities or provide the utility service authorized under the license 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 becomes responsible for fulfilling all the obligations under the license. A transfer or assignment of a license does not extend the term of the license.

L. Renewal. At least 30, but no more than 120, days prior to the expiration of a license granted pursuant to this section, a licensee seeking

renewal of its license must 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 will review the application as required by subsection D of this section and grant or deny the license within 90 days of submission of the application, or such shorter period of time as may be required by law. 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 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 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 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 will be considered:

a. Whether the violation was intentional;

b. The egregiousness of the violation;

c. The harm that resulted;

d. The licensee's history of compliance; and

e. The licensee's cooperation in discovering, admitting and curing the violation.

3. Notice and Cure. The city will give the utility operator written notice of any apparent violations before terminating a license. The notice will include a clear and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time (no less than 20 and no more than 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, the Public Works Director may refer the matter to the City Council, which will provide a duly noticed public hearing to determine whether the license will be terminated or revoked.

4. Termination by Licensee. If a licensee ceases to use the city's rights-of-way, the licensee may terminate its license upon 30-days' notice to the city. (Ord. 18-24 §1)

15.06.080 Construction and Restoration

A. Construction Codes. Utility facilities must be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules, and regulations in effect at the time of the work, including without limitation the National Electrical Code, the National Electrical Safety Code, Tigard Development Code Chapter 18.910, and the city's Public Works Improvement Design Standards.

B. Construction Permits. No person may perform any work on utility facilities within the rights-of-way without first obtaining a right-of-way permit pursuant to TMC Chapter 15.04. Notwithstanding, for routine maintenance or repair that does not alter or disturb the right-of-way, such as replacement of a light fixture or trimming of trees, the city may elect to not require a right-of-way permit provided the city receives notice of the planned maintenance repair, along with emergency contact information, as soon as reasonably practical. (Ord. 18-24 §1)

15.06.090 Location of Facilities

A. Location of Facilities. 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.

B. Unless otherwise agreed to in writing by the city, whenever any existing electric utilities, cable facilities or communications facilities are located underground within a right-of-way of the city, a utility operator with permission to occupy the same right-of-way will locate its new facilities underground at its own expense. This requirement does not apply to facilities used for transmission of electric energy at nominal voltages in excess of 35,000 volts or to antennas, streetlight poles, pedestals, cabinets or other above-ground equipment of any utility operator. No such above-ground equipment, or any aerial facilities other than electric energy transmission wires in excess of 35,000 volts, may be constructed without the written approval of the city, in addition to the permit required by TMC Section 15.06.080.B.

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

D. Relocation of Utility Facilities.

1. When requested to do so in writing by the city, a utility operator will, 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, except those facilities not required to be located underground pursuant to subsection B of this section.

2. Nothing herein precludes the utility operator from requesting reimbursement or

compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements. However, the utility operator must timely comply with the requirements of this section regardless of whether or not it has requested or received such reimbursement or compensation.

3. The city will coordinate the schedule for relocation of utility facilities and based on such effort, 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 and by the date reasonably established by the city, the utility operator will 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 workers in accordance with applicable state and federal laws and regulations, the utility facility to be removed, relocated, changed, altered or undergrounded at the utility operator's sole expense. Upon receipt of a detailed invoice from the city, the utility operator will reimburse the city within 30 days for the costs the city incurred.

E. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the city, within 30 days following written notice from the city or such other time agreed to in writing by the city, a utility operator and any other person that owns, controls or maintains any abandoned or unauthorized utility facility within a right-of-way will, at its own expense, remove the facility and restore the right-of-way to city standards.

2. A utility facility, or any portion of the facility, is unauthorized under any of the following circumstances:

a. The utility facility is outside the scope of authority granted by the city under the license, franchise or other written agreement. This includes facilities that were never licensed or franchised and facilities that were once licensed or franchised but for which the license or franchise has expired or been terminated. This does not include any facility for which the city has provided written authorization for abandonment in place.

b. The facility has been abandoned and the city has not provided written authorization for abandonment in place. A facility is abandoned if it is not in use and is not planned for further use. A facility will be presumed abandoned if it is not used for a period of one year. A utility operator may attempt to overcome this presumption by presenting plans for future use of the facility to the city, which will determine application of the presumption in its sole discretion.

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 30 days of the city sending written notice of such violation, unless the city extends such time period in writing.

F. Removal by City.

1. The city retains the right and privilege to cut or move any utility facilities 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 attempt to notify the utility operator of any cutting or moving of facilities prior to doing so. If such notice is not practical, the city will notify the utility operator as soon as reasonably practical 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 will 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 will reimburse the city for the costs the city incurred within 30 days. The obligation to remove survives termination of the license or franchise.

3. The city is 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 subsection D, E, or F of this section or undergrounding its facilities as required by subsection B of this section, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by those subsections, unless such damage arises directly from the city's negligence or willful misconduct.

G. Engineering Designs and Plans. The utility operator will, at no cost to the city, provide the city with two complete sets of as-built plans in a form acceptable to the city showing the location of all its utility facilities in the rights-of-way after initial construction if the utility operator's engineered plans materially changed during construction. The utility operator will provide two updated complete sets of as-built plans upon request of the city and at no cost to the city, but not more than once per year. The utility provider will also provide, at no cost to the city, a comprehensive map showing the location of any facilities in the city. Such map will be provided in a format acceptable to the city with accompanying data sufficient for the city to determine the exact location of facilities (GIS). The city may not request such information more than once per calendar year. (Ord. 18-24 §1)

15.06.100 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 prohibited by applicable law or a valid agreement between the utility operator and the lessee, provided that the utility operator requires that all lessees have obtained proper authority, in the form of a permit, license, or franchise from the city before leasing capacity on its system. (Ord. 18-24 §1)

15.06.110 Maintenance

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

B. If, after written notice from the city of the need for repair or maintenance, a utility operator fails to repair and maintain facilities as requested by the city and by the date reasonably established by the city, the city may perform such repair or maintenance using qualified personnel or contractors at the utility operator's sole expense.

Upon receipt of a detailed invoice from the city, the utility operator will reimburse the city for the costs the city incurred within 30 days. (Ord. 18-24 §1)

15.06.120 Vacation

If the city vacates any rights-of-way, or portion thereof, that a utility operator uses, the utility operator will, at its own expense, remove its facilities from the rights-of-way unless the city reserves a public utility easement, which the city will 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 90 days after a right-of-way is vacated, or as otherwise directed or agreed to in writing by the city, the city may remove the facilities using qualified workers in accordance with state and federal laws and regulations at the utility operator's sole expense. Upon receipt of a detailed invoice from the city, the utility operator will reimburse the city within 30 days for the costs the city incurred. (Ord. 18-24 §1)

15.06.130 Rights-of-Way Fee

A. Except as provided 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, must pay the rights-of-way 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 rights-of-way are facilities mounted on structures within the rights-of-way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the rights-of-way, will pay the attachment fee set by City Council resolution for each attachment. Unless otherwise agreed to in writing by the city, the fee will be paid quarterly, in arrears, within 45 days after the end of each calendar quarter, and will be accompanied by information sufficient to illustrate the calculation of the amount payable.

C. Unless otherwise agreed to in writing by the city, the fee set forth in subsection A of this section will be paid quarterly, in arrears, for each quarter during the term of the license within 45 days after the end of each calendar quarter, and will be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable.

D. The calculation of the rights-of-way fee required by this section is subject to all applicable limitations imposed by federal or state law.

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

F. Acceptance of any payment will not be construed as accord that the amount paid is in fact the correct amount, nor may such acceptance of payment be construed as a release of any claim the city may have for further or additional sums payable. (Ord. 18-24 §1)

15.06.140 Records and Audits

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

1. Every utility operator or provider of utility service will 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 business registration fee, license fee, rights-of-way fee, or franchise fee.

2. Every utility operator will 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 will be provided within the city unless prior arrangement for access elsewhere has been made with the city.

B. If the city conducts an audit and the city's audit of the books, records and other documents or information of the utility operator or utility service provider demonstrates that the utility operator or provider has underpaid the rights-of-way fee or franchise fee by three percent or more in any one year, the utility operator will reimburse the city for the cost of the audit, in addition to any penalties owed pursuant to TMC Section 15.06.180 or as specified in a franchise.

C. Any underpayment, including any penalty or audit cost reimbursement, will be paid within 30 days of the city's notice to the utility operator or provider of such underpayment. (Ord. 18-24 §1)

15.06.150 Insurance and Indemnification

A. Insurance.

1. All utility operators will 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 as additional insureds:

a. Comprehensive general liability insurance with limits not less than $3 million for bodily injury or death to each person, $3 million for property damage resulting from any one accident, and $3 million for all other types of liability.

b. Motor vehicle liability insurance for owned, non-owned, and hired vehicles with a limit of $2 million for each person and $3 million for each accident.

c. Workers compensation insurance with statutory limits and employer's liability with limits not less than $1 million.

2. The limits of the insurance will be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon. The insurance will be without prejudice to coverage otherwise existing (excepting workers' compensation insurance) and include, as additional insureds the city and its officers, agents and employees. The coverage must apply as to claims between insureds on the policy. The utility operator will provide the city 30 days' prior written notice of any cancellation or material alteration of said insurance. If the insurance is canceled or materially altered, the utility operator will 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 will maintain on file with the city 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 a license issued pursuant to this chapter is effective, and as necessary thereafter, the utility operator will provide a performance bond or other

financial security, in a form acceptable to the city, as security for the full and complete performance of the franchise or license, and for compliance with the terms of this chapter, including any costs, expenses, damages or loss to the city because of any failure attributable to the utility operator to comply with the codes, ordinances, rules, regulations or permits of the city. This obligation is in addition to any financial guarantee required pursuant to TMC Chapter 15.04.

C. Indemnification.

1. To the fullest extent permitted by law, each utility operator will defend, indemnify and hold harmless the city and its officers, employees, agents and representatives 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 TMC Section 15.06.070 constitutes such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the city will notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

2. Every utility operator will also indemnify the city for any damages, claims, additional costs or expenses assessed against or payable by the city arising out of or resulting, directly or indirectly, from the utility operator's failure to remove or relocate any of its facilities in the rights-of-way or easements in a timely manner, unless the utility operator's failure arises directly from the city's negligence or willful misconduct. (Ord. 18-24 §1)

15.06.160 Compliance

Every utility operator or provider will comply with all applicable federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all applicable ordinances, resolutions, rules, and regulations of the city, heretofore or hereafter adopted or established during the term of any license granted under this chapter. (Ord. 18-24 §1)

15.06.170 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, the city will take reasonable steps to protect the confidential or proprietary nature of the books, records, maps or information to the extent permitted by the Oregon Public Records Law; provided, that all documents are clearly marked as confidential by the person at the time of disclosure to the city. 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 who submitted the confidential information of the records request prior to releasing the confidential information. The city is not required to incur any costs to protect such documents, other than the city's routine internal procedures for complying with the Oregon Public Records Law. (Ord. 18-24 §1)

15.06.180 Penalties

A. Any person who fails to timely pay the right-of-way fee pursuant to TMC Section 15.06.130 is subject to the following penalties:

1. First occurrence during any calendar year: 10% of the amount owed or $25, whichever is greater.

2. Second occurrence during any calendar year: 15% of the amount owed or $50, whichever is greater.

3. Third occurrence during any calendar year: 20% of the amount owed or $75, whichever is greater.

4. Fourth occurrence during any calendar year: 25% of the amount owed or $100, whichever is greater.

B. Penalties imposed are merged with, and become part of, the fee required to be paid.

C. The City Finance Director, in the Director's sole discretion, may reduce or waive the penalties in this section.

D. Payment of penalties is due with the next regular quarterly right-of-way fee payment. (Ord. 18-24 §1)

15.06.190 Violations

A. Any person found in violation of any of the provisions of this chapter or the license are subject to a penalty of not less than $150 nor more than $2,500 for each offense. A violation will be deemed to exist separately for each and every day during which a violation exists.

B. Nothing in this chapter limits any judicial or other remedies the city may have at law or in equity, for enforcement of this chapter. (Ord. 18-24 §1)

15.06.200 Severability and Preemption

A. The provisions of this chapter will be interpreted to be consistent with applicable federal and state law, and, 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, covenant or portion of this chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this chapter will not be affected thereby but will be deemed as a separate, distinct and independent provision. Such holding will not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this chapter will 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 will be preempted only to the extent required by law and any portion not preempted will survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision will thereupon return to full force and effect and will thereafter be binding without further action by the city. (Ord. 18-24 §1)

15.06.210 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 applies to all existing franchise agreements

granted to utility operators by the city. (Ord. 18-24 §1)■