PERKINSCOIE

1120 NW Couch Street
10th Floor
Portland, OR 97209-4128

T +1.503.727.2000
F +1.503.727.2222
PerkinsCoie.com

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Lawrence H. Reichman
LReichman@perkinscoie.com
D. +1.503.727.2019
F. +1.503.346.2019

VIA EMAIL AND U.S. MAIL

Commissioner Carmen Rubio & Director
Elisabeth Perez
Office for Community Technology
City of Portland
111 SW Columbia Street, Suite 600
Portland, OR 97201
comtech@portlandoregon.gov

Re: Second Round of Comments on Proposed Ordinance for Utility Access to the City's Rights-of-Way

Dear Commissioner Rubio and Director Perez:

This law firm represents Tata Communications (America) Inc. ("TC America"). We are providing a second round of comments on the City's proposed ordinance to replace the franchise process for granting access to the City's rights-of-way ("ROW") with new provisions in the City Code, along with the proposed fee ordinance and draft administrative rules released by the City on April 29, 2022. Please refer also to TC America's first round of comments submitted on November 15, 2021, for additional points not repeated here (such as the requirement under Oregon law that fees for use of the ROW must be cost-based).

A. Introduction and Summary.

As TC America stated in its initial comments, federal law unambiguously requires municipal charges on all telecommunications providers for use of the ROW to be based on objectively reasonable estimates of the actual costs to the City resulting from a provider's use of the ROW. The City's existing gross revenues-based and linear foot-based fees likely fail this test. The City now proposes to compound these violations by increasing those fees—in some cases, including TC America's, quite drastically—without any reference to the costs on which those fees must be based. Instead, the City simply sweeps aside these federal preemptive statutes by stating they are applicable only to small-cell wireless facilities.

The City is wrong. In its recent 2018 order, the FCC issued an "authoritative interpretation" of 47 U.S.C. § 253 that applies to *all* telecommunications providers that use the ROW, not just

wireless companies or small-cell facilities.[1] Under this standard, ROW charges must satisfy three conditions: (1) they must be "a reasonable approximation of the state or local government's costs;" (2) "only objectively reasonable costs" may be considered; and (3) the fees may be "no higher than the fees charged to similarly-situated competitors in similar situations."[2] The FCC rejected the City's position that it may charge "market-based rent."[3] Moreover, the FCC's order was affirmed in all relevant respects by the Ninth Circuit Court of Appeals in a decision binding on the City.[4] The Court held that cities are not "permitted to make a profit by charging fees above costs."[5]

While charging annual linear foot-based fees for use of the ROW is not necessarily a cost-based approach, the City now proposes to charge the same fees to multiple providers for use of the same facilities. The proposed ordinance and related documents would depart from the City's decades-long practice of charging such fees only to the *owner* of facilities in the ROW and not to other providers who lease and use a portion of those same facilities. The so-called "lease exclusion" exists in the franchises of several providers including TC America. By virtue of that policy, and with the City's full understanding and agreement, TC America has paid the City a linear-foot fee for the facilities it *owns* in the City's ROW, but not for the facilities it *leases* from other providers who already fully compensate the City for their entire use of the ROW, including the leased portions. The City now proposes to abandon the policy reflected in the lease exclusion, at least in cases where the City determines the lease should be considered a "capital lease" under an accounting principle used to determine the tax treatment of certain assets. This new approach may increase TC America's franchise fees by over 4,000 percent which, combined with similar increases to other providers' fees, would result in a huge revenue windfall to the City that bears no relation to the City's costs in managing the ROW.

Lessees of conduits and/or fiber-optic cables that are already installed in the ROW do not impose any appreciable costs on the City, as they have no impact on the ROW. Installation of the facilities was accomplished by the owners who already must pay the City for the full costs imposed by their use. Charging lessees of a portion of these facilities—which may include several providers—the exact same amount for their use of the facilities cannot possibly be

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[1] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, ¶ 98, 33 FCC Rcd 9088 (2018) ("*Wireless Infrastructure Declaratory Ruling*").

[2] *Wireless Infrastructure Declaratory Ruling* ¶ 50.

[3] *Id.* ¶ 73.

[4] *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

[5] *Id.*, 969 F.3d at 1039.

justified by additional costs imposed on the City. Instead, it is an unlawful attempt to dramatically increase the City's revenues on the backs of telecommunications providers and their customers.

The City shamelessly makes this proposal notwithstanding its stated position that the new ROW ordinance is not intended to increase revenues for the City or the level of fees imposed on providers.[6] The City has refused to provide any information about the costs it intends to cover with the new ROW fees, the additional revenue it expects to raise, the intended use of that revenue, or the impacts on providers of the increased fees. Thus, neither City Council nor any affected provider may see the underlying cost and revenue data until the matter is submitted to Council.[7] The truncated and deflective public process for consideration of this ordinance has precluded meaningful participation, which is critical when fees that are a substantial cost to providers and a source of revenue to the City are changed.

The City's proposal also incorporates a confusing, vague, and expansive definition of "gross revenues" that would potentially include revenue generated from customers and services provided outside Portland. This represents a significant departure from the current treatment of ROW users in which providers serving customers in the City pay a fee that is a percentage of their revenue derived from end-user customers located in the City, and providers that use the ROW but do not serve customers in the City (so-called "pass-through" facilities) pay a fee based on the number of linear feet of facilities they own in the ROW. The inconsistencies and ambiguities in those provisions would create confusion over the fee calculations that apply to some providers and threaten another unprecedented and unjustified expansion of the City's authority over ROW users, and its application is unexplained and difficult to understand.

Moreover, the City's proposal would, for the first time, seek to impose fees for telecommunications traffic that is both interstate and international in character and the City does not set forth any methodology for fairly apportioning such revenue to the City, rendering the proposal void for vagueness and unenforceable under the Oregon and United States Constitutions.

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[6] *See, e.g.,* comments of WCI *available at* https://www.portlandoregon.gov/oct/article/799436 at 3.

[7] Binding City Policy FIN-2.04 requires the City Budget Office to prepare and submit fiscal impact statements for ordinances and significant administrative decisions submitted for Council action "to ensure compliance with the City's budget direction, identify financial and service issues, and identify impacts on businesses for the Council."

B. Federal Law Preempts the Imposition of ROW Access Fees That Are Not Cost-Based.

Pursuant to Section 253(c) of the Communications Act, state and local governments are authorized "to manage the public rights-of-way" and "to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[8] Section 253(a), however, cabins such authority by barring any state or local "statute or regulation . . . or other legal requirement" that "prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[9] In short, as the FCC has explained, Section 253(c) "set[s] forth 'defined areas in which [the City] may regulate,'" and Section 253(a) "broadly limits the ability of [the City] to regulate."[10] In turn, Section 253(d) provides that "any [state or local] statute, regulation, or legal requirement that violates" Section 253(a) is "preempt[ed] . . . to the extent necessary to correct such violation or inconsistency."[11]

Section 253(a) forecloses any state or local legal requirement or restriction that has "the effect of prohibiting" service.[12] The FCC has long held that "a state or local legal requirement constitutes an effective prohibition if it 'materially limits or inhibits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'"[13] "[U]nder this analytical framework"—known as the "*California Payphone* standard"—"a legal requirement can 'materially inhibit' the provision of services even if it is not an insurmountable

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[8] 47 U.S.C. § 253(c).

[9] *Id.* § 253(a).

[10] *Wireless Infrastructure Declaratory Ruling* ¶ 53 (quoting *Public Utility Commission of Texas et al. Petition for Declaratory Ruling and/or Preemption of Certain Provisions of the Texas Public Utility Regulatory Act of 1995*, Memorandum Opinion and Order, 13 FCC Rcd 3460 ¶ 44 (1997)).

[11] 47 U.S.C. § 253(d).

[12] *Id.* § 253(a).

[13] *Wireless Infrastructure Declaratory Ruling* ¶ 82 (quoting *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd 14191 ¶ 31 (1997) ("*California Payphone*")).

barrier."[14] As the City is well aware, the Ninth Circuit recently confirmed in *City of Portland v. United States* that it "recognize[s] the continuing validity of the material inhibition test from *California Payphone*."[15] There is therefore no question that the City is barred from imposing any legal requirement that materially inhibits telecommunications carriers from entering the marketplace or continuing to provide service.

"[A] state or local legal requirement c[an] materially inhibit service in numerous ways," including by "function[ing] as an effective prohibition . . . because of the resulting '*financial burden*.'"[16] Thus, as the FCC and "[f]ederal courts have long recognized[], . . . fees charged by local governments for the deployment of communications infrastructure can run afoul of the limits Congress imposed by the effective prohibition standard embodied in Section[] 253 …."[17] For example, the First Circuit determined in 2006 that a 5 percent gross revenue fee "violated Section 253(c) because it would result in a "substantial increase in costs" that, "together with other requirements," would "materially inhibit[] or limit[] the ability" of the subject service provider "to compete in a fair and balanced legal and regulatory environment."[18] Similarly, the Second Circuit in 2002 struck down another 5 percent gross revenue fee on comparable grounds,[19] and the Tenth Circuit in 2004 invalidated a per-foot fee that "create[d] a massive increase in cost" for the service provider to which it applied.[20]

In 2018, the FCC endorsed these decisions from the First, Second, and Tenth Circuits when the agency issued its authorized interpretation of Section 253, holding that ROW access fees for *all* telecommunications providers must be cost-based.[21] The FCC stated that state and local charges

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[14] *Id.* ¶ 35; *see also, e.g.*, *P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18 (1st Cir. 2006); *TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 76 (2d Cir. 2002); *RT Commc'ns v. FCC*, 201 F.3d 1264, 1268 (10th Cir. 2000).

[15] 969 F.3d 1020, 1034-35 (9th Cir. 2020) (citing *Sprint Telephony PCS, L.P. v. Cnty. of San Diego*, 543 F.3d 571, 578 (9th Cir. 2008) (en banc) ("[W]e note that our interpretation is consistent with the FCC's.")).

[16] *Wireless Infrastructure Declaratory Ruling* ¶¶ 37, 39 (emphasis added).

[17] *Id.* ¶ 43 & n.108.

[18] *See P.R. Tel. Co. v. Municipality of Guayanilla*, 450 F.3d 9, 18-19 (1st Cir. 2006).

[19] *See TCG N.Y., Inc. v. City of White Plains*, 305 F.3d 67, 77-79 (2d Cir. 2002).

[20] *See Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1270-71 (10th Cir. 2004).

[21] *Wireless Infrastructure Declaratory Ruling* ¶ 35.

for ROW access must be "a reasonable approximation of the state or local government's costs."[22] Further, "only objectively reasonable costs" may be considered, and the fees may be "no higher than the fees charged to similarly-situated competitors in similar situations."[23] The FCC specifically rejected the position frequently espoused by Portland that it may charge "market-based rent."[24] Moreover, the FCC's order was affirmed in all relevant respects by the Ninth Circuit Court of Appeals which held that cities are not "permitted to make a profit by charging fees above costs."[25]

The City's dismissive response to stakeholders' initial comments posits that it is "not restricted to 'recovery of reasonable costs,' except for Small Wireless facilities."[26] But that assertion ignores the substantive legal basis for the FCC's decision in the *Wireless Infrastructure Declaratory Ruling*, including in particular its reaffirmation that the *California Payphone* standard broadly prohibits unreasonable, non-cost-based ROW access fees. Although the *specific application* of the relevant legal standard in the *Wireless Infrastructure Declaratory Ruling* addressed small-cell wireless deployment, there is no doubt that the FCC's construction of Section 253 and its analysis of ROW fees apply with equal force to access fees that would materially impede the deployment of wireline telecommunications facilities.

In the *Wireless Infrastructure Declaratory Ruling*, the FCC analyzed the text and structure of Section 253, its prior interpretations and applications of the provision, and the statute's legislative history. Each confirms that ROW access fees may not exceed the City's actual, reasonably incurred costs to provide such access.

With respect to the text and structure of Section 253, the FCC emphasized the breadth of subsection (a)'s preemptive scope, and just how "narrowly[ ] tailored" the savings clause is in subsection (c).[27] "Against this backdrop," the FCC squarely "reject[ed] the view . . . that Section 253(a) necessarily requires some additional showing beyond the fact that a particular fee is not cost-based," and it "interpret[ed] Section 253(c)'s 'fair and reasonable compensation' provision to refer to fees that represent a reasonable approximation of actual and direct costs incurred by

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[22] *Id.* ¶ 50.

[23] *Id.*

[24] *Id.* ¶ 73.

[25] *City of Portland v. United States*, 969 F.3d at 1039.

[26] Stakeholder Comment Summary, *available at* https://www.portlandoregon.gov/oct/article/799437.

[27] *See Wireless Infrastructure Declaratory Ruling* ¶ 53.

the government, where the costs being passed on are themselves objectively reasonable."[28] "[W]hile it might well be fair for providers to bear basic, reasonable costs of entry," the FCC reasoned, it is not fair or reasonable to require providers "to bear costs *beyond* that level."[29] By the same token, although "[r]easonable state and local regulation of facilities deployment is an important predicate for a viable marketplace for communications services," "fees that recover more than the state or local costs associated with facilities deployment—or that are based on unreasonable costs, such as exorbitant consultant fees or the like—go beyond such governmental recovery of fundamental costs of entry."[30]

These principles, the FCC made clear, are consistent with the well-established (and judicially validated) *California Payphone* standard, which again dictates "that a state or local legal requirement would violate Section 253(a) if it 'materially limits or inhibits' an entity's ability to compete in a 'balanced' legal environment for a covered service."[31] As applied to ROW fees, the FCC explained, charges that "recover the reasonable approximation of reasonable costs do not 'materially inhibit' a provider's ability to compete in a 'balanced' legal environment," but instead "enable localities to recover their necessary expenditures to provide a stable and predictable framework in which market participants can enter and compete."[32] "On the other hand, . . . state or local legal requirements such as fees that impose a 'financial burden' on providers can be effectively prohibitive."[33] Just as the record evidence of excessive fees applicable to small-cell wireless facilities justified the FCC's preemption of such charges in the *Wireless Infrastructure Declaratory Ruling*—and the Ninth Circuit's decision upholding that ruling—the massive cost increases associated with the City's proposed imposition of access fees on wireline lessees here would materially inhibit deployment and competition in violation of Section 253.

The FCC's review of the legislative history of Section 253 in the *Wireless Infrastructure Declaratory Ruling* further bolsters this conclusion. In particular, the FCC highlighted that "Senator Diane Feinstein, during the floor debate on Section 253(c), offered examples of the types of restrictions that Congress intended to permit under [the provision], including requir[ing] a company to pay fees to *recover an appropriate share of the increased street repair and paving*

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[28] *Id.* ¶¶ 53 & n.143, 55.

[29] *Id.* ¶ 55 (emphasis added).

[30] *Id.* ¶ 56.

[31] *See id.* ¶ 57.

[32] *Id.*

[33] *Id.*

costs that result from repeated excavation."[34] The FCC also noted Representative Bart Stupak's explanation that "if a company plans to run 100 miles of trenching in our streets and wires to all parties of the cities, it *imposes a different burden* on the rights-of-way than a company that just wants to string a wire across two streets to a couple of buildings."[35]

In sum, the text, structure, and legislative history of Section 253 leave no doubt that the fundamental justification for, and limitation of, ROW fees is to reasonably compensate state and local governments for the actual costs they in incur in managing the rights-of-way. As the Ninth Circuit recognized, such fees are not intended to serve as a profit center and may not lawfully do so.[36]

C. Imposing ROW Fees on Mere Lessees of Facilities in the ROW Is Not Cost-Based and Would Be Preempted.

The City's proposal to levy ROW access fees based on the mere indirect use of wholesale providers' communications facilities in the ROW (in addition to the fees imposed on the owners of those facilities) would result in the sort of dramatic cost increases for service providers that courts have consistently invalidated. Remarkably, TC America would face a 4,000 percent increase in its fee obligations under the proposal, given that the company has a minimal facilities-based presence in the Portland ROW but leases significantly greater capacity on other carriers' transmission facilities. An increase of such magnitude would severely impact TC America's operations in the City, not only by limiting the company's ability to expand its arrangements and service offerings, but also by threatening the economic viability of existing service arrangements. Such obstacles and their consequences are precisely the kind that the FCC and courts have readily determined amount to material limitations or inhibitions on the provision of service. Accordingly, if the City were to proceed as proposed, its ROW access fee regime likely would be found to violate Section 253(a) and would be subject to preemption under Section 253(d).

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[34] *Id.* ¶ 59 (emphasis in original; cleaned up).

[35] *Id.* (emphasis in original).

[36] *See City of Portland*, 969 F.3d at 1010 ("The statute requires that compensation be 'fair and reasonable;' this does not mean that state and local governments should be permitted to make a profit by charging fees above costs.").

1. The proposed ROW access fee regime would result in the City's collection of amounts far exceeding its actual, reasonable costs.

Fatally, the ROW access fee regime that the City has proposed would make no effort to apportion costs based on burdens imposed on the rights-of-way and would not be remotely cost-based. To the contrary, the proposed approach—under which ROW access fees would be imposed not only on service providers that own facilities that are physically located in the ROW, but also on third-parties' use of such facilities via leases and other arrangements—would allow the City to collect amounts vastly in excess of its actual costs. The City has not shown that the existing approach of assessing fees on facilities-based carriers in the ROW is failing to recover the City's actual costs; and even if a showing had been made, the appropriate response would entail a modest increase in the fees imposed on such facilities-based providers.[37] By contrast, imposing fees on providers without any physical presence in the ROW would generate windfall profits—not reasonable cost-recovery—because it would sever the nexus between the fees and any actual use of the physical rights-of-way.

Indeed, because the proposal is devoid of any limiting principle, an *unlimited number of lessees* could be assessed access fees in connection with their use of a *single facility*, as each entity that uses some portion of the same facility would owe the full payment to the City. The small size and large capacity of fiber-optic cables creates a unique opportunity for significant price-gouging by the City as multiple providers can make use of the same facilities. But such additional users of that facility do not impose any incremental burden on the ROW or any additional costs on the City (*e.g.*, costs associated with digging up streets). The fact that this proposed fee structure is so completely untethered from the actual costs that the City reasonably would incur to provide access to the ROW for the deployment and maintenance of wireline telecommunications facilities demonstrates its inherently unfair and unreasonable nature. Accordingly, such duplicative, non-cost-based fees would violate Section 253 and inevitably would be struck down by a reviewing court or the FCC.

2. The City would impose a meaningless distinction among lessees.

Current franchises for companies like TC America that pay the City on a linear-foot basis appropriately exclude facilities that providers lease from third parties who already pay the City for use of the ROW for their entire facilities. This "lease exclusion" places the fee burden on facility owners who install and maintain facilities in the ROW and are in a position to apportion those costs to lessees if they desire. It also encourages an efficient and non-wasteful use of the

[37] Indeed, the City is proposing to increase the linear-foot fee to $4.75 per-foot for 2023, a 15 percent increase that is not justified by any cost data.

ROW where fees are based on the impact a provider has on the ROW and a more intensive use of the same space is encouraged, not penalized.

The proposed Code provisions are silent as to the specific fees that will be charged to users of the ROW, and when and how gross-revenue and linear-foot fees would apply. The City's proposed Fee Ordinance simply lists the level of fees that would apply to "Communications provided by a utility operator that does not own facilities," "Communications provided by a utility operator that owns facilities," and "Any utility operator that owns facilities but does not earn gross revenues (*i.e.* pass-through facilities)." These provisions do not shed any light on which fees apply to which ROW users. However, the proposed administrative rules would significantly carve back the current lease exclusion by making a meaningless distinction that also bears no relation to the City's costs.

Under the proposed administrative rules—which may be adopted and amended by the Director of the City's Office for Community Technology without involvement by the City Council[38]—the linear-foot fee would apply to "conduit or fiber owned by the utility service provider."[39] However, the Director would consider leased facilities to be "owned" and subject to the same linear-foot fee imposed on the actual owner in circumstances that threaten to completely swallow the existing lease exclusion and multiply the City's current revenue many times:

> If any linear feet of conduit or fiber is leased, the city will determine ownership by referencing Financial Accounting Standards Board (FASB) 13, "Statement of Financial Accounting Standards No. 13 – Accounting for Leases." [Footnote omitted.] Any lease which falls into the category of "capital lease" will be treated as ownership for the purposes of calculating utility service providers' per linear foot fee.[40]

TC America knows how this would play out. In 2020, the City completed its audit of TC America's franchise fee payments for the years 2012-2015. Since the early 2000's, the City had agreed that the lease exclusion in TC America's franchises did not obligate the company to pay the linear-foot fee for facilities it leased from other providers. In its 2020 Final Determination, however, the City stated its opinion that the leases should not actually be treated as leases under the franchise exclusion because they should be treated as "capital leases" under a tax accounting principle known as FASB Statement No. 13 ("FASB 13"). The City admitted, however, that no

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[38] Proposed ROW Code § 12.15.060.F.

[39] Proposed Admin. Rule 8.

[40] *Id.*

such distinction among different types of leases was made in the franchise. Noting that it had agreed to TC America's exclusion of leased facilities since at least 2002, the City ultimately decided that it should not change course and approved TC America's exclusion of leased facilities from the fee calculation. This decision resulted in the continued exclusion of approximately 97 percent of the facilities TC America uses in the Portland ROW but does not own.

The City's current proposal to terminate its current practice of utilizing negotiated franchise agreements to grant access to the ROW and to replace that with Code provisions, along with its proposal to rely on FASB 13 to re-characterize leased facilities as owned facilities, is a blatant attempt to increase TC America's franchise fees by over 4,000 percent. This proposal would also impose untold increases on any number of other lessees.

FASB 13 was developed and is utilized for an entirely different purpose, financial accounting and reporting. It has nothing to do with the purposes for which the City seeks to employ it, developing an approach to charging fees for access to the ROW. Moreover, there is absolutely nothing in its distinction between operating leases and capital leases that reflects upon the costs to the City of managing the ROW. Instead, it only supports the City's desire to multiply its ROW fees by collecting them not only from the owner of facilities, but also from one or more lessees, which clearly has no relationship to the City's costs and is therefore preempted under federal law.

Finally, even if the City unreasonably continues to disagree that ROW fees for all providers must be cost-based, there can be no dispute that they must be "fair and reasonable."[41] Collecting multiple times for the same linear feet of conduit is not fair and reasonable for any carrier under any stretch of the imagination. Further, as applied to TC America, increasing the level of ROW fees 4,000 percent under the applicable facts is not fair and reasonable. The facilities that TC America owns and uses were installed in the ROW more than 20 years ago and there has been no disturbance of the ROW resulting from TC America's activities since then. Further, TC America has engaged with the City in good faith regarding the ROW fees paid for these facilities and has relied on their agreed-upon treatment for over two decades in numerous ways, including deciding how and where to make investments in its network and how to provision and price services to its customers. Increasing fees so drastically at this time is neither fair nor reasonable.

[41] 47 U.S.C. § 253(c).

D. The Proposed Expansion of Gross Revenue-Based Fees Is Confusing, Unbounded, Vague, and Unenforceable.

The City's proposal also appears to expand the application of gross revenue-based fees to providers who use the ROW to serve customers that have no presence in or connection to the City, upending decades of policy and practice and creating massive uncertainty. This would lead to confusion and disagreement over which fees apply to a given carrier—linear foot-based fees or gross revenue-based fees—and how gross-revenue fees for pass-through facilities should be calculated. Moreover, the City does not propose *any* methodology for fairly apportioning revenue derived from interstate and international traffic to the City, rendering its proposal void for vagueness and unenforceable under well-established constitutional doctrine.

For decades, the City charged providers who serve customers within the City an ROW fee based upon their gross revenues, as authorized by state law. ORS 221.450 authorizes cities to charge utilities a "privilege tax … for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city." Thus, state law restricts the gross revenues that may be the basis of the fee to those "earned within the boundary of the city."

The City has historically respected this limitation in its franchise agreements with telecommunications carriers. For example, the City's franchise with telecommunications provider Electric Lightwave defines "Gross Revenues" as "revenues derived by Grantee for the provision of Telecommunications Services (I) originating or terminating in Portland, Oregon and (ii) charged to a circuit location in Portland, Oregon regardless of where the circuit is billed or paid."[42]

The City now proposes a definition of gross revenues that departs from the established practice, and legal limit, of considering only those revenues derived from serving customers within the City. The proposed Code would define Gross Revenue as that "derived from the use or operation of utility facilities in the city." "Utility facilities," in turn, are facilities in the ROW that are "used or designed to be used to deliver, transmit or otherwise provide utility service(s)." Finally, "utility service" is defined as the "provision of … communications services … 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*." (Emphasis added.)

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[42] *Available at* https://www.portlandoregon.gov/oct/article/400909 at 2.

Thus, for the first time the City would impose gross revenue-based fees on providers who transmit signals through the City but serve customers with no presence in or connection to the City. However, at the same time, the City proposes to maintain linear-foot fees for providers who operate so-called "pass-through" facilities in the ROW. The proposed Fee Ordinance states that "Any utility operator that owns facilities but does not earn gross revenues (*i.e.*, pass-through facilities)" will pay linear-foot fees. This term does not acknowledge the expansion of "gross revenues" in the Code and thus creates an inconsistency that is not possible to resolve. Thus, carriers with pass-through facilities appear to be subject to either (or both) gross-revenue and linear-foot fee provisions. The City must explain which payment regime it would apply to such providers, and should do so in the Code itself, not in administrative rules.

Moreover, if the gross revenue provisions are intended to apply to pass-through facilities, a host of questions would be raised as to how revenues from the transmission of services through the City that are subject to the fee should be determined. This could be a significant concern to companies like TC America whose Portland facilities are merely a small part of a global network, including underseas cables, serving wholesale and retail customers throughout the United States and around the world.

The only allusion to this issue is in the proposed administrative rules (under the control of the Director, not Council). "Revenues will be deemed derived from the city and included in gross revenues where they can be sourced to the city. This can be directly, from the service address, or indirectly, by apportionment."[43] Thus, for carriers who do not have customers with a service address in the City, some form of apportionment will be used. The only example provided, concerning advertising revenue, states:

> Because there is no service address to source the revenues earned, apportionment will prevail. The city is not confined by a particular apportionment methodology to determine the correct amount of revenues attributable to the city, as long as the apportionment methodology is reasonable and not arbitrary and capricious. Apportionment by gross revenues or customer count are examples of reasonable apportionment methodologies.[44]

The City's proposed expansion of the use of gross revenue-based fees to providers with "pass-through" facilities which do not serve customers located in Portland violates the limit imposed by ORS 221.450. It is also confusing, vague, and impossible to apply. It is confusing because it

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[43] Proposed Admin. Rule 8.

[44] *Id.*

potentially applies both gross revenue-based fees and/or linear foot-based fees to these providers. It is vague because it provides absolutely no guidance to providers as to how their gross revenues from global operations should be apportioned to the City.

It would also be practically impossible to apply. Even a preliminary review raises numerous complex and potentially unanswerable questions, such as:

- How should a company treat revenue from a customer with multiple offices around the world, with only one office in Portland, who receives a single bill for service?

- How should a company treat revenue from a subsea cable from Japan to the U.S. that lands in Oregon and is backhauled to Portland for exchange with other carriers for routing outside Portland? How can international carriers feasibly apportion revenue to a half-mile of facilities they own in Portland out of a data circuit that is thousands of miles long, such as Singapore to Seattle, WA?

- How should a company treat revenue from Internet services where that traffic may or may not utilize facilities in the Portland ROW because of technical issues pertaining to the routing of such traffic including the use of redundant facilities?

Even if these and many other questions could be answered and a methodology were established, it would require tremendous effort and utilization of significant resources for a provider to apportion revenue from hundreds of circuits and services that make a minuscule use of the ROW in Portland, and this must be repeated for each reporting period (every calendar quarter as proposed by the City) as customers, services, and revenue change frequently. TC America currently has no need to collect information about fiber miles between customer endpoints such as Singapore and Seattle. TC America would be obligated to assemble such information for every data circuit and every customer endpoint it serves that uses a circuit that transits the City. That may be impossible to do because many such circuits include facilities that are leased from other carriers where TC America has no information about how that traffic is routed. TC America and its affiliates are also some of the largest providers of international voice services. Some of their international voice traffic transits the City, but what would be a reasonable way to apportion revenue for a 27-second phone call from Singapore to Sacramento? It is conceivable that the cost of developing a system to apportion revenue to the City would exceed the revenue owed to the City. No business would ever choose to engage in such a money-losing effort.

The U.S. Supreme Court evaluated the fairness of an apportionment methodology for an Illinois tax on interstate telecommunications services in 1989.[45] That tax, similar to Portland's current

[45] *Goldberg v. Sweet*, 488 U.S. 252 (1989).

gross revenues charge, was imposed on interstate calls originating or terminating in Illinois and charged to an Illinois service address. The Court held that methodology fairly apportioned revenue to the State of Illinois. In reaching that decision, the Court noted that it would be "virtually impossible to trace and record the actual paths taken by the electronic signals which create an individual telephone call."[46] It also stated that "[a]n apportionment formula based on mileage or some other geographic division of individual telephone calls would produce insurmountable administrative and technological barriers."[47] The impossibility noted by the Court in 1989 has become even more challenging as telecommunications traffic has evolved in the three decades since that decision to utilize more and more Internet protocol, which is very difficult, if not impossible, to fully trace.

Moreover, the City's proposal sets forth no apportionment methodology whatsoever, providing absolutely no direction to telecommunications providers as to how revenue from customers located outside the City should be fairly apportioned to Portland, even if that were technically feasible. Presumably, companies are left to develop their own methods; however, any company's apportionment would be subject to second-guessing by the City or its auditor with no clear standard to guide the decision. Indeed, the City refuses to be "confined by a particular apportionment methodology to determine the correct amount of revenues attributable to the city" and reserves the right to apply any method that is "not arbitrary and capricious."[48] This provides no clarity, guidance, or comfort to providers about the ultimate ROW rates they must pay and flies in the face of Section 253(c)'s requirement that the amount of "compensation required [must be] publicly disclosed by such government." Instead, it will only lead to inevitable disputes when a provider's approach conflicts with City's views. The City's proposal would, for the first time, seek to impose fees for telecommunications traffic that is both interstate and international in character and the City does not set forth any methodology for fairly apportioning such revenue to the City, rendering the proposed ordinance void for vagueness and unenforceable under the Oregon and United States Constitutions.[49]

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[46] *Id.* at 255.

[47] *Id.* at 264-65.

[48] Proposed Admin. Rule 8.

[49] *See Big Mama Rag, Inc. v. United States*, 631 F.2d 1030, 1035 (D.C. Cir. 1980) (striking down Treasury regulations as impermissibly vague under the U.S. Constitution; "the [void-for vagueness] doctrine is concerned with providing officials with explicit guidelines in order to avoid arbitrary and discriminatory enforcement"); *State v. Henry*, 78 Or. App. 392, 396, 717 P.2d 189, 191 (1986) (striking down Oregon statute as impermissibly vague under Oregon Constitution; "A vague statute also violates Article I, section 20, of the Oregon Constitution, in

The City's proposal also raises serious questions about its legal authority and jurisdiction to impose fees based on services that are billed to customers outside the City, and that originate and terminate outside the City, which the City does not explain. As the Court stated in *Goldberg*, "[w]e doubt that States through which the telephone call's electronic signals merely pass have a significant nexus to tax that call."[50]

The City could appropriately resolve all of these unanswered questions, and conform the fees to state and federal restrictions, by maintaining its current practice of limiting gross revenues to those "earned within the boundary of the city,"[51] which it has defined as those derived from the provision of telecommunications services "(I) originating or terminating in Portland, Oregon and (ii) charged to a circuit location in Portland, Oregon regardless of where the circuit is billed or paid."[52] The City should maintain its current practice by including in gross revenues only those derived from the provision of retail communications services to customers with a service address within the corporate boundaries of the City. Revenue from wholesale services must be excluded from gross revenues to avoid double-counting because the wholesale customers would be paying the City fees based on their retail revenue from customers in the City. Moreover, if revenue from wholesale customers is assessed, carriers will likely recover those assessments from their wholesale customers who will then pass them along to their retail customers. Ultimately, retail customers in Portland will be the ones paying multiples of the assessment since the carriers serving the retail customers are going to bill them for *all* of the charges imposed by the City on them and their upstream service providers.

E. Recommended Changes.

As TC America advocated before, the City should maintain the current franchise regime and allow companies like TC America to renew existing franchises with substantially similar terms as originally agreed to in order to honor grantees' reasonable expectations and historical practices from the time they made and maintained investments in telecommunications facilities

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that it invites 'standardless and unequal application of' the law), *aff'd*, 302 Or. 510, 732 P.2d 9 (1987); *Nabors Intern., Finance, Inc. & Subsidiaries v. State*, No. 3AN-18-09155CI, 2020 WL 7973972, at *16 (Alaska Super. Aug. 12, 2020) (the apportionment formula for out-of-state and international revenue in a state statute is void for vagueness under the due process clause of the Alaska constitution).

[50] *Goldberg v. Sweet*, 488 U.S. at 263.

[51] ORS 221.450.

[52] *See* n.42 above.

in the City's ROW. If the City instead insists on proceeding with abandoning the franchise process, it should do the following.

First, the City must calculate the costs it actually and reasonably incurs due to providers' use of the ROW. Those costs must reflect different types of uses. For example, the City must separately calculate the costs imposed by both owners and lessees of telecommunications facilities in the ROW.

Second, the City must establish fees that are limited to recovery of those costs. In doing so, the City should consider the fees that are required to recover those costs on a one-time basis (*e.g.*, for installation or maintenance that requires digging up the street) as compared to a recurring basis (*e.g.*, where a facility that has already been installed in the ROW is used but not accessed in a way that impacts the ROW).

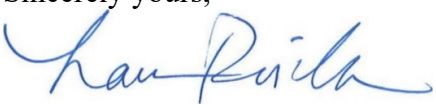
Third, the City must disclose the basis for its cost and fee calculations to affected providers and City Council before the proposed ordinance is considered by Council as required by Binding City Policy FIN-2.04. The City Budget Office must prepare and submit a fiscal impact statement that identifies the impact on the City's budget of the projected revenue as well as the impacts on businesses of the proposed ordinance.

Fourth, the City should maintain the lease exclusion for linear-foot fee payors in a way that does not make artificial distinctions among types of leases and does not permit multiple fees for the same incursion in the ROW by the owner and any lessees. TC America supports the language proposed by WCI Cable on this point in its second set of comments.

Fifth, the City should clearly define gross revenues as revenues earned only from end-user customers (rather than wholesale customers) with a service address in the City and abandon the idea of apportioning revenue earned from customers without a service address in the City which is fraught with practical and legal challenges that cannot be overcome.

Finally, these key terms should be enacted by the Council and incorporated in the City Code, and not delegated to the Director to establish by rule.

Sincerely yours,



Lawrence H. Reichman

PORTLAND
BUSINESS ALLIANCE
Commerce • Community • Prosperity

June 1, 2022

City of Portland
Office of Community Technology
1120 SW 5th Ave, Suite 405
Portland, OR 97204

The Portland Business Alliance (the Alliance) is greater Portland's Chamber of Commerce and represents the largest, most diverse network of businesses in the region. The Alliance advocates for business at all levels of government to support commerce, community health, and the region's overall prosperity. We represent over 2,100 members, from 27 counties, 13 states, and virtually every industry sector. More than 80% of our members are small businesses.

We write today to submit the following comments on the proposed second draft ROW Code 12.15 on behalf of the greater Portland business community, including our members who require Right of Way (ROW) franchise agreements with the City of Portland (the City) to conduct their business and provide their services to their customers. These companies provide some of the most essential services to Portlanders, including electric and gas utilities, fuel, and broadband service. It is not an exaggeration to say that these companies are as essential, if not more so, to day-to-day life in Portland as any provided by the public or private sector.

After reviewing the second draft of the ordinance, we continue to harbor significant concerns with this proposal. The lack of a thorough stakeholder process and the impacts this code will have on Portland residents and business, especially small businesses as it relates to a higher cost of living, is hugely problematic. It was evident, upon our review of the customer comment document provided by the City which summarized stakeholder responses from the first comment period, that nearly every previous concern and suggested change submitted by stakeholders was ignored in the updated draft; as such, we continue to have many of the same issues with the draft language that we did before.

The rationale presented for this code change by the Office of Community Technology (OCT) is the need to streamline its work to most efficiently provide access to the right of way and ensure all entities that use the right of way play by the same rules. Further, OCT accurately states that most cities in the Portland region have already completed this streamlining process. To be clear, the Alliance and our members agree with these policy goals. However, it is grossly misleading for the City to claim that this proposed code represents such a simple policy change. In reality, the new proposed code is replete with so many new requirements and policies that its purpose is clear. It appears to be a vehicle for other bureaus to achieve some of their most controversial and costly policy objectives, even if, in some cases, those objectives appear to violate federal law, conflict Oregon Public Utility Commission requirements, or even Supreme Court decisions.

Additionally, there are significant cost of living impacts this proposal would inflict on a city that is already dealing with soaring inflation, high cost of living and housing, and a long road ahead to post-pandemic economic recovery. It would not be a stretch to call this one of the largest hidden tax increases ever proposed in Portland's history. The cost of electricity, fuel, mobile service, cable television, internet, and more will unquestionably increase under this draft. And while it is a reasonable policy goal to streamline the City's work to most efficiently provide access to the right of way, this proposal does not appear to have considered streamlining this process for franchise agreement holders in any way. This is not surprising, since even after two public comment periods, there has been very little proactive stakeholder outreach and engagement on the part of the City.

This draft code proposal is so flawed that in addition to the numerous technical comments we have submitted and are re-emphasizing below, we strongly urge Commissioner Rubio and OCT to go back to the drawing board and reset the process with deep and sincere stakeholder and community engagement. It is eminently reasonable to request that the

shared purpose of this draft code change be to make access to the right of way work better for both the City and the entities that require that access.

The Alliance and our members have demonstrated again and again our willingness to be a collaborative partner in improvement efforts in numerous policy areas with the City of Portland. We are committed to partnering with OCT and the Commissioner's office to achieve the stated policy outcomes of this initiative. Unfortunately, in order to reach that goal, it is necessary for Commissioner Rubio and OCT to reset this process with the actual involvement of all impacted parties brought forth by the City.

<u>Formal Comments on Proposed City Code 12.1.5:</u>

1. Lack of transparency and public process:

    - The City has made no attempt to develop this ordinance, with massive impacts on virtually all Portlanders, with transparency or impacted stakeholder input. This is entirely unacceptable. OCT must commit to a deliberate, transparent process that involves all stakeholders from the start, and this cannot be achieved in the compressed timeline the City has allocated. The reasoning that many other cities have completed this process is inadequate; Portland has a unique form of government and a unique way of life. The way we implement a streamlining right of way process must reflect the stakeholders that live and work in our city and must be the right process for us.

    - An acceptable process must include a transparent, negotiated, and justified method of setting fees and rates. The fact that this draft ordinance omits proposed fee amounts from the policy process, until "determined by a resolution of the City Council" at a later date appears to be a deliberate attempt to shield a large tax increase from public scrutiny, and does not provide clear way to address issues that may be in dispute.

2. Draft ordinance represents a massive hidden tax and fee increase that appears to violate federal law and legal precedent:

    - This proposed draft code is essentially a massive hidden tax increase by making it far more expensive to access the right of way. It would result in a significant cost increase for the combined hundreds of thousands of Pacific Power, NW Natural, and Portland General Electric customers, as well as virtually every Portlander's mobile carrier service. According to the Pew Research Center, over 97% of Americans subscribe to mobile device services.

    - If the City would like to turn right of way policy into a revenue raising mechanism by increasing the cost of critical services dependent on ROW access, this is not the appropriate way to make such a proposal. The City should be transparent about its revenue raising goals and propose raising franchise fees consistent with applicable law, with a full analysis of how rates are set and how they will impact consumer and business costs, why additional fees are needed, and how said fees would be used once allocated.

    - The draft will create a new "Right of Way Access Fee," which would charge service providers for use of facilities *that they themselves do not own*. This essentially represents an attempt to charge a fee for the same access twice since the owner of those facilities would already pay the City a right of way fee and a service provider that leases those facilities already pays the owner of the facilities for the right to lease those facilities. The City here is seeking to charge multiple entities for the same infrastructure. The courts and the Federal Communications Commission (FCC) have rejected the proposition that a carrier "uses" the right of way simply by obtaining backhaul services from third parties as in *AT&T Communications of SW., Inc. v. City of Austin,* 235 F.3d 241 (5th Cir. 2000). Similarly, in *Qwest Corp. v. City of Portland*, 275 Or. App. 974, 888 (2015), the Oregon Court of Appeals rejected arguments that "resellers"—i.e., companies that purchase transport service from another company that owns fiberoptic lines—were "using" the right of way even though the resellers did not themselves own or control the fiberoptic lines.

- Relatedly, in Section 12.15.040 (C), the City expressly disavowed any obligation to "*maintain or repair any part of the right of way."* This begs the question: If the City has no obligation to maintain the right of way, what are the right of way operators paying for, beyond the cost-based Registration and utility License administration fees? According to the City's FAQ document, the "Right of Way Access Fee" will be based on a percentage of gross revenue. This appears to violate federal law. Per Section 253 of the Telecommunications Act, fees imposed on telecommunications providers must be proportionate to the City's costs to provide access to the right of way. Applying Section 253, a 2018 FCC Order on Small Wireless Facilities, explicitly held that state and local ROW access fees for deployment of small wireless facilities must be cost-based.[1] The FCC in fact stated in paragraph 70 of the order that "we agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW."

- The City has an obligation to transparently justify how a ROW access fee based on a percentage of a *company's* gross revenue can be a cost-based fee that accurately represents *the City's* proportionate costs for providing right of way access. Such justification would seem impossible since the ordinance explicitly exempts the City from a ROW maintenance obligation.

- Finally, the draft ordinance would give non-elected City staff authority to increase taxes, fees, and rates without a public process. This authority must remain with the City Council, with transparent means to challenge issues that are in dispute.

3. Gives the Office of Community Technology unfettered power to establish new policy:

    - As previously stated, the draft ordinance would give non-elected City staff authority to increase taxes, fees, and rates without a public process. This authority must remain with the City Council.

    - The draft ordinance gives the OCT director authority to establish new policy at any time, when an essential element of franchise agreements is the certainty they provide to those who invest in the infrastructure necessary to provide critical services.

4. Draft ordinance attempts to make policy that has nothing to do with ROW access:

    - The proposed ordinance essentially embeds the twice-remanded fossil fuels infrastructure ordinance and bans fossil fuel infrastructure. As previous comments by the Alliance and other organizations have accurately stated, this sets this ordinance up for immediate legal action and almost certain rejection by LUBA.

    - Additionally, the proposed ordinance violates City Resolution No. 37168 regarding City climate policy on fossil fuel infrastructure projects. The City's policy is to exempt needed infrastructure that:

        - Improves safety;
        - Provides service directly to end users;
        - Develops emergency backup capacity;
        - Enables recovery or reprocessing of petroleum products, or;
        - Accelerates the transition to lower emission sources.

    - The ability of the OCT director to impose new program rules without a public process creates a level of uncertainty that is unacceptable for right of way operators who are making long-term capital investment

[1] The fee requirements of the order were upheld the Ninth Circuit Court of Appeals, and the Supreme Court of the United States earlier this year declined to review the Ninth Circuit's decision.

decisions. This is why operators and cities have traditionally sought 10-year charter franchises; it allows from long-term planning based on agreed-upon rules that cannot suddenly change from year to year.

5. Draft ordinance establishes unfair competition within industries:

   - The proposed code would only apply to right of way operators after the expiration of their current franchise. In several cases, this would allow entities who have signed permanent franchises in 2020 to enjoy many years of financial advantage over any competitor whose franchise agreement expired prior to that time. This would be in direct contradiction to one of the main policy goals of this ordinance, which is to shift to a unified utility code so that every right of way operator is treated equally. The grandfathering process needs to be reworked to avoid establishing long-term competitive situations where certain entities operate for several years under different policies.

   - While OCT staff have stated that these proposed code changes would only apply to right of way operators after the expiration of their current franchise, this seems to be inconsistent with language in the draft ordinance. Draft language in section 12.15.200 provides that it would apply to existing franchises agreements "to the extent that this Chapter is not in conflict with and can be implemented consistent with existing franchise agreements." If it was not to apply to existing franchise agreements, then this would be clearly articulate in the draft code language (e.g., "this Chapter will not apply to any existing franchise agreements granted to utility operators by the City until such a franchise agreement expires or terminates.").

Thank you for taking our comments into consideration. It is our hope that we can collaborate to achieve a shared goal of a more streamlined, fair, and effective policy solution. The Alliance is ready and willing to help the City of Portland reach that objective. Before that can happen, the City must commit to a more transparent and comprehensive stakeholder process and account for the feedback submitted by the Alliance, our partner organizations, and direct and impacted stakeholders. And it must take into consideration that this policy, as currently drafted, will exacerbate our region's growing cost of living crises by increasing the cost of services that virtually every resident of the city rely on. The City also must be willing to recognize that the process thus far has not reflected that ideal and go back to the drawing board if necessary to create a more credible and legitimate policy process.

Sincerely,

Andrew Hoan *(he/him/his)*
President & CEO
Portland Business Alliance
p: 503-224-8684 | ahoan@portlandalliance.com

Greater Portland's Chamber of Commerce
DowntownPortland.org | PortlandAlliance.com | PartnersinDiversity.org
Be here for Portland.

David J. von Moritz
Corporate Counsel & VP

3700 Monte Villa Pkwy
Ste. 110
Bothell, WA 98021

david.vonmoritz@astound.com

office: (425) 896-1868

June 1, 2022

Via Electronic Mail

City of Portland
Office for Community Technology
111 SW Columbia Street, Suite 600
Portland, Oregon 97201
comtech@portlandoregon.gov

Re: Comments on Draft Code for Utility Access to the Right-of-Way (the "Draft ROW Code")

To Whom It May Concern:

Astound Broadband, LLC ("Astound") provides broadband service and holds a telecommunications franchise granted by the city of Portland (the "City") in 2011 via Ordinance No. 185018. Astound appreciates this opportunity to provide comments regarding the updated Draft ROW Code issued by the Office for Community Technology ("OCT") on April 26, 2022. As explained below, most of our comments at this stage are focused around seeking additional clarity on the scope of the rules in general and a better sense of how the provisions of the Draft ROW Code are consistent with federal law. We look forward to working with OCT and the other stakeholders in this proceeding.

I. Comments

As a preliminary matter, Astound notes that the Draft ROW Code is intentionally broad in scope. Because the degree of breadth involved in the Draft ROW Code makes it difficult to review and provide productive comments at this time, we focus on those issues that pervade the majority of the provisions of the Draft ROW Code. Although we stand ready to provide a more detailed response once we have an insight into the methodology used by the City to determine the cost of providing access to the right of way, we identify below some examples below that serve as illustrative examples of the primary issues in this proceeding, many or all of which intersect with the applicable federal law.

A. Section 253(a) of the Communications Act

Namely, Section 253(a) of the Federal Telecommunications Act of 1996 (the "Act") contains key limitations that apply to right of way ordinances such as the Draft ROW Code, providing that "[n]o State or local statue or regulation, or other State or local legal requirement,

may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[1] This federal statute further limits local governments to receiving only "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government."[2]

The Federal Communications Commission ("FCC" or "Commission") recently clarified that under section 253 of the Act, state and local authorities cannot materially inhibit the provision of telecommunications services.[3] The FCC also clarified in the *Third R&O* that localities materially inhibit provision of telecommunications services when they charge fees greater than actual cost.[4] This question of whether a state or local government action materially inhibits telecommunications services—a statutory concept that includes the broadband services provided by Astound—and violates section 253 is subject to the following three-pronged test developed by the FCC:

1. Fees for accessing the right of way must be a reasonable approximation of the costs to the state or locality;
2. Only objectively reasonable costs are factored into these access fees; and
3. Access fees are no higher than those fees charged to similarly-situated competitors.[5]

This material inhibition test does not reflect a novel change in direction by the FCC or the presence of new principles in the law. With respect to the imposition of gross revenue fees, the Commission and courts have also aligned on how to address gross revenue fees in this context: "For example, the Commission agrees with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the right of way, and where that is the case, are preempted under Section 253(a)."[6]

Leaving aside this language clarifying that fees such as those in the Draft ROW Code are generally preempted, an in-depth, meaningful assessment of the draft language in the Draft ROW Code is not possible at this stage. In order to determine the degree to which the gross revenue fees imposed in the Draft ROW Code fail to pass any of the three prongs of the material inhibition test, stakeholders must have and review the cost study performed by the City in order to examine and evaluate the whether the City's methodology is consistent with federal law. As a result,

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[1] 47 U.S.C §253(a).

[2] 47 U.S.C §253(c).

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Decl' Ruling and Third Report & Order, 33 FCC Rcd 9088 (2018) ("*Third R&O*").

[4] *Id.* at 9091, para. 10.

[5] *Id.* at 9112-13, para. 50.

[6] In addition to the FCC agreeing with multiple courts "that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW" in paragraph 70 of the *Third R&O*, the Ninth Circuit recently upheld the FCC's approach in the *Third R&O* ("The FCC's approach to fees is consistent with the language and intent of Section 253(c)"). *Third R&O*, 33 FCC Rcd at 9124-25, para. 70; *City of Portland v. United States*, 969 F.3d 1020, 1039 (9th Cir. 2020).

stakeholders are also unable at this time to assess whether any particular terms or conditions in the Draft ROW Code can pass the material inhibition test.

B. Examples

At this time, the broad scope and lack of clarity in much of the language of the Draft ROW Code serves to emphasize the gap between the terms and conditions as currently drafted and the statutory limitations imposed on this ordinance. Therefore, providing extensive comments at this juncture would not be productive. However, by engaging in a brief examination of the language in some provisions, we hope to illustrate the type of issues that pervade the Draft ROW Code for the edification of the City.

Example – License requirement. Under section 12.15.080 of the Draft ROW Code, "[e]very person that uses, owns, or controls utility facilities in the right-of-way" is required to obtain a license, if not party to an active franchise agreement.[7] The degree of right of way access involved in this obligation seems excessively broad, especially given that this language seems to capture a wide range of uses, such as leasing capacity, which do not seem to impose an objective cost on the City. On a similar note, Astound also agrees with several previous comments that discussed that the absence of a lease exclusion from licensing obligation has problematic ramifications.[8] Without insight into the methodology employed by the City, it is difficult to even assess whether the access uses invoked by section 1.215.080's language are based on objective costs borne by the City when granting right of way access or would represent a reasonable approximation of the costs to the City of Portland, for example. At this time, it is unclear how the Draft ROW Code or the record supports imposing this obligation on a broad class of users, such as lessees of services or facilities, particularly as they may already be subject to a separate licensing obligation.

Example – Access ROW fee requirement. The fee to access and use the right of way is to be paid in an amount determined by City Counsel ordinance, and apart from a provision that generally references "applicable limitations" of state and federal law, does not further specify the amounts due on a quarterly basis or the method by which the fee should be calculated.[9] Although the Draft ROW Code does contain a definition of "gross revenues" that is relevant to the amount determined by ordinance,[10] there is no reference or definition of linear feet in the Draft ROW Code. Instead the concept is raised in the draft fee ordinance setting the applicable amounts for each use case[11] and the draft administrative rules.[12] As defined in the Draft ROW Code, gross revenue encompasses: "any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectables, derived from the use or operation of utility facilities in the city,

[7] Draft ROW Code § 12.15.080.

[8] *See* Alaska Communications Nov. 15, 2021 Comments at 2; *see also* Tata Communications (America) Inc. Nov. 15, 2021 Comments at 2.

[9] Draft ROW Code § 12.15.140.

[10] Draft ROW Code § 12.15.030(H).

[11] Draft Exhibit B, Ch. 12.15.

[12] Draft Administrative Rules, released Apr. 15, 2022 ("Draft Administrative Rules").

subject to all applicable limitations in state or federal law. Examples of gross revenue may be identified in administrative rules."[13]

As a preliminary matter, it seems that the focus on revenue is contrary to the statutory principles clarified by the FCC that the charging of fees greater than actual cost is prohibited. Moreover, because the language "any and all" in the definition is extraordinarily broad in scope, it is likewise difficult to see how every use case within the sweep of the Draft ROW Code comports with federal law. For example, there are multiple use cases that impose no objectively reasonable costs, such as leasing capacity from, or providing capacity to, another provider, that would fall within the scope of the definition but not necessarily satisfy the material inhibition test. To understand how these provisions interact with the general provision that the Draft ROW Code is subject to the applicable limitations of state and federal law, review of the relevant cost study performed by the City could provide necessary insight into these issues, including how the cost study supports the position that a "but-for" threshold to be applied based on the Draft Administrative Rules[14] is a reasonable approximation of the City's costs and related to an objectively reasonable cost incurred by the City.

We do note that, to the extent that the current examples in the Draft Administrative Rules provide some needed clarity, they seem to be preempted by federal law. For example, Draft Administrative Rule 1 makes it clear that gross revenues cover "whether revenue generated would have occurred but-for the utility operation, service, or use of facilities within the city." The Draft Administrative Rule 1 itself makes it clear that such revenue includes late fees, billing/collections fees, advertising revenues, pass-through of regulatory costs if imposed on the utility (i.e., pass-through costs of right of way/access fees get double taxed).[15] Again, without review of the cost study, it is unclear at best how some of these revenue sources create an objectively reasonable cost to the City and do not run afoul of the material inhibition test.

Example – Linear Feet Fee. As mentioned above, the lack of clarity in the Draft ROW Code makes it hard to determine the applicable amounts when providing services and maintaining facilities in the right of way that are not related to gross revenue generation. Unlike section 12.15.100 in the previous version of the Draft ROW Code, the current version does not provide language that specifies how the linear feet fees and attachment fees apply to service providers. Similarly, it is not clear whether these fees only apply when providing pass-through services that do not result in gross revenue generation, or whether the linear feet and attachment fees are charged in addition to the 5% gross revenue fee. Perhaps the removal of language specifically limiting payment of these fees to operators not otherwise providing service to customers within the City of Portland from the previous section 12.15.100(B) was inadvertent, in which case restoration would be both consistent with the City's intent and helpful to stakeholders.

Leaving this issue aside, we also note that the practice of providing key examples in the administrative rules, especially when there is little or no corresponding language in the Draft ROW Code itself, does not provide sufficient clarity on whether the obligation overlaps or applies in separate circumstances (and when it applies in separate circumstances). Nor does the interplay between the concepts as drafted in the Draft ROW Code and Draft Administrative Rules. For

[13] Draft ROW Code § 12.15.030(H).

[14] Draft Administrative Rule 1.

[15] *Id.*

example, Administrative Rule 8 appears to state that the linear fees applicable to the use of fiber are (1) separate from the service provided over the fiber (2) and applied to the linear feet separately for each type of service provided over the fiber in the right of way. On the basis of the language that is currently in the Draft ROW Code, this is difficult to parse. The same holds true for Draft Administrative Rule 9, which could likewise be read to support a double-charging framework, assuming the same principle applies to attachment fees. Finally, given the lack of notice and comment that correspond with the release and application of administrative rules, we also do not recommend continuing to rely on this vehicle.

II. Conclusion

Again, we welcome the opportunity to provide input and comments on the Draft ROW Code in this proceeding, and look forward to taking the next steps in this process with OCT and the other stakeholders. However, we suggest that the City reconsider the timeline for this proceeding by including additional time for stakeholders to review the cost study performed by the City so that all parties can participate in a meaningful way going forward. To that end, we also request that the City make the cost study and any supporting materials related to its methodology publicly available so that all stakeholders can review and better understand OCT's approach and the intended application of the provisions of the Draft ROW Code.

Please let us know if you have any questions.

Sincerely,

/s/

David J. von Moritz
Corporate Counsel & VP

May 6, 2022

Elisabeth Perez, Director, Portland Office of Community Technology
Jillian Schoene, Chief of Staff, Office of Commissioner Carmen Rubio

Re: Request for 30-Day Extension of Comment Period
Proposed Chapter 12.15 Utility Access to and Use of the Right-of-Way

Dear Elizabeth and Jillian:

We write to you on behalf of AT&T, T-Mobile, and Verizon (hereinafter, the "Telecommunications Providers") as stakeholders in the draft Utility Access to and Use of the Right-of-Way ordinance currently under consideration by the City of Portland ("City") and for which the City just circulated another draft with comments due on Sunday, May 29, 2022. We received these draft documents last Friday afternoon and the 30-day comment window closes on the Sunday of Memorial Day weekend, thereby reducing the number of business days in the comment period. It should be noted that the city originally agreed to distribute this draft back in January. While we understand some of the challenges underlying the delay, the reality is that the time allowed for review of the new draft materials and thoughtful preparation of our comments has been drastically truncated—which is particularly concerning because this is a significant policy proposal with major implications for stakeholders and their partners.

Moreover, while we appreciate the inclusion of additional details in this distribution, such as the proposed fee schedule, we remain uncertain of the City's intent with this code update. In order to comment in detail, we reasonably need: (a) time to meet with staff for a question and answer session to understand the City's intent and (b) an additional thirty (30) days to prepare comments. The timeline indicates that the ordinance will not be sent to council until mid-July. We therefore request extending the comment period to give critical stakeholders more time to absorb, analyze, and provide comments on a policy change of this size and importance. The goal should be to get Portland's Right-of-Way policies done right; not done fast.

The Telecommunications Providers continue to share serious concerns about the draft ordinance. As one example, the new draft does not disclose how the City is responding to our previously expressed concerns about the City's "Reservation of city rights" to attach the City's facilities to a carrier facility in the right-of-way, at no charge. See proposed Section 12.15.080(I). We are concerned that we might not learn how the City will be addressing this issue in advance of the Council meeting. When will we be provided information about what the City intends here and any new language for this provision?

As another example, you will recall that we raised concerns last fall with the potential for double-charging, especially under proposed new Section 12.15.080(J)(Multiple Services). With the latest version of Subsection (J), it is still unclear whether one provider (or multiple providers) will be

charged multiple times for the same service or over the same facility in the right-of-way. In our experience in other Oregon jurisdictions, some have taken the position that a right-of-way fee must be paid by a party that is the customer in the service provider relationship (for example, when wireless facilities are served by fiber for backhaul). This is a double charge. What is the City's intent under Subsection (J)?

Numerous other provisions of proposed Chapter 12.15 remain unclear, some new provisions were added, and we are concerned that we do not have the context needed to suggest clarifying changes to ensure that the new code is easy to understand and apply, as well as fair and reasonable.

Thank you for your consideration of this request.

Sincerely,

Tim Halinski

Tim Halinski, Corporate Counsel
For T Mobile

Kim Allen
Senior Vice President, Wireless Policy Group, LLC For Verizon

Amir Johnson
Director – Oregon
External & Legislative Affairs
For AT&T

TECHNOLOGY ASSOCIATION OF OREGON

May 26, 2022

Via Email

Re: Draft Utility Access to the Right-of-Way Code (Chapter 12.15); Response to Portland's Second Request for Public Comments

Dear Mayor Wheeler and Members of Portland City Council,

We write to you on behalf of the members of the Technology Association of Oregon (TAO) in regards to the draft Utility Access to the Right-of-Way code (Chapter 12.15) currently under consideration by the City of Portland ("City"). We have serious concerns about the process by which the City's new right-of-way (ROW) policies are being developed, and the lack of consideration given to stakeholder input thus far. This policy proposal from the Office for Community Technology (OCT) and the Portland Bureau of Transportation (PBOT) represents a significant and permanent change in how utilities and other service providers access the ROW to serve Portland's residents and businesses, and what the cost of that access and ability to provide service will be for them and their customers. It is essential that the process by which these policies are developed and vetted be commensurate with the scope of the policy impact itself, which is considerable. That has unfortunately not been the case up to this point.

Concerns about the lack of a meaningful stakeholder involvement were expressed by members of TAO and other affected parties from the very beginning of this process, when the City released its first draft of the ROW code last fall. In addition to the broad process concerns (and despite the lack of basic rate and implementation information available to make a comprehensive assessment of the proposed code), stakeholders submitted numerous detailed comments, concerns, and suggested changes to the City's first draft of the ordinance. Nearly six months after those comments were due, the City released the second draft of the ROW code—this time including a draft rate schedule and proposed administrative rules. We and other stakeholder groups were extremely disappointed to find that it incorporated essentially none of the changes requested by stakeholders in response to the first draft. Instead, a matrix was provided of anonymized, selectively chosen stakeholder comments, together with the City's response to them. In nearly all cases, "none required" was the City's answer to whether ROW operators' concerns needed to be addressed. Earlier assurances given by City staff to some ROW operators about the supposedly neutral revenue impacts of the City's new code have—with the release of the new draft and associated fee schedule and administrative documents—shown themselves to be false.

TECHNOLOGY ASSOCIATION OF OREGON

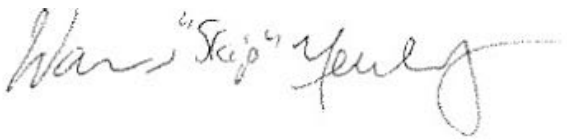
The new draft, in fact, *doubles down* on the most egregious proposals that were the subject of several TAO members and other stakeholder groups' letters to the City during the first comment period. For instance, the City continues to insist that it will charge service providers for use of facilities in the right-of-way *that they themselves do not own.* Additionally, the new draft now pointedly includes "users" of ROW infrastructure in the definition of "Utility Operator," as well as in a provision identifying those entities that would be required to be licensed by the City to "operate" in the city-- and would be subject to associated fees. There are several other key definitions that have been amended to either be narrower or more expansive, seemingly depending on the associated revenue implications.

Relatedly, the City persists in rejecting the obligation to provide a cost study, or otherwise transparently justify the connection between the proposed ROW fees and the proportional cost to the City to administer access to the ROW. This is in clear violation of federal law. In fact, previous language that tied the amount charged for license fees to be set "*in an amount sufficient to fully recover all of the City's costs related to processing the application for the license*" was removed from the current draft.

Many other significant concerns remain, and final comments from stakeholders are currently due. After that, the next time our members will see the code will be when it's voted on in July. Given the lack of stakeholder involvement in the ordinance development process, the dismissal of nearly every comment and recommendation from affected ROW operators to this point, the insufficient comment period length and the City's unwillingness to extend it beyond June 1, and—up to this point—the lack of adequate access to the city staff responsible and accountable for the substance of the proposed code, we have very little confidence that our members' concerns—which have only grown more significant in recent weeks—will be considered at all by staff before this comes before the City Council for a vote. The implications are significant.

This is a major policy shift which will impact all Portlanders for years to come, and it is critical that we get this right. We strongly urge OCT and PBOT to push the reset button and engage with stakeholders in a deliberate, collaborative, and transparent process to craft an equitable and durable ROW policy that considers the broad, cross-bureau technology policy impacts, and addresses our shared equity and economic challenges.

Sincerely yours,



Skip Newberry

President & CEO, Technology Association of Oregon

Davis Wright Tremaine LLP

Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5610

Mark P. Trinchero
503-778-5318 tel
503-778-5299 fax

marktrinchero@dwt.com

Attorney-Client Privileged Communication

May 12, 2022

VIA EMAIL: ComTech@portlandoregon.gov

Office for Community Technology
City of Portland
111 SW Columbia Street, Suite 600
Portland, Oregon 97201

Re: Comcast Comments on Updated Draft ROW Code

To Whom It May Concern:

This law firm represents Comcast of Oregon II, Inc. and its affiliates ("Comcast"). Comcast appreciates this opportunity to provide comments regarding the Updated Draft ROW Code ("Draft Code") issued by the Office for Community Technology on April 26, 2022.

Because Comcast has a valid franchise agreement with City,[1] under the Draft Code, Comcast would not be required to obtain a license.[2] Accordingly, those provisions of the Draft Code applicable to a "licensee" would not apply to Comcast.[3] However, the definition of the term "licensee" in Draft Code § 12.15.030(J) is overly broad and should be modified to read:

> "Licensee" means every person required to obtain a license pursuant ~~a utility operator to subject~~ to the provisions of this Chapter.

The Draft Code provides that the fees to access and use the City's rights-of-way ("ROW Fee") will be "reduced by any franchise or Utility License Law (Chapter 7.14) fee payments received by

[1] *See* Franchise Agreement For Cable Services Between Comcast of Oregon II, Inc. And City of Portland, Oregon, Effective January 1, 2012 ("Comcast Franchise"). Comcast and the City are currently in cable franchise renewal negotiations pursuant to federal law, *see* 47 U.S.C. § 546, and the Comcast Franchise remains valid throughout the renewal process. Pursuant to Draft Code § 12.15.080(E), the provisions of the Comcast Franchise (including the renewed Comcast Franchise) will control to the extent they conflict with the provisions of the Draft Code.

[2] Draft Code § 12.15.080(A)(1).

[3] *See, e.g.*, Draft Code §§ 12.15.080 – 130, and 150-170.

Attorney-Client Privileged Communication

the city . . ."[4] For Comcast then, in effect, the only change to the status quo under the Draft Code would be the annual registration requirements.[5]

The updated Frequently Asked Questions document states that the annual registration process "ensure[s] the City has up-to-date information."[6] For entities operating under a cable franchise agreement, such as Comcast, the annual registration requirement is superfluous, as cable franchise agreements typically require detailed annual updates that include all of the information that would be provided in an annual registration.[7] Accordingly, Comcast recommends that Draft Code § 12.15.070(A) be modified to read:

> Registration Required. Except for entities operating pursuant to a cable franchise, ~~E~~every person who desires to provide utility services to customers within the city will register with the city prior to providing any utility services to any customer in the city. Every person required to register ~~providing utility services to customers within the city~~ as of the effective date of this Chapter will register within forty-five (45) calendar days of the effective date of this Chapter.

Please let me know if you have any questions.

Sincerely

Davis Wright Tremaine LLP

Mark P. Trinchero
Attorney for Comcast

cc: Tim Goodman (via email)

[4] Draft Code § 12.15.140(B). To the extent that the Draft Code would require Comcast to pay the ROW Fee on its broadband services, it is preempted by federal law. *See City of Eugene v. FCC*, 998 F.3d 701, 715 (6th Cir. 2021); *see also* 47 U.S.C. § 151 Note (Moratorium on Internet Taxes), § 1101(a)(1) (prohibiting "[t]axes on Internet access").

[5] *See* Draft Code § 15.15.070.

[6] Portland ROW Code FAQ, p. 1.

[7] *See, e.g.*, Comcast Franchise § 13.2.

Utility Access to and Use of the Right-of-Way ordinance (12.15) Administrative Rules

Admin Rule 1 – Definition of Gross Revenue – "Any and All Revenue"

"[A]ny and all revenue" will be determined by assessing whether the revenue generated would have occurred but-for the utility operation, service, or use of facilities within the city. If such revenue would not have been received in the absence of such utility operation, service, or use of facilities within the city, facilities, then it will be included in "any revenue" and included in gross revenues.

Example 1: Late Fees. Customer does not pay for their utility service(s) on time and the utility service provider assesses and collects a late fee from the customer. Because the late fee would never have been collected but-for the utility service consumed, the late fees will be included in gross revenue.

Admin Rule 2 - Definition of Gross Revenue – "Derived from the operation or use of utility facilities in the City of Portland"

Revenues will be deemed derived from the city and included in gross revenues where they can be sourced to the city. This can be directly, from the service address, or indirectly, by apportionment.

Example 1: Directly Sourced – Service Address. Utility service provider receives revenue from a utility service provided to an address located in Portland, Oregon, but the customer's billing address is in Seattle, WA. Because the service address (the address where the utility service was consumed) is in Portland, the revenues will be included in gross revenues. This example only applies to utility operators that own facilities and provision Natural Gas or Electric services.

Example 2: Indirectly Sourced – Apportionment. Utility service provider receives advertising revenues within the State of Oregon. Because there is no service address to source the revenues earned, apportionment will prevail. The city is not confined by a particular apportionment methodology to determine the correct amount of revenues attributable to the city, as long as the apportionment methodology is reasonable and not arbitrary and capricious. Apportionment by gross revenues or customer count are examples of reasonable apportionment methodologies.

Admin Rule 3 – Definition of Gross Revenues – Fee Recovery

All revenue received by the utility service provider that are the result of fees imposed on the utility service provider, and not the customer, that the utility service provider passes through to their customers, will be included in gross revenues. These are typically fees assessed by a government, whether city, state or federal on the utility service provider and not the customer.

Example 1: Right-of-way access and use fees. The utility service provider pays based on gross revenues (as defined by Portland City Code (PCC) 12.15), under a franchise agreement, or utility license law (PCC 7.14). If a utility service provider passes that fee onto their customers, that amount will be included in gross revenues.

Example 2: Sales Taxes. This type of revenue would not be included in gross revenues. In some states, certain purchases are subject to a sales tax. This tax is levied on the consumer, rather than the utility service provider, to be held by the business as a liability until the funds are remitted to the state.

Commented [KJ1]: As stated in our comments to the draft ordinance, pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. Gross revenue-based fees are not cost-based and are therefore preempted and prohibited by federal law.

Commented [KJ2]: Without waiving our previously stated objection and opposition to gross revenue percentage fees, we wish to further point out that the City's attempt to include pass through fees in the definition of "gross revenue" is also wrongful because it results in "double dipping" by the city collecting fees twice from two different parties.

Admin Rule 4– Definition of Gross Revenues – Billing, Collection Fees

Billing and collection fees, including but not limited to non-sufficient funds (NSF) charges, late fees, connection fees, upgrade fees, downgrade fees, service calls shut off fees or disconnect fees, convenience fees, equipment rental fees and administrative fees will be included in gross revenues.

Admin Rule 5 – Not gross revenues

The following fees and charges will not be included within the definition gross revenues. This is an exhaustive list of exclusions which the city will periodically review and revise.

1. **Public purpose charges**: Specific charges collected by a utility service provider selling electrical energy or gas for public purposes will be excluded from gross revenues. For example, a charge or surcharge to a utility customer that the utility service provider is required or authorized to collect by federal or state statute, administrative rule, or by tariff approved by the Oregon Public Utility Commission, that raises revenue for a public purpose and not as compensation for either the provision of utility services or for the use, rental, or lease of the utility service provider's facilities within the city. The list represents an exclusive and exhaustive list of public purpose charges excluded from gross revenues.

   Specific public purpose charges excluded from gross revenues:
   - energy efficiency programs
   - market transformation programs
   - low-income energy efficiency programs
   - carbon offset programs

2. **Residential Exchange Program (Bonneville Power Administration credits)**: The program created by the Northwest Electric Power Planning and Conversation Act to provide residential and farm customers of Pacific Northwest regional utilities a form of access to low-cost Federal power https://www.bpa.gov/Finance/ResidentialExchangeProgram/Pages/default.aspx

3. **Oregon and Federal Universal Service Funding**: Revenues associated with Universal Service funding requirements under the federal universal service fund, 47 U.S.C. § 254, or the Oregon universal service fund, ORS 759.425 (2020).

4. **Revenues associated with taxes for emergency communications under ORS Chapter 403.**

5. **E9-1-1**: The calculation of gross revenues for telecommunications utilities will not include revenues from any tariffed or non-tariffed charge or service applicable to any connection, circuit or equipment which brings an E9-1-1 call to the appropriate responding Public Safety Answering Point, regardless of where the E9-1-1 call is originated.

6. **Sales of bonds, mortgages, or other evidence of indebtedness, securities or stocks.**

Admin Rule 6 – Definition of Utility Facility

"Utility Facility" as defined in PCC 12.15 also includes any place, amenity, or piece of equipment used for the purpose of facilitating the production, storage, transmission, delivery or to otherwise provide a utility service. This includes any and all revenue from leases, indefeasible right of use agreements (IRUs), and other similar agreements, for the Portland portion of the utility service provider's system for dark or lit fiber.

Example 1: Equipment rental. Customer leases a telephone from a utility service provider which they use to consume telecommunications services. The telephone is considered a utility facility and all revenues generated from the lease of that equipment will be included in the gross revenues of the utility service provider.

Example 2: Revenue from the lease of Rack space. Utility service provider A leases to utility service provider B rack space for utility service provider B's telecommunications equipment. The rack space is a place to store utility facilities and will be considered a utility facility under PCC 12.15.030(T). As a result, all revenues generated from the lease of rack space will be included in the gross revenues of the utility service provider.

Example 3: Revenues from the lease of Dark fiber. Utility service provider A leases to utility service provider B dark fiber which utility operator B "lights up" to use in their own system, uses to provision utility services, or to lease to another utility service provider. The dark fiber which is leased is a piece of equipment that is used for the purpose of provisioning a utility service and all revenues generated from that lease will be included in gross revenues.

Admin Rule 7 – Refunds by City to Licensee – Statute of Limitations

The utility service provider may request a refund by filing with the city a written request within three (3) years from the date payment is due. The written request will state the specific reason upon which the claim is based. The request will include sufficient documentation, for the city to easily verify the claim. The utility service provider will provide, at no cost to the city, any additional information the city deems necessary to verify the claim. If the claim is approved by the city, the verified claim amount may be credited against any amount due and payable.

Example: Payment Due Date. Licensee's 1st calendar quarter of 2022 remittance was due on May 14th, 2022. The city received the remittance on August 31st, 2022. Licensee's three (3) year statute of limitations to file a written request for a refund is on or before May 14th, 2025. Licensee will submit all information required or requested by the city on or before the statute of limitation expires or the claim will be denied.

Admin Rule 8 – Fees Paid Per Linear Foot

For the purposes of PCC 12.15.140, the utility service provider will include the following when calculating the linear feet fee:

- Any conduit or fiber owned by the utility service provider
- Any fiber owned by the utility service provider that passes through a leased conduit
- For multiple strands of fiber owned by a utility service provider through a single conduit length, the utility service provider will count only the equivalent length of one strand from the bundle.

For multiple strands of fiber through a single conduit length, the linear foot is measured by the length of the longest fiber strand.

- For a utility service provider providing multiple types of services via multiple lengths of infrastructure in the same trench, such as strands of fiber through a single trench or conduit, the utility service provider will count the linear feet per strand, which is dedicated to a separate line of service, even if the infrastructure is occupying similar space in the right-of-way.

Example: A utility service provider has two lines of business: (1) cable, and (2) telecommunications. The utility service provider has two strands of fiber within a single trench and/or conduit, one for their cable services and one for their telecommunications services. The utility service providers will pay fees per linear feet for each strand of fiber, regardless of whether those strands are in the same trench and/or conduit.

If any linear feet of conduit or fiber is leased, the city will determine ownership by referencing Financial Accounting Standards Board (FASB) 13, "Statement of Financial Accounting Standards No. 13 – Accounting for Leases."[1] Any lease which falls into the category of "capital lease" will be treated as ownership for the purposes of calculating utility service providers' per linear foot fee.

If there is one conduit with strands of fiber owned by multiple utility service providers inside the conduit, each utility service provider will pay a separate linear per foot fee, if applicable.

Admin Rule 9 – Attachment Fee

Attachment fees pursuant to PCC 12.15.140 will be paid quarterly, in arrears, for each calendar quarter, within forty-five (45) calendar days after the end of each calendar quarter. Fees will begin on the date the utility service provider receives approval for a street opening permit from the Bureau of Transportation (PBOT).

Attachment fees do not include any fees for placement of equipment or facilities within the right-of-way.

Example: A utility service provider obtains a permit from PBOT on January 20th, the utility service provider will pay the quarterly fee. A utility service provider obtains a permit on February 15th, the utility service provider will pay two-thirds (2/3) of the quarterly fee.

[1] https://www.fasb.org/resources/ccurl/62/358/fas13.pdf

From:
To: Fwd: [INTERNET] Re: FW: Portland ROW ordinance - PAC, PGE, NWN follow-up
Subject: Friday, May 27, 2022 8:46:21 AM
Date: image001.png
Attachments:

Did you get this one?

Stay safe and take care.

Thank you,
Reba Crocker

---------- Forwarded message ---------
From: **Gravely, Bob (PacifiCorp)** <

Thanks, Reba. We will do that. _____

I'm continuing to get questions, though, from Pacific Power tax group on the indirectly sources revenue piece. Our intent is to file redline suggestions on this, but in order to do so productively they are asking for some clarification on how this is intended to work.

Can you take another look at these questions provided and let me know If there's any prospect of getting additional guidance from staff? Thanks.

-Bob

1. **Administrative Rule 2 – Indirectly Sourced Gross Revenue**

The long-standing practice in Portland and the other 93 Oregon cities served by Pacific Power is to assess franchise fees on taxable revenues that are based on the retail amounts billed to utility customers for service provided within city limits (i.e., based on the customer's service address, subject to certain carve outs).

As we've reviewed draft administrative rule #2, specifically with respect to "indirectly sourced" gross revenue, it is not clear what specific categories of gross revenues earned by regulated electric utilities the rule is meant to capture. As a result, it is difficult to provide constructive feedback beyond general concerns

about the potential expansiveness of this new approach and its administrability.

One question we have is how the term “derived from the operation or use of utility facilities in the City of Portland,” which is used in the ordinance, squares with the definition in administrative rule 2, which uses the term “deemed derived from the city”? Should the administrative rule be read to mean “deemed derived from the operation or use of utility facilities in the City of Portland”? Or is use of the term “deemed derived from the city” different altogether and intentionally so?

Another question we have is with respect to administrative rule 2, example 2. What relationship does the advertising revenue received by the utility service provider within the State of Oregon have to the operation or use of utility facilities in the City of Portland? The example may benefit from such a clarification.

In addition to providing answers to the questions above, if you could please work with City staff to bring us a real-world example(s) of “indirectly sourced” gross revenues presently earned by Pacific Power that are not already being taxed by the City of Portland under our franchise agreement, but would be under proposed administrative rule 2, that would help us provide more specific feedback.

Hi and Happy Friday,

I did tell this group that I would have some feedback today - however the city and I are still looking at possible resolutions.

I would encourage everyone to make official comments that include a redline of the code and related documents. I would suggest that those suggestions include language for the city to consider. Keep in mind that the code applies to all providers.

Stay safe and take care.

Thank you,

Reba Crocker

ROW Consultants LLC

OATOA President

503-724-0766

www.NATOA.org

On Fri, May 20, 2022 at 9:30 AM Gravely, Bob (PacifiCorp) <e:

> Hi Reba,
>
> I wanted to check back to see what the best way would be to receive any updates from you following your meeting with staff on Wednesday. You had indicated you would take in our concerns and questions forward.
>
> As the deadline for comments gets closer it would be helpful to know if there's been movement or conclusions on any of the ongoing issues we've raised.
>
> Thanks. And let us know the best way to receive that input, whether another meeting, following back with us individually or as a group.
>
> -Bob
>
> Bob Gravely
>
> Regional Business Manager, Pacific Power
>
> Office: 503-813-7282 | Mobile: 503-568-3174 | bob.gravely@pacificorp.com

From: Gravely, Bob (PacifiCorp)
Sent: Tuesday, May 17, 2022 5:10 PM
T
Subject: Portland ROW ordinance - PAC, PGE, NWN follow-up

Reba,

Thanks again for speaking with us and the opportunity to follow-up regarding our concerns and suggestions. When sitting with this further, an overall request is for the city to take more time to get this right. The stated purpose of the ordinance is to simplify processes, but there is a lot in the draft ordinance and rules that remains unclear to us and that we don't want to leave up to interpretation down the road.. Taking the time to more fully talk these things through is doable and would lead to a better and more durable product, but not in the timeframes that have been established. A lot of our remaining concerns are the ones we've expressed - more clear definitions, not expanding the scope of gross revenues and resulting cost impacts, need for an appeals process, among others. The apportionment language in the administrative rules adds a new one in addition.

Per your request to collect our input in one e-mail, please see NW Natural's public comments attached. Andrew's reference to the OPUC approved language to calculate gross revenues used for ratemaking is below. Following that are some additional questions for you and city staff on the apportionment language in the administrative rules and some suggestions on what's counted in gross revenues from Pacific Power.

We hope this is helpful to be able to relay where the three main energy utilities stand and we look forward to continued conversation.

-Bob Gravely

Pacific Power

503-568-3174

From PGE

Below is the link to the OAR that discusses the definition of gross revenues. The OPUC uses the below OAR to define the calculation of gross revenues that we use for rate making that's approved by the OPUC.

https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=221088

Sub section (2) includes the clarity that PGE would like to see cited and called out in the admin rules as the way we calculate gross revenues (see picture below):

(2) Except as otherwise provided herein, "gross revenues" means revenues received from utility operations within the city less related net uncollectibles. Gross revenues of an energy utility shall include revenues from the use, rental, or lease of the utility's operating facilities other than residential-type space and water heating equipment. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, sales at wholesale by one utility to another when the utility purchasing the service is not the ultimate customer, or revenue from joint pole use.

This citation applies to utilities regulated by the OPUC, and therefore, is a citable solution to use that would only impact PGE, PAC, and NWN.

From Pacific Power

1. **Administrative Rule 2 – Indirectly Sourced Gross Revenue**

The long-standing practice in Portland and the other 93 Oregon cities served by Pacific Power is to assess franchise fees on taxable revenues that are based on the retail amounts billed to utility customers for service provided within city limits (i.e., based on the customer's service address, subject to certain carve outs).

As we've reviewed draft administrative rule #2, specifically with respect to "indirectly sourced" gross revenue, it is not clear what specific categories of gross revenues earned by regulated electric utilities the rule is meant to capture. As a result, it is difficult to provide constructive feedback beyond general concerns about the potential expansiveness of this new approach and its administrability.

One question we have is how the term "derived from the operation or use of utility facilities in the City of Portland," which is used in the ordinance, squares with the definition in administrative rule 2, which uses the term "deemed derived from the city"? Should the administrative rule be read to mean "deemed derived from the operation or use of utility facilities in the City of Portland"? Or is use of the term "deemed derived from the city" different altogether and intentionally so?

Another question we have is with respect to administrative rule 2, example 2. What relationship does the advertising revenue received by the utility service provider within the State of Oregon have to the

operation or use of utility facilities in the City of Portland? The example may benefit from such a clarification.

In addition to providing answers to the questions above, if you could please work with City staff to bring us a real-world example(s) of "indirectly sourced" gross revenues presently earned by Pacific Power that are not already being taxed by the City of Portland under our franchise agreement, but would be under proposed administrative rule 2, that would help us provide more specific feedback.

2. **Additional gross revenues definitions**

Because franchise fees are included as a cost of service on customer bills, we continue to advocate that the city not expand what counts as gross revenues from current and standard practice. Doing so would increase the power bills of Portland customers at a time when costs are increasing significantly and do so in a way the disproportionately affects low-income customers.

For those reasons, Pacific Power supports the exclusion of public purpose charges, BPA Residential Exchange credits and other items listed in Administrative Rule 5. We would ask that other similar non-revenue pass through items that appear on customer bills be added to this list and excluded from the gross revenue definition.

Other Proposed Changes

a. Delete Administrative Rule 3 – Franchise fee recovery. The separately stated franchise fee amounts collected from customers and then remitted to the city of Portland do not represent revenues for any purpose. Like sales taxes, such amounts are recorded "as a liability until the funds are remitted." Significantly, such amounts are indistinguishable from the numerous items listed in Admin Rule 5 for which utility companies are merely acting as a collection agent on behalf of the associated government agency. The only party for which such amounts represent revenue is the governmental agency for which they are collected, in this case the city of Portland.

b. Exclude late fees (Administrative Rule 1, Example 1). One of the stated purposes of the new ordinance is to "Ensure that the city's current and ongoing costs of granting and managing access to and the use of the right of way are fully compensated by the persons seeking such access and causing such costs." Because the city's cost of granting and managing access to city rights of way is not in any way impacted when a utility customer pays their bill after its due date, the inclusion of late fees in gross revenue is unwarranted.

From:
To:
Subject: Fwd: NWN proposed language to not prohibit transitional/renewable fuels
Date: Friday, May 27, 2022 8:40:09 AM

Dkd you get this one?

---------- Forwarded message ---------
From: **Rasmussen, William**
Date: Mon, May 23, 2022 at 3:02 PM
Subject: NWN proposed language to not prohibit transitional/renewable fuels
T

Reba,

Per our conversation, below is a proposed revision to the fossil fuel definition to enable transition fuels as contemplated in City Resolution 37168 exception 5, which expresses City policy to "not restrict … infrastructure that will accelerate the transition to non-fossil fuel energy sources." Here is the proposed language with the addition underlined:

"Fossil fuels" means petroleum products (such as crude oil and gasoline), coal, methanol and gaseous fuels (such as natural gas and propane) that are made from decayed plants and animals that lived millions of years ago and are used as a source of energy. Denatured ethanol and similar fuel additives with less than five percent (5%) fossil fuel content, biodiesel/renewable diesel with less than five percent (5%) fossil fuel content, and petroleum-based products used primarily for nonfuel uses (such as asphalt, plastics, lubricants, fertilizer, roofing and paints) are not fossil fuels. Hydrogen, renewable natural gas, and other low or lower carbon fuel sources are not fossil fuels for purposes of this Chapter.

Thanks,

Will

William L. Rasmussen
Partner

Miller Nash LLP
US Bancorp Tower | 111 SW Fifth Ave, Ste 3400 | Portland, OR 97204
Direct: 503.205.2308 | *Office*: 503.224.5858
Email | **Bio** | **Insights** | **Website**

Our attorneys regularly offer insights to address the challenges faced by our clients. To visit the Miller Nash industry-focused blog overview page on our updated website: please click this link.

From:
To: Fwd: OAR for Gross Revenue Calculation
Subject: Friday, May 27, 2022 8:48:08 AM
Date: image001.png
Attachments: image002.png

And there's more.

Stay safe and take care.

Thank you,
Reba Crocker

---------- Forwarded message ---------
From: **Andrew Speer** <
Date: Thu, May 12, 2022 at 3:37 PM
Subject: OAR for Gross Revenue Calculation
To:

Hi Reba,

Below is the link to the OAR that discusses the definition of gross revenues. The OPUC uses the below OAR to define the calculation of gross revenues that we use for rate making that's approved by the OPUC.

https://secure.sos.state.or.us/oard/viewSingleRule.action?ruleVrsnRsn=221088

Sub section (2) includes the clarity that PGE would like to see cited and called out in the admin rules as the way we calculate gross revenues (see picture below):

(2) Except as otherwise provided herein, "gross revenues" means revenues received from utility operations within the city less related net uncollectibles. Gross revenues of an energy utility shall include revenues from the use, rental, or lease of the utility's operating facilities other than residential-type space and water heating equipment. Gross revenues shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks, sales at wholesale by one utility to another when the utility purchasing the service is not the ultimate customer, or revenue from joint pole use.

This citation applies to utilities regulated by the OPUC, and therefore, is a citable solution to use that would only impact PGE, PAC, and NWN.

Please let me know if you have questions or need my accounting folks to weigh in.

Thank you for the call today,

Andrew

Andrew Speer
Local Government Affairs Manager • (o) 503-464-7486 • (c) 503-830-6000
PortlandGeneral.com • Follow us on social @PortlandGeneral

PACIFIC POWER
POWERING YOUR GREATNESS

PGE

Commissioner Carmen Rubio & Director Elisabeth Perez
City of Portland
Office for Community Technology
111 SW Columbia St., Ste. 600
Portland, OR 97201

June 1, 2022

Dear Commissioner Rubio and Director Perez,

As the electricity service providers for residents of City of Portland ("City"), Portland General Electric (PGE) and Pacific Power appreciate the opportunity to weigh in on the proposed changes to how the City manages use of the public right-of-way.

The City's stated purpose of the newly proposed ordinance is simplification of the utility license process by replacing dozens of individually negotiated and managed franchise agreements with a single ordinance. PGE and Pacific Power acknowledge the City's desire to create a more uniform treatment of licensees. However, it has become clear that the practical effect of the draft ordinance could lead to increased costs, increased uncertainty, and a failure to recognize the different uses of public rights of way and business models of the City's licensees.

As drafted, the proposed ordinance and administrative rules substantially change the playing field upon which electric utilities have operated for decades. A fundamental, even if unintended, result could be a substantial increase in costs borne by Portland customers at a time when residents of the City are already facing higher costs of living due to the current economic conditions. Additionally, rather than simplifying and clarifying the Utility License Law to help ensure licensees understand and comply with the law, the proposed ordinance and the accompanying administrative rules create additional vagueness and uncertainty that will almost certainly lead to costly and timely compliance disputes.

Echoing comments PGE and Pacific Power submitted following issuance of the first draft of the ordinance in November 2021, we ask that the City retain existing and historically accepted methods of computing gross revenue which is the vital component of determining the amount of fees for use of the right-of-way. These fees are a cost of doing business in the City and ultimately paid by utility customers. Deviation from the current and historic definition of gross revenue serves only to increase the cost to City residents. Changing this definition does not serve to simplify the law or its application.

PGE and Pacific Power appreciate that the draft administrative rules exclude from gross revenue some pass-through items that have never previously been considered part of gross revenue, including credits customers receive for benefits of the federal hydro system (i.e., BPA credits), as well as public purpose charges for energy efficiency and other programs. That these items are being highlighted as exemptions from taxation arises only due to the City's assertion of an overly expansive interpretation during a recent franchise audit and not from any past practice or under Pacific Power's existing franchise agreement. The draft administrative rules, however, do not address or expressly exclude many items that have not historically been, and should not now become, a component of gross revenue. In other words, the fact that the City must exempt some pass-through items that appear on bills demonstrates the implicit expansion of what is considered to be included in "gross revenues" and signals the significant policy

change being proposed. PGE and Pacific Power strongly urge more open and transparent dialogue on this subject.

Additionally, the draft of the administrative rules introduces new concepts such as "apportionment" and "sourcing" that are typically associated with tax law but are ill-defined and misplaced in the context of the proposed ordinance. These are completely new policy concepts with little explanation or consumer impact analysis. In sum, these additions create vagueness, uncertainty, and vast room for future debate.

Also of concern for Pacific Power, and also likely other entities with existing franchise agreements, is the potential for the proposed ordinance to apply simultaneously and conflict with existing franchise agreements that will remain in place for a period of years following enactment of the ordinance. Despite statements in a public FAQ issued by the City to the contrary, the ordinance by its express terms could be interpreted to apply to existing franchise agreement holders without clear consideration how these requirements interact. This could create additional compliance and administrative burden and further increase costs to Portlanders.

We also continue to have concerns about transparency and process given that key aspects of the definition of gross revenue are being addressed solely through administrative rules and not in the ordinance itself. While the draft ordinance does call out a process for changing the administrative rules, it is still the Director who is the decision maker and can unilaterally make decisions on policies that have significant impact on the licensees and their customers. This process does not cure the problems created by the recent utility franchise audits where the City applied new interpretations to existing contract language and procedures that resulted in significant controversy.

As we discuss in our comments, the ordinance itself should contain a clear and complete definition of gross revenue, the most critical component of the license fee. Being left to administrative rule making does not provide the same degree of involvement by the licensees, consumer advocates and other key stakeholders, nor does it provide enough permanency to allow the licensees to plan and prepare for any changes that may affect their business operations and local customers.

Raising more revenue is not an express goal of the City relative to the new ordinance. We are not aware of any data provided by the City or others that identifies a gap between revenue currently raised through franchise fees and the actual costs of managing the right-of-way. If there is such a gap, however, we would fully support an open and transparent dialogue about how to fill the gap. We do not support changes to the law that could result in raising the amount of fees by expanding how fees are computed.

Given all of these concerns, we would ask the City to reconsider whether all users of the right of way should be covered by this ordinance. The ordinance treats essential users of the right of way, such as electric utilities, the same as other licensees. However, electric utilities, have significantly more interaction with the City than other licensees for use of the right of way. PGE and Pacific Power believe bilateral franchise agreements are a superior mechanism to govern the relationship between this subset of licensees and the City. In addition, electric utilities have different business models and sources of revenue than other licensees. Where "apportionment" may be appropriate for certain licensees based on their business models, PGE and Pacific Power do not understand how apportionment would apply to

electric utilities. If electric utilities could be carved out from the ordinance, fees could continue to be established within the framework of a franchise agreement and the uncertainty created by a "one-size-fits-all" ordinance could be avoided.

Please see the attached document for a more detailed account of these concerns and suggested changes related primarily to : 1) the ordinance's application to existing franchisees, 2) the definition of gross revenue, 3) the administrative rules and 4) the new penalty regime.

For each of our respective companies on this topic, please reach out to Andrew Speer (Andrew.Speer@pgn.com) for PGE, and Bob Gravely (Bob.Gravely@pacificorp.com) for Pacific Power.

We look forward to continued dialogue on this important matter.

Sincerely,

Cory Scott
Pacific Power
Vice President,
Customer and Community Solutions

Dave Robertson
Portland General Electric
Vice President,
Public Affairs

Attachment

PGE AND PACIFIC POWER COMMENTS

I. APPLICATION TO EXISTING FRANCHISE AGREEMENTS

The FAQs, published by the City relative to the proposed ordinance, indicate that existing franchise agreements will remain in effect until they expire, at which time the utility with the expiring franchise will become subject to the new ordinance and have to register. See, FAQ No. 1, FAQ No. 7 and FAQ No. 10, Scenario 2.

Section 12.15.200 of the proposed ordinance, however, contradicts the FAQs. It states:

"12.15.200 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 will apply to all existing franchise agreements granted to utility operators by the City."

Section 12.15.140B. of the proposed ordinance states:

"B. Fee payments required by this Section will be reduced by any franchise or Utility License Law (Chapter 7.14) fee payments received by the City, but in no case will be less than zero dollars ($0)."

Based on these two provisions of the proposed ordinance, licensees with existing franchise agreements will be subject to the new ordinance immediately upon adoption. They will be required to register, pay a registration fee and comply with the ordinance to the extent "not in conflict" with their existing franchise agreement.

In sum, current licensees like Pacific Power, that are subject to a franchise agreement, would be required to conform to and comply with both the ordinance and their franchise agreement, pay the amounts due under their franchise agreement and any additional amounts due under the proposed ordinance (i.e., to the extent that the definition of Gross Revenue is more expansive under the ordinance). As the ordinance is drafted, payments under a franchise agreement are not in lieu of payments under the ordinance. Rather, franchise agreement payments are merely credited against amounts due under the ordinance.

While the City's intent may be expressed in the FAQs, the FAQs do not conform to the express provisions of the ordinance. The FAQs are not the application of the law.

To require a licensee to conform to both a franchise agreement and a new ordinance is burdensome and can create confusion and conflicts in how they operate together. The potential for disagreement as to what provisions of the ordinance "conflict with" the existing provisions of a franchise agreement is broad and will almost certainly lead to disputes.

If the City's actual intent is that existing franchise agreements will remain in effect until they expire, at which time the licensee with the expiring franchise will become subject to the new ordinance, then a better approach would be to modify Section 12.15.200 to read:

> "If a Licensee has a franchise agreement in effect on the date this Utility Access to and Use of the Right-of-Way ordinance becomes effective, then such Licensee shall be exempt from the provisions of this Chapter until the day immediately following the date such franchise agreement expires."

II. DEFINITION OF GROSS REVENUE

A. CITY PROPOSED DEFINITION OF GROSS REVENUE

"Gross revenue" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, derived from the use or operation of utility facilities in the City, subject to all applicable limitations in state or federal law. Examples of gross revenue may be identified in administrative rules.

PGE AND PACIFIC POWER COMMENTS

The proposed definition of Gross Revenue is overly broad. Rather than provide clarity, simplification and guidance, it is vague and will likely lead to timely and costly compliance disputes.

Deferring to administrative rule making for "[e]xamples of gross revenue" does not provide reasonable advance guidance to the licensees. It is not transparent or fair to the licensees and their customers.

It is important to consider that an ordinance is a law, while an administrative rule is merely an interpretation of the ordinance and must be expressly authorized by the ordinance. Administrative rules are generally less permanent than ordinances as they can be amended, repealed, withdrawn, modified or revised without the rigors of ordinance adoption. Hence, administrative rules, if authorized by the ordinance, reflect less permanency. Given the importance of this definition, it deserves to be well defined in the ordinance and not left for subsequent rule making. Licensees and their customers need and are rightful to expect some level of certainty in this regard. To fall short of that is a disservice to the licensees and their customers (residents of the City).

Licensees have a reasonable expectation that the ordinance contains a clear definition of what constitutes Gross Revenue without having to wait for examples to be published in administrative rules, which are not subject to the same notice, opportunity to comment and other rigors of ordinance adoption or change. Since Pacific Power is a current franchisee of the City, this uncertainty over what local customers would be charged is especially frustrating, since usual and customary methodologies to charge resident customers will no longer be the standard and costs could escalate sharply.

Importantly, the proposed ordinance, on its face, does not grant the Director authority to promulgate rules which have the effect of excluding items from the definition of Gross Revenue.

Rather, by its plain language, the ordinance only gives the Director the authority to provide "[e]xamples of gross revenue." Additionally, the word "may" does not provide certainty that "examples" (beyond what is currently being proposed) will be provided. It is in everyone's best interest that clarity and certainty be provided in the ordinance.

A clear definition of Gross Revenue (including any tests and items specifically included and excluded) is a critical component to the ordinance and should, out of fairness, equity and transparency, be part of the ordinance itself. Given the recent disputes over this very issue, it is imperative for both the City and the licensees that the ordinance be clear, complete and understandable.

To the extent a specific test is adopted to determine Gross Revenue or specific revenue items are to be specifically included or excluded from the definition of Gross Revenue, then such test and such items should be part of the ordinance itself. Examples involving such test(s), items or specific factual scenarios are more properly described in administrative rules.

For these reasons, the definition of Gross Revenue in the ordinance should be revised to include any applicable tests and to specify items to be included and excluded from Gross Revenue. It should also grant the Director authority to promulgate rules which may clarify items specifically included, add to the list of items specifically excluded, and provide clarifying examples.

B. CURRENT DEFINITION OF GROSS REVENUE IN ORDINANCE 7.14.040

"Gross revenue" means any revenue earned within the City, after adjustment for the net write-off of uncollectible accounts, from the sale of electrical energy, gas, district heating or cooling, or water, or sewage disposal and treatment service, from the furnishing or sale of communications or associated services by or from a telecommunications or cable communications business, or any revenue earned by a Utility within the City from the use, rental, or lease of operating facilities, or any revenue earned within the City for supplying electricity or natural gas. Gross revenues do not include proceeds from:

1. The sale of bonds, mortgages, or other evidence of indebtedness, securities, or stocks, or sales at wholesale by one utility to another of electrical energy when the utility purchasing such electrical energy is not the ultimate consumer; or

2. Public purpose charges collected by a utility selling electrical energy or gas. For purposes of this Subsection, "public purpose charges" means a charge or surcharge to a utility customer that the utility is required or authorized to collect by federal or state statute, administrative rule, or by tariff approved by the Oregon Public Utility Commission, that raises revenue for a public purpose and not as compensation for either the provision of utility services or for the use, rental, or lease of the utility's facilities within the City. "Public purpose" includes energy efficiency programs, market transformation programs, low-income energy efficiency programs, carbon offset programs and other types of programs designed to benefit utility customers within Oregon and the City.

3. Revenues associated with Universal Service funding requirements under 47 U.S.C. § 254 (2012) or revenues associated with taxes for emergency communications under ORS Chapter 403 (2011).

4. Residential Exchange Program (Bonneville Power Administration credits): The program created by the Northwest Electric Power Planning and Conversation Act to provide residential and farm customers of Pacific Northwest regional utilities a form of access to low-cost Federal power.

5. The calculation of gross revenues for telecommunications utilities for purposes of the Utility License Fee shall not include revenues from any tariffed or non-tariffed charge or service applicable to any connection, circuit or equipment which brings an E9-1-1 call to the appropriate responding Public Safety Answering Point, regardless of where the E9-1-1 call is originated.

C. CURRENT DEFINITION OF GROSS REVENUES IN PACIC POWER FRANCHISE AGREEMENT

"Gross Revenues" means any and all revenues derived by Grantee within the City from Grantee's Electric Energy System, and includes, but is not limited to, the sale of and use of electricity and electric service, and the use, rental, or lease of its operating Facilities, after adjustment for the net write-off of uncollectible accounts. Gross Revenues do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, or sales at wholesale by Grantee to another utility when the utility purchasing such electricity and electric services is not the ultimate consumer. Gross Revenues also do not include revenue from joint pole use. For purposes of this Section 2.9, revenue from joint pole use includes any revenue collected by Grantee from any other Person franchised, permitted, licensed or otherwise granted authority by the City to attach wires, cable or other facilities or equipment to, or place them in, Grantee's Facilities. Gross Revenues also do not include revenue from charges for late payments or finance charges collected by Grantee from ratepayers within the City.

D. PGE AND PACIFIC POWER PROPOSED DEFINITION OF GROSS REVENUE

"**Gross Revenue**" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectables, derived from the operation of utility facilities in the City, subject to all applicable limitations in state or federal law. For these purposes, "any and all revenue" will be determined by assessing whether the revenue generated would have occurred but-for the utility operation, service or use of facilities within the City. Notwithstanding the foregoing, "Gross Revenue" shall not include:

(1) Proceeds from the sale of bonds, mortgages, or other evidences of indebtedness, securities or stocks;
(2) Proceeds from the sale of energy to another utility when the purchasing utility is not the ultimate consumer of the energy;
(3) Proceeds from joint utility pole use;
(4) Bonneville Power Administration Residential Exchange Program revenues, credits or proceeds;
(5) Customer late fees or charges;
(6) Privilege taxes;
(7) Privilege tax credits;

(8) Public Purpose Charges, including energy efficiency programs, market transformation programs, low-income energy efficiency programs, carbon offset programs, and other types of similar programs designed to benefit utility customers within the City or the state of Oregon;
(9) Proceeds from utility facilities for residential-type space and water heating equipment;
(10) Field Service Charges, including connection and disconnection fees;
(11) Meter Tampering fees or charges;
(12) Meter Information Service fees or charges;
(13) Customer Switching fees or charges;
(14) Wheeling Resale proceeds or revenues;
(15) Fees or charges for Transmission Services;
(16) Revenues associated with the Universal Service funding requirements under the federal universal service fund, 47 U.S.C. § 254, or the Oregon universal service fund, ORS 759.425 (2000);
(17) Revenues associated with taxes for emergency communications under ORS Chapter 403; and
(18) Revenues from any tariffed or non-tariffed charge or service applicable to any connection, circuit, or equipment which brings an E9-1-1 call to the appropriate responding Public Safety Answering Point, regardless of where the E9-1-1 call is originated.

For purposes of this definition, "Public Purpose Charges" means any charge or surcharge to a utility consumer that the utility is required or authorized to collect by federal or state statute, administrative rule, or by tariff approved by the Oregon State Public Utility Commission, that raises revenue for a public purpose and not as compensation for either the provision of utility services or for the use, rental or lease of the utility's facilities within the City.

The Director has authority to adopt administrative rules to clarify the definition of Gross Revenue, including expanding the list of items excluded from Gross Revenue.

PGE AND PACIFIC POWER COMMENTS

This definition is complete and leaves little room for misnterpretation. It gives the licensees sufficient guidance so that they can ensure compliance and some permanency which is required for business planning. Further, it should minimize future disputes. Additionally, it provides customers of licensees some cost stability which is ever needed in our current economic times.

III. ADMINISTRATIVE RULES

A. CITY PROPOSED ADMINISTRATIVE RULES WITH PGE AND PACIC POWER COMMENTS

Utility Access to and Use of the Right-of-Way ordinance (12.15) Administrative Rules

Admin Rule 1 – Definition of Gross Revenue – "Any and All Revenue"

"[A]ny and all revenue" will be determined by assessing whether the revenue generated would have occurred but-for the utility operation, service, or use of facilities within the City. If such

revenue would not have been received in the absence of such utility operation, service, or use of facilities within the City, facilities, then it will be included in "any revenue" and included in gross revenues.

PGE AND PACIFIC POWER COMMENTS

This language is overly broad and vague. As drafted, it appears to capture all kinds of revenue that should not be included. For example, it may capture revenue generated from the wholesale sale of energy to a utility outside of the City and also capture wheeling revenue to utilities outside the City. This administrative rule, rather than providing guidance, will likely create confusion and room for future debate and litigation It goes against the City's goal of simplification and provision of clarity. Moreover, as noted above, if such a "but-for" test is to be used for purposes of determining Gross Revenue, then that test should be included in the ordinance itself, and not just the administrative rule.

Example 1: Late Fees. Customer does not pay for their utility service(s) on time and the utility service provider assesses and collects a late fee from the customer. Because the late fee would never have been collected but-for the utility service consumed, the late fees will be included in gross revenue.

PGE AND PACIFIC POWER COMMENTS

Late fees have nothing to do with sale or use of electricity. A late fee is to compensate the utility for not receiving payment for service. In essence, it is to make the utility whole for the time value of money. As such, Gross Revenue should not include late fees.

Late payment and finance fees have historically (going back several decades) been expressly excluded from the definition of Gross Revenue in the Franchise Agreement. Further, under the Utility License Law, late payment and finance fees, in practice, have been excluded from Gross Revenue.

Adding late payment and finance fees now to the definition of Gross Revenue serves to merely increase the amount of the license fee (which is a tax). This administrative rule is contrary to the City's stated goal of placing all licensees under the same law, providing clarity, and simplifying the rules. It is purely a revenue generator that will be passed along to the licensee's customers (residents of the City).

Admin Rule 2 - Definition of Gross Revenue – "Derived from the operation or use of utility facilities in the City of Portland"

Revenues will be deemed derived from the City and included in gross revenues where they can be sourced to the City. This can be directly, from the service address, or indirectly, by apportionment.

PGE AND PACIFIC POWER COMMENTS

This administrative rule adds, rather than minimizes, confusion. The proposed rule does nothing to illuminate what "sourced" or "apportionment" means in the context of the proposed ordinance.

Apportionment is a matter of tax law, which the City has repeatedly asserted the license law is not. Regardless, apportionment is the determination of the percentage of revenues subject to a given jurisdiction's tax regime.

Interestingly, sourcing is also a matter of tax law. It refers to the origin of where revenue is earned. Again, if the license law is not a tax, it is not clear why these terms are important and deserving of an administrative rule. The administrative rules should clarify the ordinance, not add additional vagueness.

Example 1: Directly Sourced – Service Address. Utility service provider receives revenue from a utility service provided to an address located in Portland, Oregon, but the customer's billing address is in Seattle, WA. Because the service address (the address where the utility service was consumed) is in Portland, the revenues will be included in gross revenues. This example only applies to utility operators that own facilities and provision Natural Gas or Electric services.

PGE AND PACIFIC POWER COMMENTS

This example appears to be illustrating that the billing address for utility services is inapplicable; the relevant inquiry is where the utility service is provided. Nobody should disagree with such conclusion. That said, the definition of Gross Revenue as proposed by licensee would capture the revenue in the above illustration. If this administrative rule is to be adopted, the phrase "[d]irectly [s]ourced" should be omitted to avoid confusion and room for future controversy.

Example 2: Indirectly Sourced – Apportionment. Utility service provider receives advertising revenues within the State of Oregon. Because there is no service address to source the revenues earned, apportionment will prevail. The City is not confined by a particular apportionment methodology to determine the correct amount of revenues attributable to the City, as long as the apportionment methodology is reasonable and not arbitrary and capricious. Apportionment by gross revenues or customer count are examples of reasonable apportionment methodologies.

PGE AND PACIFIC POWER COMMENTS

This example makes no sense. What apportionment does it address? It is so vague and overly broad to be void on its face.

How are advertising revenues related to the provision of utility service? Why would such apportionable revenues be based on those received within the State of Oregon?

What advertising services is this administrative rule aimed at?

Clarity and transparency are necessary and a reasonable expectation of the licensees.

If there is some source of revenue that the City believes should be included in Gross Revenue, a clear administrative rule is in order. Further, if apportionment applies, a specified method or methods of apportionment should be stated, so a licensee can comply with its obligations under the ordinance.

Admin Rule 3 – Definition of Gross Revenues – Fee Recovery

All revenue received by the utility service provider that are the result of fees imposed on the utility service provider, and not the customer, that the utility service provider passes through to their customers, will be included in gross revenues. These are typically fees assessed by a government, whether City, state or federal on the utility service provider and not the customer.

Example 1: Right-of-way access and use fees. The utility service provider pays based on gross revenues (as defined by Portland City Code (PCC) 12.15), under a franchise agreement, or utility license law (PCC 7.14). If a utility service provider passes that fee onto their customers, that amount will be included in gross revenues.

PGE AND PACIFIC POWER COMMENTS

This administrative rule creates a tax on a tax. Also, recovery of the franchise fee is not revenue.

Such an interpretation defies plain English. Webster's Third New International Dictionary defines "revenue" as "an item of income." "Income," in turn, is defined as "a gain or recurrent benefit that is [usually] measured in money and for a given period of time, derives from capital, labor, or a combination of both, includes gains from transactions in capital assets, but excludes unrealized advances in value." Recovery of part of the fee cannot be considered "revenue" for these purposes, because it would not constitute "income" under the definition discussed above.

The licensees gain nothing and realize no benefit from the collection of the license fee, because it must directly remit the entire amount to the City. On top of that, under federal regulatory treatment, the Federal Energy Regulatory Commission requires that any recovered fee not be recorded as revenue. Last, recovery of the fee is not derived from the licensee's utility system or facility. The fee recovery has never been considered Gross Revenue under the Utility License Law or the franchise agreement. To add it to the definition of Gross Revenue is merely an increase in the license fee, which is contrary to the City's stated goal in this ordinance adopting effort. Such increased fees will ultimately be paid by the licensee's customers (residents of the City).

Example 2: Sales Taxes. This type of revenue would not be included in gross revenues. In some states, certain purchases are subject to a sales tax. This tax is levied on the consumer, rather than the utility service provider, to be held by the business as a liability until the funds are remitted to the state.

PGE AND PACIFIC POWER COMMENTS

There is no sales tax in Oregon, so this is not a relevant example.

Admin Rule 4– Definition of Gross Revenues – Billing, Collection Fees

Billing and collection fees, including but not limited to non-sufficient funds (NSF) charges, late fees, connection fees, upgrade fees, downgrade fees, service calls shut off fees or disconnect fees, convenience fees, equipment rental fees and administrative fees will be included in gross revenues.

PGE AND PACIFIC POWER COMMENTS

As stated above, late fees and related charges have nothing to do with the sale or use of electricity. A late fee and any related charge are to compensate the utility for not receiving timely payment for service. In essence, it is to make the utility whole for its loss from the time value of money, and taxing that recovery simply inflates the overall calculation of "revenue" and ultimate costs to customers.

Late payment and related charges have historically (going back several decades) been expressly excluded from the definition of Gross Revenue in the Franchise Agreement. Further, for several decades under the Utility License Law, late payment and finance fees have been in practice excluded from Gross Revenue.

Adding late payment and related charges to the definition of Gross Revenue serves to merely raise the license fee which will ultimately be borne by the licensee's customers (residents of the City).

Further, connection fees, upgrade fees, downgrade fees, service calls shut off fees or disconnect fees, convenience fees, equipment rental fees and administrative fees have never been included in Gross Revenue. To add such items to Gross Revenue is merely another means to increase the license fee.

This administrative rule is in direct opposition to the City's stated goal in this entire ordinance adoption process.

Admin Rule 5 – Not gross revenues

The following fees and charges will not be included within the definition gross revenues. This is an exhaustive list of exclusions which the City will periodically review and revise.

1. **Public purpose charges**: Specific charges collected by a utility service provider selling electrical energy or gas for public purposes will be excluded from gross revenues. For example, a charge or surcharge to a utility customer that the utility service provider is required or authorized to collect by federal or state statute, administrative rule, or by tariff approved by the Oregon Public Utility Commission, that raises revenue for a public purpose and not as compensation for either the provision of utility services or for the use, rental, or lease of the utility service provider's facilities within the City. The list represents an exclusive and exhaustive list of public purpose charges excluded from gross revenues.

Specific public purpose charges excluded from gross revenues:

- energy efficiency programs
- market transformation programs
- low-income energy efficiency programs
- carbon offset programs

2. **Residential Exchange Program (Bonneville Power Administration credits)**: The program created by the Northwest Electric Power Planning and Conversation Act to provide residential and farm customers of Pacific Northwest regional utilities a form of access to low-cost Federal power https://www.bpa.gov/Finance/ResidentialExchangeProgram/Pages/default.aspx

3. **Oregon and Federal Universal Service Funding**: Revenues associated with Universal Service funding requirements under the federal universal service fund, 47 U.S.C. § 254, or the Oregon universal service fund, ORS 759.425 (2020).

4. **Revenues associated with taxes for emergency communications under ORS Chapter 403.**

5. **E9-1-1**: The calculation of gross revenues for telecommunications utilities will not include revenues from any tariffed or non-tariffed charge or service applicable to any connection, circuit or equipment which brings an E9-1-1 call to the appropriate responding Public Safety Answering Point, regardless of where the E9-1-1 call is originated.

6. Sales of bonds, mortgages, or other evidence of indebtedness, securities or stocks.

PGE AND PACIFIC POWER COMMENTS

PGE and Pacific Power agree with these exclusions. However, for clarity and transparency, as well as permanency, they should be stated in the definition of Gross Revenue contained in the ordinance itself.

Admin Rule 6 – Definition of Utility Facility [NO COMMENT]

"Utility Facility" as defined in PCC 12.15 also includes any place, amenity, or piece of equipment used for the purpose of facilitating the production, storage, transmission, delivery or to otherwise provide a utility service. This includes any and all revenue from leases, indefeasible right of use agreements (IRUs), and other similar agreements, for the Portland portion of the utility service provider's system for dark or lit fiber.

Example 1: Equipment rental. Customer leases a telephone from a utility service provider which they use to consume telecommunications services. The telephone is considered a utility facility and all revenues generated from the lease of that equipment will be included in the gross revenues of the utility service provider.

Example 2: Revenue from the lease of Rack space. Utility service provider A leases to utility service provider B rack space for utility service provider B's telecommunications equipment. The rack space is a place to store utility facilities and will be considered a utility facility under PCC 12.15.030(T). As a result, all revenues generated from the lease of rack space will be included in the gross revenues of the utility service provider.

Example 3: Revenues from the lease of Dark fiber. Utility service provider A leases to utility service provider B dark fiber which utility operator B "lights up" to use in their own system, uses to provision utility services, or to lease to another utility service provider. The dark fiber which is

leased is a piece of equipment that is used for the purpose of provisioning a utility service and all revenues generated from that lease will be included in gross revenues.

Admin Rule 7 – Refunds by City to Licensee – Statute of Limitations [NO COMMENT]

The utility service provider may request a refund by filing with the City a written request within three (3) years from the date payment is due. The written request will state the specific reason upon which the claim is based. The request will include sufficient documentation, for the City to easily verify the claim. The utility service provider will provide, at no cost to the City, any additional information the City deems necessary to verify the claim. If the claim is approved by the City, the verified claim amount may be credited against any amount due and payable.

Example: Payment Due Date. Licensee's 1st calendar quarter of 2022 remittance was due on May 14th, 2022. The City received the remittance on August 31st, 2022. Licensee's three (3) year statute of limitations to file a written request for a refund is on or before May 14th, 2025. Licensee will submit all information required or requested by the City on or before the statute of limitation expires or the claim will be denied.

Admin Rule 8 – Fees Paid Per Linear Foot [NO COMMENT]

For the purposes of PCC 12.15.140, the utility service provider will include the following when calculating the linear feet fee:

- Any conduit or fiber owned by the utility service provider
- Any fiber owned by the utility service provider that passes through a leased conduit
- For multiple strands of fiber owned by a utility service provider through a single conduit length, the utility service provider will count only the equivalent length of one strand from the bundle.
- For multiple strands of fiber through a single conduit length, the linear foot is measured by the length of the longest fiber strand.

Example: A utility service provider has two lines of business: (1) cable, and (2) telecommunications. The utility service provider has two strands of fiber within a single trench and/or conduit, one for their cable services and one for their telecommunications services. The utility service providers will pay fees per linear feet for each strand of fiber, regardless of whether those strands are in the same trench and/or conduit.

If any linear feet of conduit or fiber is leased, the City will determine ownership by referencing Financial Accounting Standards Board (FASB) 13, "Statement of Financial Accounting Standards No. 13 – Accounting for Leases." Any lease which falls into the category of "capital lease" will be treated as ownership for the purposes of calculating utility service providers' per linear foot fee.

If there is one conduit with strands of fiber owned by multiple utility service providers inside the conduit, each utility service provider will pay a separate linear per foot fee, if applicable.

Admin Rule 9 – Attachment Fee [NO COMMENT]

Attachment fees pursuant to PCC 12.15.140 will be paid quarterly, in arrears, for each calendar quarter, within forty-five (45) calendar days after the end of each calendar quarter. Fees will begin on the date the utility service provider receives approval for a street opening permit from the Bureau of Transportation (PBOT).

Attachment fees do not include any fees for placement of equipment or facilities within the right-of-way.

Example: A utility service provider obtains a permit from PBOT on January 20th, the utility service provider will pay the quarterly fee. A utility service provider obtains a permit on February 15th, the utility service provider will pay two-thirds (2/3) of the quarterly fee.

IV. PENALTIES

A. PENALTIES UNDER CURRENT ORDINANCE

7.14.110 Civil Penalties.

A. The Director may assess civil penalties for any of the following violations of the Utility License Law:

1. Any failure to file a license application at the time required under the Utility License Law;

2. Any failure to pay the utility license fee when due;

3. Any failure to file a utility license fee report when due;

4. Any failure to provide or make available all books, financial records, papers, invoices, documents, data and related information when required by the Director; or

5. For any person to make any false statement on any license application or utility license fee report or to provide false information in any investigation or audit conducted pursuant to the Utility License Law.

B. The Director may assess civil penalties for any violation under Subsection 7.14.110 A. of the greater of either a minimum of $500 per occurrence or up to two percent (2%) of the utility's gross revenues subject to the Utility License Law for the period during which the violation occurred.

C. The Director may assess a civil penalty of $500 if a person fails to file a reporting form as required under Section 7.14.080.

D. In assessing civil penalties under this Section, the Director shall produce a written decision, identifying the violation, the amount of the penalty, and the basis for the decision. In making such determination, the Director shall consider the following criteria:

1. The extent and nature of the violation;

2. Any benefits to the licensee and any impacts to the City or the general public, financial or otherwise, resulting from the violation;

3. Whether the violation was repeated and continuous, or isolated and temporary;

4. Whether the violation appeared willful (characterized primarily by substantial acts of commission) or negligent (characterized primarily by substantial acts of omission);

5. The magnitude and seriousness of the violation;

6. The City's costs of investigating the violation and correcting or attempting to correct the violation; and,

7. Any other factors the Director deems relevant in the particular case.

E. The Director may impose civil penalties under this Section only after having given written notice of the potential for assessment of civil penalties identifying the violation serving as the basis for the assessment.

F. The Director may waive or reduce any civil penalty for good cause, according to and consistent with written policies.

B. PENALTIES UNDER FRANCHISE AGREEMENT

A Penalty of five percent (5%) of the underpayment shall be assessed and due within thirty (30) days of written notice from the City, if the City's audit discloses that the Grantee has paid ninety-five percent (95%) or less of the principal amount owing for the period under audit. If such payment is not received within thirty (30) days of written notice from the City, then interest shall be compounded daily from the date on which the payment was due until the date on which the City receives the payment, such interest to be calculated at one percent (1%) over the existing prime rate as set by the Wells Fargo Bank, National Association, or its successors and assigns as designated by the City.

C. PENALTIES UNDER PROPOSED ORDINANCE (Sections 12.15.150 and 170)

Section 12.15.150

A. Payment of the fee(s) under this Chapter will be subject to audit and review by the City for compliance. Any information requested or required by this Chapter will be delivered to the City, at no cost to the City.

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

1. Every licensee will deliver to the City information sufficient to easily demonstrate that the licensee is in full compliance with all the requirements of this Chapter, its franchise agreement, if any, including but not limited to payment of any applicable fees.

2. Every licensee will make available for inspection by the City at reasonable times and intervals all maps, records, books, diagrams, plans and other documents with respect to its use of the right-of-way. Access will be provided within the City unless prior written arrangement for access elsewhere has been made and agreed to by the City.

3. If any licensee fails, refuses or neglects to provide or make records available to the Director for determining licensee's compliance with this Chapter, including but not limited to the amount of fees due or payable, the Director may determine the amount of the fees due or payable based upon readily available facts and information. The Director will notify the licensee in writing of the amount of such fee so determined, together with any penalty or interest due. The total of such amounts will become immediately due and payable, together with any penalties or fines assessed by the Director.

4. Final audit determinations appealable to the Business License Appeals Board using the process set forth in City Code Section 7.02.290. The licensee must file a written appeal within thirty (30) calendar days of the date of the final audit determination letter. In such an appeal, the licensee will have the burden of establishing that the Director's determination is incorrect, either in whole or in part.

5. The filing of any notice of appeal to the Business License Appeals Board will not stay the effectiveness of the Director's determination unless the Business License Appeals Board so directs.

C. Any underpayment, including any interest, penalties or fines, will be paid within thirty (30) calendar days of the City's notice to the licensee of such underpayment.

D. **Penalties.** A penalty of five percent (5%) of any underpayment will be due within forty-five (45) calendar days of written notice from the City, if the City's review of payments under this Chapter discloses that a licensee has paid ninety-five percent (95%) or less of the principal amount owing for the period under review.

E. If the City's review of payments under this Chapter discloses that a licensee has paid ninety-five percent (95%) or less of the principal amount owing for the period, the licensee will pay all costs incurred by the City for conducting the review.

F. The Director may issue and seek enforcement of an administrative subpoena for the purpose of collecting any information necessary to enforce any provision of this Chapter. Licensee will comply with the administrative subpoena within sixty (60) days.

Section 12.15.170

A. The City will give the licensee written notice of any violations and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar days) for the licensee to remedy the violations. If the Director determines the licensee is guilty of violating any of the provisions of this Chapter or the license after the time to remedy has passed, the Director will consider the standards found in Subsection C of this Section and: (i) issue a hold on any permit applications filed by the licensee for work in the right-of-way; (ii) fine the licensee not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each offense; or (iii) both (i) and (ii). A separate and distinct offense will be deemed committed each day on which a violation occurs or continues.

B. Violations of this Chapter include <u>but are not limited to</u>:

1. Any failure to file a registration or license application at the time required under this Chapter or to promptly update registration or license information;

2. Any failure to pay any fee required by this Chapter when due;

3. Any failure to file the documentation required, or fees;

4. Any failure to provide or make available all maps, records, books, diagrams, plans or other documents with respect to its utility services and facilities within the right-of-way;

5. Any repeated failure to comply with this Chapter; and

6. Any false statement on any registration or license application, on any documentation required, or in response to any audit or compliance investigation conducted under this Chapter.

C. In assessing civil penalties under this Section, the Director will produce a written decision identifying the violation, the amount of the penalty and the basis for the decision. In making such determination, the Director will consider the following criteria:

1. The extent and nature of the violation;

2. Any impacts to the City or the general public resulting from the violation;

3. Whether the violation was repeated and continuous, or isolated and temporary;

4. Whether the violation appeared willful or negligent;

5. The City's costs of investigating the violation and correcting or attempting to correct the violation; and

6. Any other factors the Director deems relevant.

D. The Director may reduce or waive any civil penalty for good cause, according to and consistent with written policies.

E. Except as provided in Section 12.15.150 B.4., a determination made by the Director is a quasi-judicial decision and is not appealable to the City Council. Appeals from any determination made by the Director will be solely and exclusively by writ of review to the Circuit Court of Multnomah County, as provided in ORS 34.010 to 34.100.

F. Nothing in this Chapter will be construed as limiting any judicial or other remedy the City may have at law or in equity for enforcement of this Chapter.

PGE AND PACIFIC POWER COMMENTS

While no licensee intends to be noncompliant with the ordinance or its franchise agreement, the attendant penalties being proposed are strong (i.e., 5% of the underpayment and all costs of the City in its audit/review if the payment was 95% or less of what is determined by the City to be due).

The penalty under the current ordinance is up to 2% of the gross revenue subject to the license law, but there is no payment of the City's costs of audit/review.

The current franchise agreement provides for a penalty up to 5% of the underpayment if 95% or less of the fee owing after audit was paid with the return. The current agreement contains no provision that would result in a recovery of the City's costs of audit/review.

The penalty under the proposed ordinance is out of the ordinary. A similar penalty is found nowhere in Federal, State or Local tax regimes. If the actual goal is to simplify the utility law by putting all licensees on the same playing field (i.e., eliminating franchise agreements), why does the penalty regime need to be made more robust?

Additionally, if the penalty regime is to be made more robust, clarity in the ordinance is required. Leaving important aspects of the ordinance such as the definition of Gross Revenue and what constitutes the City's "costs" incurred in an audit/review to future administrative rulemaking is not fair or reasonable. The licensees need a clear path to compliance. Leaving room for vast debate, especially with the City having the right to assess robust penalties that include recovery of its audit/review costs, is unfair and inequitable. Some observers may even say it is heavy-handed and lacks transparency.

For example, if payment of the City's costs of audit/review are to be included, does this mean the City's out-of-pocket costs (e.g., travel, outside advisors) or does it include an apportionable cost of compensation for City personnel involved in the review/audit? Does it include an apportionable amount of City overhead? If so, how would such costs be determined and apportioned? Does it cover costs related to any appeal by the licensee? This is a potential morass of vagueness. It is fundamentally punitive when payment of costs is in addition to a penalty for underpayment, and such a rule would create incentives for City auditors to aggressively seek ways to prolong audits for the purpose of increasing licensee costs, to "find" additional underpayments for the purpose of

recovering costs and to improperly use the threat of licensee payment of such costs as a lever with which to force agreement. This is inherently problematic if there is no reciprocity.

At the very least, the penalty regime needs further review. If the payment of fees and costs is to be contained in the penalty regime, out of fairness and equity, it must be reciprocal – if the City is wrong in its compliance audit, just like the licensee, it should be responsible for the licensee's audit/review costs.

DUFFY KEKEL LLP
Attorneys at Law

MITCHEL R. COHEN
mcohen@duffykekel.com

June 1, 2022

VIA EMAIL (comtech@portlandoregon.gov) AND U.S. MAIL

City of Portland
Office for Community Technology
111 SW Columbia Street, Suite 600
Portland, Oregon 97201
Attn: Elisabeth Perez, Director

Re: Comments (Second Comment Period) on Draft Code and Draft Administrative Rules for Utility Access to and Use of the Right-of-Way

Dear Ms. Perez:

We represent Alaska Communications System Holdings, Inc. (Alaska Communications), the parent company of WCI Cable, Inc. (WCI). We are writing on behalf of Alaska Communications and WCI to provide you with comments on the revised draft ordinance and draft administrative rules on Utility Access to and Use of the Right-of-Way (ROW).

Note: Background information on Alaska Communications and WCI, and on WCI's franchise agreement (Ordinance No. 186165) with the City, is contained in the letter sent to you by Alaska Communications dated November 15, 2021, in which the company provided comments on the original version of the draft ROW ordinance.

Summary of Comments

Our comments may be summarized as follows:

- The definitions and other provisions in the proposed code regarding "gross revenues" derived from the operation of utility services in the City are confusing and need to be clarified. The proposed code lacks a clear rule distinguishing, for fee payment purposes, between operators who collect gross revenues from local customers *vs.* those that do not. There is thus no clear rule for distinguishing between operators who pay based on gross revenues *vs.* those who pay a per-linear foot fee.

- Important policy considerations (minimization of construction in the right-of-way and reduction of the regulatory burden on the City) support the current lease exclusion in franchise agreements with telecoms that pay the per-linear foot fee. The lease exclusion subjects only the owner of infrastructure (ducts, conduits and vaults) installed in the right-of-way to fees for use of the right-of-way. Others who, pursuant to an IRU or other lease

arrangement, use, but do not own, the infrastructure, do not pay fees. The current lease exclusion does not distinguish between telecoms who lease fiber owned by another telecom, *vs.* those, such as WCI, that lease space in another telecom's installed facilities (ducts, conduits and vaults) to house their own fiber. The lease exclusion, in its' present form, should be retained and should be set forth in the ordinance itself, not in an administrative rule or policy. As we were invited to do at the May 20th video meeting with Commissioner Rubio and City staff, we are submitting proposed statutory language on the lease exclusion which we request that you incorporate in the right-of-way ordinance (*see* page 6).

- Under Section 253 of the 1996 federal telecommunications act (47 U.S. Code §253) fees charged telecoms for use of the public right-of-way must be cost based, not based on "market" (rental value) considerations. The stated purposes of the proposed ordinance include the purpose to secure "fair and reasonable compensation" for the use of the public right-of-way. It thus appears that the City's goals in adopting the proposed code are in conflict with federal law, and that raising fees by eliminating, or limiting the scope of, the lease exclusion may on that basis be subject to legal challenge.

- Under draft Admin Rule 8 certain leased facilities apparently would be excluded from per-linear foot fees. As already indicated, the lease exclusion needs to be statutory, not provided by administrative rule or policy. Also, as drafted draft Admin Rule 8 does not go far enough in adopting the current lease exclusion, because it would eliminate the exclusion with respect an IRU conduit lease, such as the present one between WCI and Zayo Group, whereby an operator leases the right to run its' own fiber through another operator's installed ducts, conduits and vaults. Draft Admin Rule 8 also would adopt a complex financial accounting rule (FASB 13) as a standard for determining whether certain lease arrangements ("capital leases") would be deemed equivalent to an ownership interest, and on that basis disqualified for the lease exclusion. Such a rule not only is a departure from current practice, but is entirely unnecessary and should be dropped, in favor of a rule based on legal title alone, *i.e.,* only the party with legal title should be treated as owning facilities placed in the right-of-way. Alternately, if FASB 13 rule is retained, then IRUs and other contractual arrangements already treated as leases under current franchise agreements should be exempted from the rule (grandfathered), and in applying the rule in other situations the treatment of an arrangement under FASB 13 by the lessee on its own financial statements should control.

- We also are curious about the reason for the change, in proposed code §12.15.070.L., whereby all leases, including those entered into in the ordinary course of business, of facilities placed in the right-of-way would in the future require notice to and consent by the City. In our view, the current system under franchise agreements whereby such leases may be freely entered into without the City's involvement has worked well and underpins the policy of encouraging shared use of installed infrastructure by telecoms. In any event, if such a change is made, existing IRUs and other lease arrangements should be grandfathered (not require new approvals).

- For these reasons we believe the proposed code needs substantial revision before it is presented to the City Council for action. Rather than moving forward with finalization of the code language, we request that you instead slow the process, and in the interval that you engage in a more robust dialogue with the utilities and other companies who will be impacted by adoption of the proposed code. Alaska Communications looks forward to participating in such a process.

- Finally, as requested in the Alaska Communications' November 15, 2021 comment letter, we urge the City to be transparent with respect to the projected revenue impact of the proposed code, particularly when it comes to the impact that the proposed code will have on the fees paid by telecoms, such as WCI, who are subject to the per-linear foot fee. In this regard, we note that the City Budget Office has instituted mandatory procedures under which fiscal "Impact Statements," including changes in current and future revenues, including dollar amounts and funding sources, must be prepared and submitted to City Council in support of every proposed ordinance.[1] In light of these procedures, we request that you make public, at the earliest possible opportunity, the projected fiscal impact, including fee increases, for the proposed ordinance.

Discussion

1. The definitions and other provisions in the proposed code regarding gross revenues are confusing and need to be clarified

Under the City's existing franchise agreements, franchisees pay fees for use of the public right-of-way in one of two ways: Franchisees who derive revenues from "within the City" – which generally means that they provide telecommunications service to customers who reside locally within the City limits – pay fees to the City based on a percentage (currently 5%) of their gross revenues collected from their local customers; whereas franchisees, such as WCI, who do not serve local customers and thus do not derive revenue from within the City limits, pay fees based on the linear feet of their "systems" (as defined) physically located within the City in the public right-of-way. According to the FAQs issued along with the draft code and draft administrative rules, fee payments by operators, such as WCI, that currently pay by the linear foot (or attachment) will not change under the new code. Portland ROW Code FAQ 3. (April 2022 – Updated).

[1] *See:* Portland, City Budget Office, "Impact Statement for Requested Council Action" and "Impact Statement Instructions", posted at: https://www.portlandoregon.gov/cbo/67112. *See also:* City of Portland, Drafting Manual, Ordinances Resolutions Reports, at p. 23 and Appendix H (January 2019), available at: https://www.portland.gov/sites/default/files/policies/2019-corrected-manual-january_updated-20190718.pdf . The source of the impact statement procedure appears to be Binding City Policy (BCP) FIN-2.04 ("Review of Council Actions"), available at: https://www.portland.gov/policies/finance/comprehensive-financial-management-policies/fin-204-budget#:~:text=The%20City%20shall%20develop%20and%20implement%20a%20budget%20process%20that%20shall%3A&text=Make%20prudent%20use%20of%20public%20resources.&text=Include%20financial%20forecast%20information%20to,for%20current%20and%20future%20needs

We are concerned because at no point in the draft code do we see clear language laying out a firm rule distinguishing, for fee payment purposes, between operators who collect gross revenues from local customers *vs.* those that do not.

In fact, the language that we do see in the definitional section (§12.15.030) of the proposed code touching on the concept of gross revenues is, in this regard, at best confusing. Thus, draft code §12.15.030.H. states that "Gross Revenue" means (in part) "any and all revenue . . . *derived* from the use or operation of utility facilities in the city." [Emphasis added.] "Utility facility" is in turn defined as "any physical component of a system . . . located within, under or above the right-of-way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service(s)." (Draft code §12.15.030.T.) Finally, "Utility service" is defined to mean the provision of communications and other services 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." (Draft code §12.15.030.V.)

Taken together, these definitions seem to say, or at least logically could be read as saying, that "gross revenues" are derived from the use or operation of facilities in the City, and thus would be subject to the percentage fee, if they provide services to *either* customers located within the corporate boundaries of the City, *or* transmit services through the City even if no customers located within the City are thereby served. In other words, revenues earned by an operator, such as WCI, with no local customers, nonetheless might be considered to be derived locally if they are in any way derived from or attributable to telecommunications signals that are transmitted over the WCI system located within the boundaries of the City. If so, then this would mark a stark departure from how revenues currently are sourced for franchise fee purposes.

In view of the FAQ referred to previously *(i.e.,* operators that currently pay per-linear foot fees will still calculate fees in the same way), we assume no such result is intended.

If so, then we strongly urge you to clarify this point in the proposed code before it is adopted.

2. There are important policy reasons for the "lease exclusion" contained in the City's franchise agreements, which the new code should retain, in current form

Alaska Communications' letter commenting on the first version of the draft ordinance issued by the City last Fall urged the City to retain, in present form, the lease exclusion for franchisees that pay fees based on linear feet. We now see that the draft administrative rules (dated April 15, 2022), in Admin Rule 8, contain a series of rules under which certain leased facilities apparently would be excluded from per-linear foot fees. While we applaud the addition of draft Admin Rule 8 as a step in the right direction, unfortunately we believe the proposed rule falls short of the mark. As discussed later, below, we have several concerns regarding the draft rule and the way in which it was drafted. Moreover, we believe the lease exclusion needs to be statutory, not left to an administrative rule or policy.

However, before discussing our concerns, we think it would be helpful to review the policy considerations behind the lease exclusion – policies that remain as valid today as when the exclusion

first was implemented more than two decades ago – and the important role the exclusion plays in managing the public right-of-way and assuring that municipal fees imposed for use of the right-of-way do not present financial hurdles to the widespread deployment of telecommunications services.

Some history will be instructive: In 1996 Congress passed the Telecommunications Act of 1996 (Pub. L. No. 104-104), thereby deregulating the industry. In its wake capital flooded into the telecommunications industry, as existing firms and new ones began building networks over land, undersea and in the air. The internet clearly was seen as the future. The situation in Portland was no different. Many of the telecoms (or their respective predecessors), that currently hold franchise agreements with the City for use of the public street right-of-way first entered into those agreements, and laid the infrastructure (ducts, conduits and vaults) for their systems in the City streets, in the late 1990s to early 2000s. WCI was no exception. In 1998 WCI entered into a franchise agreement with the City (Ordinance No. 172750) and thereafter constructed the part of its' system that occupies the public right-of-way in Portland.

Like many municipalities, Portland was confronted with the challenge of managing competing demands for use of the public right-of-way and minimizing disruption to the public caused by construction in the streets. At the time (as is still true today) the City regulated use of the public right-of-way by telecoms by requiring each company to enter into a separate franchise agreement (essentially a contract) with the City for use of the right-of-way. To the greatest extent possible it was (and still is) the City's policy to standardize these agreements. (Which also is the stated goal of the proposed ROW ordinance.)

One solution to the problem of competing demands for use of the public right-of-way is to foster shared use. Unlike other utilities (electricity, natural gas, water, etc.) shared use of facilities, especially underground ducts, conduits and vaults, is both feasible and common in the telecom industry, even among competitors.

To encourage shared use of the right-of-way, the City's franchise agreements with telecoms subject to the linear foot fee contain a specific provision, known as the "lease exclusion." The lease exclusion fosters shared right-of-way use in two important ways. First, it provides a financial incentive for telecoms to enter into arrangements (IRUs and other leases) for the shared the use of infrastructure (ducts, conduits and vaults) placed in the right-of-way, by charging only one franchise fee, to the owner/lessor. Second, to ease the structuring of these arrangements, the lease exclusion grants the telecoms free rein to enter into them purely on the basis of private, contractual agreements (IRUs and other leases), on such terms as the telecoms see fit, without any regulatory approval or other involvement on the part of the City.[2] By eliminating any involvement by the City in the structuring of these arrangements, the City not only eliminates "red tape" that might otherwise slow or hinder their adoption, but also reduces the City's own administrative workload, by eliminating any responsibility on

[2] *See, e.g.,* WCI franchise agreement (Ordinance No. 186165), §15.3 ("Grantee may lease any portion of its Telecommunications System in the ordinary course of its business without otherwise obtaining the City's consent by ordinance, so long as Grantee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its Telecommunications System.")

the City's part to authorize (by ordinance) or monitor the arrangements.[3] Put another way, by making shared use of the right-of-way entirely a private contractual matter, the City effectively "out-sources" to the telecoms what otherwise might be a burdensome government responsibility.

As discussed in the Alaska Communications' comment letter, in exempting shared use from duplicative franchise fees, the lease exclusion makes no distinction between lessees who use another franchisee's ducts, conduits and vaults under a fiber lease (or "IRU") entered into with the owner of the ducts, conduits and vaults, *vs.* a lessee (such as WCI) who contracts to run its own fiber through another franchisee's (Zayo Group's) ducts, conduits and vaults. Because both arrangements serve the policy goals (decreased construction/disruption of the streets and reduced administrative burden on the City) that underpin the lease exclusion, both situations justifiably receive the same incentive (a single, not multiple fees).

All of this makes perfect sense from the perspective of a municipality, such as Portland, genuinely interested in being a responsible and efficient manager of the public right-of-way. Limiting the number of times that City streets and sidewalks are disturbed by construction is of obvious benefit to the public. As noted, by making the owner/lessor solely responsible for negotiating and administering leases, the City's workload in managing the right-of-way is reduced. And since, under the lease exclusion, access to infrastructure placed in the right-of-way is strictly limited to the owner/lessor, the City's ongoing role in monitoring access is minimized. Nor in any meaningful way is the City financially disadvantaged: The burden placed on the public right-of-way, and thus the City's costs, are not measurably increased, no matter how many different telecoms run fiber or send their signals through the same system of buried ducts, conduits and vaults.

During our May 20th video meeting Alaska Communications was invited to submit proposed statutory language on the lease exclusion. Accordingly, we hereby submit the following proposed language, which we urge you to include in the ordinance:

> "The linear feet of a utility operator's facilities shall be determined by excluding (1) fiber, cables, ducts, conduit, vaults and other facilities used by the operator that are owned by another licensee, and (2) fiber, cable and other facilities owned by the operator that are housed in ducts, conduits, vaults or other infrastructure owned by another licensee. Only the owner of the ducts, conduits, vaults and other infrastructure that house fiber, cable and other facilities shall be liable for fees for use of the right-of-way occupied by such facilities. Ownership shall be based on fee title alone and facilities that are leased or used pursuant to authority other than fee ownership shall not be

[3] Under the Portland City Charter (Section 10-207) franchise agreements for use of the public right-of-way can only be granted by ordinance passed by the members of the City Council by a super-majority vote of four commissioners, and there are special notice, publication and other procedures that apply to the grant of a franchise. As currently noted at the City website (https://www.portlandoregon.gov/oct/58882) "Franchises can take anywhere from six months to one year or more to finalize depending on the complexities involved." By allowing one franchisee to freely lease space to another, the City avoids entirely the legal complexities that otherwise might be involved in extending use of the right-of-way from an initial grantee to others, by means of an ordinance granting a new franchise agreement or amending an existing agreement.

considered, regardless of the form of lease (e.g., capital or operating lease) or other rights."

3. Eliminating, or limiting the scope of, the lease exclusion will raise concerns under Section 253 of the 1996 federal telecommunications act (47 U.S. Code §253)

Entirely apart from the policy considerations that underpin the lease exclusion, the fees the City charges telecoms for use of the public right-of-way, and by extension the lease exclusion, also must comply with federal telecommunications law, specifically Section 253 of the Telecommunications Act of 1996 (47 U.S. Code §253). As interpreted by the Federal Communications Commission (FCC) in an authoritative 2018 order,[4] fees charged telecoms for use of the public right-of-way must be cost based, not based on so-called "market" considerations.

Nationally, municipalities and other local government units vary widely in their practices in managing the public right-of-way. As documented by the FCC,[5] while many local government units recognize that telecommunications are a beneficial service and crucial for economic development and thus allow carriers to occupy the public right-of-way in return for one-time permit charges or similar fees that are limited to recovering the cost of right-of-way management and maintenance, others see the opportunity for large and continuous revenue streams, and have used their monopoly control over the public right-of-way to extract large fees that are used to subsidize other government services. [6]

In enacting the Telecommunications Act of 1996, Congress recognized the potential for municipalities and other local government units to use their monopoly power over the public right-of-way to create competitive imbalances and to obstruct network expansion.[7] Congress, therefore, included a provision, at 47 U.S. Code §253, to preempt certain practices. Section 253(a) preempts any local government requirement that "may prohibit or have the effect of prohibiting" the provision of telecommunications services, while Section 253(c) provides a limited exception to preemption for local government requirements setting "fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis."

One obvious question raised by Section 253(c)'s exception for "fair and reasonable compensation" is the extent to which the exception limits a municipality to merely recouping management costs related to the public right-of-way, as opposed to allowing fees to be established at

[4] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Record 9088 (2018) (FCC 18-133) (available at: https://digital.library.unt.edu/ark:/67531/metadc1518625/m1/558/).

[5] FCC, Connecting America: The National Broadband Plan 1, 113 (2010), available at: https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf

[6] *See:* Snyder and Fitzsimmons, Putting a Price on Dirt: The Need for Better-Defined Limits on Government Fees for Use of the Public Right-of-Way Under Section 253 of the Telecommunications Act of 1996, 64 Fed. Comm. L. J. 137, 138-39 (2011) (available at: https://www.repository.law.indiana.edu/cgi/viewcontent.cgi?article=1607&context=fclj).

[7] *Id.,* at p. 140..

"fair market value" based on the perceived benefit enjoyed by telecoms. Until recently, the courts lacked definitive guidance on this question from the FCC, the federal agency charged with interpreting and administering the law. Lacking such guidance, the courts not surprisingly reached conflicting results in their interpretations and application of Section 253.

However, in September 2018 the FCC issued a landmark order involving wireless broadband deployment – known as FCC Order 18-133 or, more colloquially, the "Small Cell Order."[8] The order thereafter was challenged in court in a case brought by the City of Portland and a large group of other municipalities and parties. In an opinion issued in 2020,[9] the Ninth Circuit Court of Appeals upheld in full the part of the FCC order that dealt with the "fair and reasonable compensation" standard – after which the U.S. Supreme Court denied review of the Ninth Circuit Court's decision.

In its' 2018 order the FCC ruled that right-of-way access fees, fees for the use of government property in the right-of-way, and application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of small wireless facilities inside or outside the right-of-way, violate Section 253 unless three conditions are met: (1) the fees are a reasonable approximation of the state or local government costs, (2) only objectively reasonable costs are factored into the fee, and (3) the fees are not higher than the fees charged to similarly-situated competitors in similar situations.[10]

In other words, fees for the use of the public right-of-way are not to be based on some market construct that attempts to charge for the perceived value of the benefit enjoyed by telecoms, but rather must be based solely on an objectively reasonable estimate of municipal costs for managing the right-of-way.

Although the FCC order primarily addressed small wireless facilities, it is widely understood as having established new standards to determine the types of fees that violate Section 253. As such, there is every reason to expect that the FCC would today apply these same standards to fees for locating other types of telecommunications facilities in the public right-of-way.

Our purpose today in describing to you Section 253(c)'s "fair and reasonable compensation" standard and the 2018 FCC order interpreting that standard is not (at this point) to challenge the City's long-standing practice of charging a per-linear foot fee (currently $4.11/foot) for use of the public right-of-way. We'll leave that discussion to another day, in the event the City moves forward with what we believe is a wholly unjustified effort to eliminate or narrow the lease exclusion and thereby increase fees.

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[8] *See* Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Record 9088 (2018) (FCC 18-133) (available at: https://digital.library.unt.edu/ark:/67531/metadc1518625/m1/558/).

[9] City of Portland *v.* FCC, 969 F.3d 1020 (9TH Cir. 2020), *cert. denied,* 141 S. Ct. 2855, 210 L. Ed. 2d 962 (2021).

[10] Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Inv., 33 FCC Record 9088, 9112-9113 (2018).

However, we do believe that the 2018 FCC order interpreting Section 253, and the Ninth Circuit Court decision affirming that order, means that the City must justify both current fees, and any increase in those fees – such as by eliminating or gutting the lease exclusion – by demonstrating that the fee or increase is necessary to enable the City to recoup its objectively reasonable costs for managing the public right-of-way.[11] In this regard, we note that the City's avowed purpose for adopting the proposed right-of-way code is to "streamline [the City's] work to efficiently provide access to the right-of-way." (Portland ROW Code FAQ 4 (April, 2002 – Updated). That being the case, we have serious doubts that the City can justify a fee increase as necessary to recover costs of administering and managing the right-of-way under the new code.

4. Specific comments on draft Admin Rule 8

a. Draft Admin Rule 8 should be replaced with a statutory lease exclusion. We believe the lease exclusion should be set forth in the new right-of-way code, not left to an administrative rule, and, as set forth above, we have tendered precise statutory language to that effect.

By its nature, a draft administrative rule is subject to change prior to adoption. And even if it is adopted in the same form as proposed, an administrative rule can thereafter be changed far too easily (and often) in comparison to a statutory rule – administrative rules change basically at the discretion of administrators who, unlike the elected members of City Council, are not directly answerable to the citizens of and businesses that operate in the City.

Absent a clear statutory rule, WCI and others similarly situated simply do not have the certainty we deserve regarding the scope of our prospective financial obligations under the proposed ordinance.

b. Draft Admin Rule 8 is too narrow and makes an artificial distinction between fiber leased *vs.* fiber owned but housed in leased ducts, conduits and vaults. As currently written draft Admin Rule 8 states that in calculating linear feet, a utility service provider will be required to include "Any fiber owned by the utility service provider that passes through a leased conduit." The draft rule also states, "If there is one conduit with strands of fiber owned by multiple service providers inside the conduit, each utility service provider will pay a separate linear per foot fee, if applicable." Taken at face value, these two provisions would, for the first time, require a telecommunications company, such as WCI, that (pursuant to an IRU lease) runs fiber through another utility's ducts, conduits and vaults, to pay fees to the City with respect to that fiber, with those fees being paid ***in addition to*** the fees that would still be charged by the City to the owner of the ducts, conduits and vaults.

As described in Alaska Communications' prior comment letter, since 1999 WCI has had an IRU conduit lease with another franchisee (Zayo Group), under which WCI leases the right to use 29,019 linear feet of Zayo Group conduit, ducts and vaults. As also described in that letter, in the more than two decades that WCI has had a franchise agreement with the City WCI has never reported, or been

[11] We note that the stated purposes of the proposed right-or-way code include not only ensuring that the City is "fully compensated" for its "ongoing costs of granting and managing access to and use of the right-of-way," but also to "Secure fair and reasonable compensation" from the operators who "generate revenue" by use of the right-of-way. *See* draft code, §12.15.020.B & -C. As noted above, obtaining reasonable compensation from telecoms for the perceived benefit of using the right-of-way is not a valid consideration under Section 253.

required to pay fees on, the WCI fiber that runs through the Zayo Group conduit. Elimination, or any narrowing, of the lease exclusion that renders the exclusion inapplicable to the WCI/Zayo Group conduit lease would result in a ***more than doubling of the linear feet*** that WCI would be obligated to report to the City for use of the City right-of-way.[12]

As discussed earlier, we believe any such limitation or narrowing of the lease exclusion will mark a significant departure from established policy in managing the City's right-of-way and further risks violation of Section 253 of the federal act.

In addition, we believe the distinction the draft administrative rule attempts to draw for fee purposes between "owned" fiber and "leased" fiber is entirely artificial.[13] Under the City's current franchise agreements,[14] and the proposed ordinance (in proposed §12.15.080.L.) only the lessor has the right to locate, service, repair, relocate or remove facilities placed in the public right-of-way, thus clearly denying to a lessee (such as WCI) any right to access or remove fiber that is located in leased conduit. Given these provisions, it is difficult to see how in reality a lessee's purported "ownership" of the fiber amounts to anything other than the right to use it for a period of time, after which (of necessity) it would have to be abandoned.

Put another way, fiber optic cable that is buried in the public right-of-way in ducts, conduits and vaults that belong to another operator possesses no utility or value apart from the utility and value that is derived from the rights granted to the lessee to temporarily use the leased ducts, conduits and vaults to house the fiber.

c. Reference to FASB 13 is unnecessary and FASB 13 is, in any event, an inappropriate standard for determining ownership under a statutory fee code. Draft Admin Rule 8 states that "If any linear feet of conduit or fiber is leased, the city will determine ownership by referencing Financial Accounting Standards Board (FASB) 13, "Statement of Financial Accounting Standards No. 13 – Accounting for Leases. Any lease which falls into the category of "capital lease" will be treated as

[12] As described in Alaska Communications' prior (November 15, 2021) comment letter, under its' franchise agreement WCI currently remits fees to the City on the basis of 22,412 linear feet and excludes, under the lease exclusion, 29,019 linear feet of fiber that is housed in Zayo Group conduit pursuant to an IRU conduit lease agreement dating back to 1999.

[13] During the May 20th video conference meeting with Commissioner Rubio and City staff, one City staff member analogized the assessment of fiber located in leased conduit to a residential lease that charges more rent for a three-bedroom vs. a two-bedroom unit. We do not necessarily agree that an analogy to residential apartment leases is really all that useful as a policy tool in analyzing important issues under the proposed ROW ordinance. However, to the extent that such an analogy may be of some benefit in framing issues, we hereby present what we believe to be a more apt analogy: Basing liability for ROW fees on who "owns" the fiber running through leased conduit makes no more sense than would a residential lease that allows the tenant to have roommates, but jacks up the rent only if a roommate happens to bring her or his own bedroom furniture instead of using furniture already belonging to the tenant.

[14] *See* WCI franchise agreement (Ordinance No. 186165), §15.3.

ownership for the purposes of calculating utility service providers' per linear foot fee." [Footnote reference omitted.]

As previously discussed, the lease exclusion that has been part of the City's franchise agreements for over two decades makes no distinction between fiber that is leased, and fiber that is owned but runs through leased conduit. Accordingly, we do not believe the new code requires any rule to distinguish between leased fiber and owned fiber.

Apart from that, we question the whole idea of importing a financial accounting standard, such as FASB 13, into a statutory fee code. According to its' website, the "FASB," or Financial Accounting Standards Board, is a private (nonprofit) organization that "establishes financial accounting and reporting standards for public and private companies and not-for-profit organizations that follow Generally Accepted Accounting Principles (GAAP)."[15] And, in setting standards the FASB's mission is "to provide useful information to investors and other users of financial reports and educate stakeholders on how to most effectively understand and implement those standards."[16]

Given this mission, we do not believe that FASB 13 has any relevance when it comes to determining linear feet for purposes of the proposed right-of-way code.

Moreover, we are puzzled as to what the whole point is for having a rule to distinguish between IRUs and other arrangements that will be treated as true "leases" and those that are not and instead are treated as equivalent to ownership. Is (as we suspect) the goal simply to have a rule that the City can employ, at its discretion, to disqualify IRUs and other lease arrangements, so as to further narrow the effective scope of the proposed lease exclusion in draft Admin Rule 8 and, thereby, increase revenues? If so, then we oppose any such rule as inconsistent with the policies underlying the lease exclusion, and as also inconsistent with Section 253 of the 1996 telecommunications act, as previously discussed.

We also have the following questions/concerns about the practicalities of a new rule employing FASB 13 as a litmus test to determine true "lease" status:

- How would an FASB 13 rule be applied to existing IRUs and other lease arrangements – such as the 1999 WCI/Zayo Group IRU conduit lease – that the City long ago agreed was a lease that falls within the franchise agreement lease exclusion? Thus, if FASB 13 is adopted by the new code as the litmus test for determining lease *vs.* ownership, will all existing IRUs (and other lease arrangements) currently characterized as leases for franchise fee reporting purposes be grandfathered? Or will they all be required to be tested anew by running the FASB 13 gauntlet?
- And if so, what weight will be given to how a particular franchisee, under FASB standards, historically (and currently) already characterizes an IRU in its own financial statements? If a franchisee characterizes an IRU or other arrangement for financial reporting purposes as a lease, will the City accept that determination as final? Or will the City be entitled to

[15] https://www.fasb.org/info/facts

[16] *Id.*

challenge the characterization of a lease by the company's ***own auditors***? And if so, and the City reaches a contrary conclusion, how would such a "battle of accountants" be resolved?

- What happens if, as already has occurred, the FASB amends, modifies or alters its' accounting standards for financial statement reporting of lease arrangements? For example, it appears that as recently as 2016 the FASB issued revised standards for financial statement reporting of lease transactions, in the form of Accounting Standards Update (ASU) 2016-02, Leases (2/25/2016),[17] now "codified" as Accounting Standards Code (ASC) 842.[18] If, as a result of a change made by the FASB, there is a change in the financial statement characterization of a lease arrangement entered into by a utility operator, would the operator's liability for fees under the new code also be subject to change?

- Finally, we are confused by the reference in draft Admin Rule 8 to FASB 13 and the link provided in footnote 1 of the draft rule. As best we can tell, FASB 13 has been superseded by ASC 842. By your reference to FASB 13 do you intend to rely on the last promulgated version of FASB 13? Or do you really mean to refer to ASC 842, as it may be modified or amended in the future? In any event, the link that appears in footnote 1 of the draft rule appears defective, because upon copying the link into our browser we were directed not to a copy of FASB 13, but rather to a message "page can't be found."

In sum, we object to the adoption of an administrative or other rule for characterizing IRUs and other lease arrangements as constituting ownership *vs.* a lease, and we especially object to the proposed use of a financial accounting standard (FASB 13 or ASC 842) for this purpose. However, if, nonetheless, you chose to employ an accounting standard, then we recommend that:

- Existing IRUs and other lease arrangements currently characterized for franchise fee reporting purposes as "leases" are grandfathered and as such will be not subject to recharacterization under the new rule; and

- For all other IRUs and lease arrangements the characterization of the IRU or lease by the utility operator for purposes of its own financial statement reporting controls and is not subject to recharacterization by the City.

5. Current lease arrangements should not require re-authorization. As noted earlier (at page 5, n. 2) current franchise agreements permit telecoms to freely enter into leases of their facilities in the ordinary course of business without notice to or consent by the City, and the original draft code circulated by the City last Fall would have continued this policy. However, the revised draft code (in §12.15.070.L.) would reverse the
policy and instead require that all leases, including those made in the ordinary course of business, obtain the City's advance, written consent "not to be unreasonably withheld, conditioned or delayed". We are surprised by this proposed change of policy and are curious about the rationale for the change. Has the City recently experienced problems with leases? As noted earlier, the long-standing policy of

[17] Available at: https://www.fasb.org/Page/ShowPdf?path=ASU+2016-02_Section+A.pdf&title=Update+2016-02%E2%80%94Leases+%28Topic+842%29+Section+A%E2%80%94Leases%3A+Amendments+to+the+FASB+Accounting+Standards+Codification%C2%AE&acceptedDisclaimer=true&Submit=as

[18] Available at: https://asc.fasb.org/

the City has been to encourage leases, thereby fostering shared use of the public right-of-way. Is the City now abandoning that policy? Also, how will this new, advance consent requirement be applied to existing IRUs and leases? Will they be grandfathered? Or, prior to the date on which the new code becomes effective with respect to a particular operator, will the operator be required to submit all its existing IRUs and leases to the City for advance approval?

* * * *

Thank you for the opportunity to comment on the proposed ROW code.

Very truly yours,

Mitchel R. Cohen

Copies: Galen Pospisil
Gayle Doty

June 1, 2022

Commissioner Carmen Rubio and Director Elisabeth Perez
City Of Portland
Office of Community Technology
111 SW Columbia St., Ste 600
Portland, OR 97201

RE: NW Natural comments on draft language for proposed City of Portland ROW ordinance

Dear Commissioner Rubio and Director Perez,

NW Natural appreciates the opportunity to provide comments on the second draft of the City of Portland's proposed Right of Way (ROW) code, Chapter 12.15. As an energy provider serving Portland for over 162 years, we have a long history working well with the City and the Office of Community Technology on the use of the City's rights-of-way (ROW). We hope to work with the City on streamlining the management of this valuable resource, while executing on duty to serve our customers by providing the affordable and reliable energy that Portland residents and business owners depend upon daily.

As mentioned in our prior comments, NW Natural remains concerned that the City's proposed ROW program changes in terms of their purported scope, lack of clarity and transparency. While we appreciate the City's desire for efficiency in managing its' and the ROW, the proposed changes do not resemble the agreements or structures used by other cities within our service territory. Moreover, the proposed changes appear to increase obligations and administrative burdens on both the City and ROW occupants without any corresponding increase in efficiency, and in addition taking aim at varying policy objectives one, one which is to raise further City revenue. This is particularly concerning at a time when the City's budget is fully funded and when you consider all the other increasing costs that residents and businesses are experiencing right now.

We have appreciated the outreach from your ROW consultant, Reba Crocker, the compressed timeline the City continues to pursue to presents challenges in creating this far-reaching and detailed policy. Good policy that addresses the City's aims, has strong legal foundation, and meaningfully incorporates stakeholder feedback takes time and is an iterative and interactive process. Utility customers represent nearly all individual City constituents- residents and business; in Portland, so we would expect a more comprehensive and well-paced discussions and process when undertaking such significant changes. This is not what we have or are experiencing during this process, and we are unclear as to the need to adhere to what appears to be an arbitrary and rushed timeline. Our previously identified concerns around unclear language and vague definitions or which could have unintended and significant consequences remain in this latest draft. We are troubled about what seems to be a dismissal of much of our prior comments, particularly without any explanation of how they were considered (if at all), why they were not incorporated. We would like to work with the City in a transparent and forthright manner to

create a more streamlined process, the City still seems to be aimed at addressing other non-ROW related policy aims with its current draft.

Our requests and recommendations around this draft are as follows:

1. Request for time to resolve legal issues.

In addition to the reasons state above concerning the need for adequate time to develop a good policy approach, the City should also pause further advancement of the draft ROW Code to address the current version's legal defects. Below are a few of the significant issues, each of which would jeopardize enforceability of the draft code if adopted.

A. The draft ROW Code violates provisions of the Portland City Charter.

"A city's charter is, in effect, the city constitution. Any city ordinance, rule, or regulation in conflict with its provisions is void."[1] The Portland City Charter contains an entire chapter dedicated to regulation of public utilities and the use of public right-of-way. Regarding the latter, chapter 10, article 2, states that "[e]very franchise hereafter granted shall be expressly subject to all the provisions of the foregoing sections and the power of control and regulation as authorized by such sections cannot be limited, divested, or granted away." Portland Charter, § 10-201. The City's misnaming of franchises in the ROW Code as "licenses"[2] does not render this unequivocal charter language any less controlling.

The ROW Code is inconsistent with multiple procedural requirements in the charter for the grant of right to use public right-of-way. More importantly, the ROW Code violates the requirement in Section 10-209(b) that compensation to the City be based on "fair compensation" or the "cash value" of the particular rights granted. The ROW Code goes far beyond "fair compensation" and applies an excise tax on "gross revenue," using an

[1] *Portland Police Ass'n v. Civil Serv. Bd. of Portland*, 292 Or 433, 440, 639 P2d 619 (1982) (citations omitted).

[2] There is no question that the grant of rights under the ROW Code will often constitute a "franchise" as that term is used in the City's charter. "Franchise" in the context of use of right-of-way has a universally accepted meaning. As the Oregon Supreme Court stated in *Northwest Nat. Gas Co. v. City of Portland*, 300 Or 291, 308, 711 P2d 119, (1985): "The state or municipality also granted franchises to corporations to use these public streets and highways for providing public services. A franchise is a special privilege granted by the government to a person or corporation, which privilege does not belong to the citizens of a county, of common right." (Internal citation omitted.) *See also* McQuillin: The Law of Municipal Corporations, § 34:3 (3d ed) (A franchise is a "right granted by the state or a municipality * * * to do certain things that a corporation or individual otherwise cannot do, such as the right * * * to use the street or alley underneath the surface for water pipes, gas pipes, or other conduits."). Black's Law Dictionary clarifies that "the term 'franchise' is often used to connote more substantial rights, whereas the term 'license' connotes lesser rights." Thus, the City's charter describes the right to use right-of-way as a "franchise," and the term "license" is used to refer to lesser rights, such as the privilege to carry on a business or own pets. This is why there is a one-year limitation on licenses versus a 25-year limit on franchises. Portland Charter, §§ 2-105(a)(17), 10-206.

overexpansive definition that covers revenue unrelated to the use of the right-of-way and even the City altogether. Such a "fee"[3] is not allowed under the charter and is thus invalid.

B. The ROW Code does not satisfy constitutional due-process requirements.

Licenses are protected property interests that cannot be revoked or impaired without constitutional due process,[4] which means an opportunity to be heard "at a meaningful time and in a meaningful manner"[5] prior to termination.[6] Due process is also required prior to the assessment of financial penalties.

Except in the context of an audit, the ROW Code provides virtually no right to be heard prior to a decision by the Director, nor an opportunity for a local appeal. In fact, Section 12.15.170(E) expressly states that outside the audit context, "a determination made by the Director is a quasi-judicial decision and is not appealable to the City Council [,]" and that the only recourse for a licensee is to seek a writ of review from state court. These procedures do not meet the requirements of due process.

C. The ROW Code violates the Dormant Commerce Clause of the United States Constitution.

The Dormant Commerce Clause in the United States Constitution limits the nature of taxes or fees that a state or local government may impose on interstate commerce. A local tax or fee on interstate commerce is allowed only if the relevant commerce occurs within the jurisdiction, is properly apportioned, and is proportional to the services or benefits provided by the local jurisdiction.[7]

The ROW Code fails to meet these criteria. It employs an overbroad definition of "gross revenue" to target commerce conducted entirely outside its jurisdiction. Further, the proposed fee on pass-through facilities is far beyond an amount that can be justified by the value of the right-of-way used by the licensee. These costs, due to the fact of the regulatory framework NW Natural operates under, will be passed on to the residents of Portland in their utility bills.

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[3] The ROW Code clearly imposes a tax as defined by Oregon law because the fee is not limited to regulatory costs.
[4] *See Barry v. Barchi*, 443 US 55, 99 S Ct 2642, 61 L Ed 365 (1979) (horse trainer's license is protected property interest); *State ex rel. Gobeson v. Oregon State Bar*, 291 Or 505, 632 P2d 1255 (1981) (law license is protected property interest).
[5] *See Armstrong v. Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965).
[6] *See Floyd v. Motor Vehicles Div.*, 27 Or App 41, 44, 554 P2d 1024 (1976) ("Except in emergency situations, the affected individual must be given notice and an opportunity for a hearing before the termination becomes effective.").
[7] *See Complete Auto Transit, Inc. v. Brady*, 430 US 274, 279, 97 S Ct 1076, 51 L Ed 2d 326 (1977); *Northwest Airlines, Inc. v. Cty. of Kent, Mich*., 510 US 355, 373, 114 S Ct 855, 127 L Ed 2d 183 (1994).

D. The prohibition on fossil-fuel infrastructure in the ROW Code is a land use regulation that violates the City's comprehensive plan.

The ROW Code mandates that licensees "operate in a manner that is consistent with City Code and Binding City Policy, including Resolution No. 37168, which prohibits additions or alterations to facilities that expands or increases the capacity to transport fossil fuels." ROW Code, § 12.15.090(B). The ROW Code also states that "the Director may immediately revoke or terminate a licensee's license who expands or increases capacity to transport fossil fuels in violation of City Code and binding city policies." *Id.*, § 12.15.080(N)(3)(a).

These provisions are clearly land use regulations because they implement standards[8] in the City's comprehensive plan[9] and impact the application of existing zoning code.[10] As such, their adoption is subject to the City's code for amendments to zoning regulations and state law requirements for post-acknowledgement code amendments. More importantly, as the Land Use Board of Appeals (LUBA) has already determined twice[11] that this prohibition does not appear to comply with the City's comprehensive plan. The City cannot avoid these LUBA decisions by merely adopting the prohibition within a new right-of-way code.

E. The ROW Code is too ambiguous and vague to be enforced.

Finally, the numerous ambiguous provisions throughout the ROW Code render it not only unworkable, but legally untenable. Due process under the 14th Amendment of the United States Constitution requires a law imposing penalties to set out what conduct will result in liability and be sufficiently clear to be understood by persons of common intelligence.[12] Further, city code cannot be so broad that it allows city officials to essentially set policy,[13] but "must contain sufficient guidelines for the exercise of the administrative decision-making authority,"[14] and be sufficiently specific to provide safeguards for those persons impacted by the regulation.[15] Otherwise, the code constitutes an impermissible delegation of legislative authority.

The ROW Code is replete with ambiguous terms and unbounded delegations of authority to the Office for Community Technology.[16] Perhaps the most glaring is the key definition of "gross

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[8] E.g., "Fossil fuel distribution. Limit fossil fuels distribution and storage facilities to those necessary to serve the regional market." 2035 Comp. Plan Pol'y 6.48.

[9] ORS 197.015(11) ("Land use regulation" means any local government zoning ordinance * * * or similar general ordinance establishing standards for implementing a comprehensive plan.").

[10] *See Port of Hood River v. City of Hood River*, 47 Or LUBA 62, 68 (2004).

[11] *See Columbia Pacific Bldg. Trades Council v. City of Portland*, 76 Or LUBA 15 (2017); *Columbia Pacific Bldg. Trades Council v. City of Portland*, LUBA No. 2020-009 (Oct. 30, 2020).

[12] *See City of Portland v. Anderson*, 40 Or App 779, 596 P2d 603 (1979); *State v. Robertson*, 293 Or 402, 408, 649 P2d 569 (1982).

[13] *See Anderson v. Peden*, 284 Or 313, 325, 587 P2d 59 (1978).

[14] *Pre-Hospital Med. Servs., Inc. v. Malheur Cty.*, 134 Or App 481, 492, 896 P2d 585 (1995).

[15] *See Warren v. Marion Cty.*, 222 Or 307, 314, 353 P2d 257 (1960).

[16] For example, multiple definitions that are unlimited in scope. Sections 12.15.030(Q) (""Right-of-way" means and includes, *but is not limited to*, * * *"), 12.15.030(T) (""Utility facility" or "facility" means any physical component

revenue," which is so broad that the department is able to create its own definition through administrative rules.[17] And Section 12.15.170(E) explicitly states that with limited exception, none of the Director's decisions are subject to review by City Council or other review body. This is impermissible delegation of legislative authority by City Council.[18]

2. Proposed Amendments

NW Natural hopes that the City will recognize the many issues with the current version of the ROW Code and pause further consideration until it has an opportunity to make necessary revisions with assistance from all stakeholders. While recognizing the need for larger overhaul of the current draft, we offer the following examples of needed changes to again illustrate the hazards of rushing this process and need more time.

The ROW Code needs clarification regarding the prohibition on alterations to facilities that increase the capacity to "transport" fossil fuels. The current language could be read in a manner that would interfere with NW Natural's state-mandated duty to serve (providing service to new customers) and illogically block its transition to renewable fuels. To ensure that the ROW Code is consistent with Resolution 37168, NW Natural proposes the two amendments below, which refine the definition of "fossil fuels" in Section 12.15.030(G) and set out the resolution's exceptions to the prohibition on transportation capacity increases in Section 12.15.090(B)(1). The latter amendment also proposes that the title of Section 12.15.090(B) be changed from "Pipeline Services" to "Pipeline Systems" because the current title is not defined or used elsewhere in the code. NW Natural proposes the following:

> **12.15.030 Definitions.**
>
> * * *
>
> G. "Fossil fuels" means petroleum products (such as crude oil and gasoline), coal, methanol, and gaseous fuels (such as natural gas and propane) that are made from decayed plants and animals that lived millions of years ago and are used as a source of energy. Denatured ethanol and similar fuel additives with less than five percent (5%) fossil

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of a system including *but not limited to* * * *"), 12.15.030(V) (""Utility service" means the provision of electricity, natural gas, communications services, * * * *or other services* to or from customers within the corporate boundaries of the city * * *") (emphasis added). The Director is also empowered to unilaterally adopt unspecified procedures and policies (§ 12.15.060(B)), approve or block transfers or leases of facilities without limitation on grounds (§ 12.15.080(K)-(L)), terminate licenses based on extremely general criteria (§ 12.15.080(N)), determine whether efforts to cure violations have been sufficient with no standards in the code for making such determinations (§ 12.15.080(N)(1)), unilaterally decide, based on no guidance, when a licensee is excused from removing facilities at the end of a license (§ 12.15.080(N)(1)), and demand production of records, maps, and any other information from licensees with no defined limits (§ 12.15.150(B)).

[17] Section 12.15.030(H): ""Gross revenue" means any and all revenue, of any kind, nature, or form * * *."

[18] Portland Charter § 2-104 General Powers: "The Council shall have and exercise all powers and authority conferred upon the City of Portland * * * The Council may delegate any of its *nonlegislative functions* or powers to subordinate officers, boards or commissions as it may find appropriate." (Emphasis added.)

fuel content, biodiesel/renewable diesel with less than five percent (5%) fossil fuel content, and petroleum-based products used primarily for nonfuel uses (such as asphalt, plastics, lubricants, fertilizer, roofing, and paints) are not fossil fuels. Hydrogen, renewable natural gas, and other low or lower-carbon fuel sources are not fossil fuels for purposes of this Chapter.

12.15.090 Utility-Specific Provisions.

B. Pipeline ~~Services~~ Systems.

Licensee will operate in a manner that is consistent with City Code and Binding City Policy, including Resolution No. 37168, which prohibits additions or alterations to facilities that expands or increases the capacity to transport fossil fuels, except for:

improvements in the safety or efficiency, seismic resilience, or operations of existing infrastructure;

the provision of service directly to end users;

development of emergency backup capacity;

infrastructure that enables recovery or reprocessing of used petroleum products; or

infrastructure that will accelerate the transition to non-fossil-fuel energy uses.

NW Natural is also concerned with the default requirement in Section 12.15.080(N) that licensees remove all utility facilities upon the termination or expiration of a license. This is problematic in several respects, and impracticable and unworkable in others. First, it is expensive to excavate and restore city sidewalks and streets to remove subterranean facilities, which is unnecessary in most cases because these facilities will not interfere with future use of the right-of-way and pose no risk to the public or city. It is also possible that facilities taken out of service could be put back into service or repurposed in the future. Thus, the current approach in Section 12.15.080(N) will result in significant costs to licensees (and their customers), unnecessary excavation work, and the destruction of potentially valuable infrastructure with little to no benefit for anyone. Accordingly, NW Natural proposes that the section be changed so that removal is required only when necessary:

12.15.080 Licenses.

N. Termination.

4. Removal of Utility Facilities. If the city has revoked or terminated a license or if a license has expired without being renewed or extended, all the licensee's rights under the license will immediately cease and be divested. In such an event, if the Director determines that some or all of licensee's utility facilities pose a material contamination or safety risk, or are likely to substantially interfere with future use of right-of-way, the Director may order the removal of those facilities after the licensee has had an opportunity to provide to the City information concerning the costs and risks with removal and alternatives to removal of the facilities. Thereafter, except as otherwise provided in writing by the Director, the licensee will obtain permits and other permissions and at its own expense remove its utility facilities from the right-of-way and restore the right-of-way to the standards provided in applicable regulations of the city.

We would respectfully ask that before determination the Director be required to consulted with affected entity to understand implications of potential determination and ascertain if there is not a more cost-effective solution that is mutually agreeable.

NW Natural has identified many other areas where the draft code could be improved both in its language and operation. The needlessly compressed time and lack of feedback from the City on our previously expressed concerns around the draft all point to a draft that is not ready to move forward, let alone be presented to City Council within the month as a final product or good policy with adequate stakeholder input or support.

We look forward to working with the City in addressing these issues, and a frank discussion with the Office of Community Technology about how we can meaningfully resolve these concerns and improve the draft ROW Code for the transparent policy to achieve the and effective management goals the City has states it has.

Sincerely,

Nina Carlson

Nina Carlson
NW Natural, Government Affairs

NW Natural®

250 SW Taylor Street
Portland, OR 97204

503-226-4211
nwnatural.com

November 15, 2021

Commissioner Carmen Rubio & Director Elisabeth Perez
City of Portland and Office for Community Technology
111 SW Columbia St, Suite 600
Portland, OR 97201

RE: Comments on City of Portland proposed ROW ordinance

Dear Commissioner Rubio and Ms. Perez,

NW Natural appreciates the opportunity to provide comments on the City's proposed new Right of Way (ROW) code, Chapter 12.15. We have a long history of working well with the City and the Office of Community Technology with our franchise agreement, and hope that this positive and professional relationship can continue.

With a service territory that covers well over 140 cities in Oregon and Washington, NW Natural operates under both traditional franchise agreements and various ROW and utility license fee structures. However, the City's proposed changes to its ROW program bears little resemblance to any of these agreements and structures in other cities in NW Natural's service territory in its purported scope, lack of clarity, and transparency. While NW Natural appreciates the desire for efficiency in management of the City's franchises and ROW, the proposed changes go well beyond this and seem to be aimed at varying policy objectives, one of which is to raise further City revenue, while missing the mark of reducing administrative burdens. Particularly at a time when the City's budget is full funded, and customers and businesses can ill afford additional cost burdens, this seems a misplaced aim and burden to impose upon City residents.

NW Natural also has serious concerns regarding the structure and intent of the proposed ROW ordinance. At the most basic level, the lack of any meaningful or transparent stakeholder input in the drafting process is concerning, as is the unclear language and intent in significant sections of the proposed changes. Our concerns fall into a few broad categories, many of which are shared by our other utility colleagues, City business organizations, and Portland customers we serve:

<u>Process</u>

- The proposed changes were created without input from impacted stakeholders, neither regulated users of the right-of-way, nor the customers they serve. This failure by the City is particularly puzzling to NW Natural given our long history of working well with the City and the Office of Community Technology. To highlight just one straightforward, yet important,

- manifestation of the lack of stakeholder input is not expressly allowing utilities to self-insure. NW Natural has maintained a solid, self-insured structure for many years as expressly allowed by Section 7.1(C) of its franchise agreement with the City and is not aware of any concerns that would justify not allowing NW Natural to self-insure going forward (putting aside the issues over the authority of the City to mandate such a change).
- The proposed ROW ordinance reaches well beyond other comparable utility licensing laws by seeking to implement various policy goals under the guise of simply improving administrative efficiency.

Authority and administration

- The City, in Section 12.15.20 attempts to expand its taxation powers beyond the taxation of revenue without authority or justification. For example, in the definitions, where revenue is defined, the language implies that the City intends to impose the utility license tax on the public purpose charges customers pay as part of their monthly utility bills. As the City knows well from multiple prior audits of the energy utilities, these public purpose charges are not revenue to the utilities as they do not compensate the utilities for services they provide until those funds, consistent with their statutory and regulatory purpose, are used to pay bills. At that point, these funds are taxed as revenue to the utilities. Under the City's proposed ordinance, it would be seeking to tax these public purpose charges twice – first when the public purpose charges are collected from utility customers and again when those funds are used to pay utility bills.
- The changes appear designed to collect revenue, with unelected city staff able to do significant rulemaking to effectuate and change substantive rights with no public process. See Proposed Ordinance § 12.15.060.C, F (1)-(2) (allowing staff or agents to adopt rules by posting a notice on the City website and waiting two weeks)
- Proposed Ordinance § 12.15.090.B.1 and other sections of the proposed ordinance appears likely in conflict with the authority of our regulator, the Oregon Public Utility Commission, particular insofar as the changes would seek to ban or impermissibly place burdens upon NW Natural serving new customers within the City.
- While purportedly focused on ease of administration, the proposed changes also attempt to mandate various employment and contracting practices through a utility license law. NW Natural does not dispute the value of these practices, and last year, for example, NW Natural purchased $31.5 million goods and services from verified minority-, woman- or veteran-owned businesses. However, adding these requirements here will increase, rather than decrease, the administrative burden on the Office of Community Technology.

Lack of clarity and transparency

- While the transition to a utility license law is purportedly directed at efficiency of administration, the proposed changes also include fossil fuel-related restrictions that violate City Resolution No. 37168, which expressly excluded (i) the provision of service directly to end users, (ii) infrastructure that accelerates the transition to non-fossil fuel energy sources, and (iii) improvements in the safety, or efficiency, seismic resilience, or operations of existing infrastructure. NW Natural is a local distribution company that delivers both conventional natural gas and renewable fuels to customers within the City. In other words, its activities

- are entirely consistent with City Resolution No. 37168, yet the wording and multiple topics included with the proposed ROW ordinance makes it unclear if the City is attempting to ban or impermissibly limit NW Natural's ability to use the ROW to serve new customers or make improvements to maintain service to existing customers, and makes no allowance for our growing renewable natural gas supply. This lack of clarity and transparency is compounded by the proposed ROW ordinance providing no notice and opportunity to cure in this context. See Proposed Ordinance § 12.15.080.N.4.
- An annual registration requirement in Proposed Ordinance § 12.15.070 seems particularly inefficient and at odds with the City's purported aims of easier administration for energy utilities given our long histories of serving Portland residents and businesses.
- The proposed changes invite conflict with existing franchises, with no clear process for resolution. Proposed Ordinance § 12.15.200 (making chapter applicable to existing franchise agreements).
- As noted above, the proposed ROW ordinance defers actually setting fees until some future date and as noted above, vests rulemaking authority with non-elected City staff or agents with no public process.

Language and definitions

- The broad and ambiguous definition what "gross revenue" covers in the proposed Ordinance belies the City's purported goal of administrative efficiency and instead reveals its purpose of revenue generation. NW Natural's current franchise agreement with the City includes specific provisions that clarify the scope of "gross revenue," such as allowing for deductions for Public Purpose Charges that NW Natural collects under applicable law but does not compensate NW Natural for the services it provides. The scope of "gross revenue" in the proposed ROW ordinance should be no broader than the scope of NW Natural's franchise agreement. Without such provisions, the proposed ROW ordinance appears to be intended to massively increase City revenues on the backs of customers.

Cost to customers

- This regulation will be an increase in cost to residents of Portland, during a time of economic hardship brought on by COVID 19 pandemic, without notification or ability to redress the increases in utility bills this will require.
- Utilities are key inputs for cost of goods for certain sectors, because of this a thoughtful economic analysis of compounded cost increases should be considered for unintended consequences for supply chains, as all utility cost will go up throughout the city.

NW Natural supports, as it appears our other utility partners do, a commonsense utility licensing structure focused on streamlining the City's administration of its rights-of-way and allowing the City to recover costs needed to maintain them, while protecting customers from cost increases. However, the proposed ROW ordinance will increase the cost burden on Portland residents and

businesses during a time of economic hardship brought on by the COVID 19 pandemic, without notification or ability to redress the increases in utility bills imposed by the City's changes. We urge the City to work with its utility partners to work with covered entities with a clear and transparent process to achieve these aims. We look forward to working with the City to improve this draft.

Kind regards,

Nina Carlson
NW Natural, Government Affairs

June 1, 2022

Facilities

tel 503 346-0000
fax 503 494-8809

facilities@ohsu.edu
www.ohsu.edu

Mail code: PP 242
3181 SW Sam Jackson Park Rd.
Portland, OR 97239

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Chad Sorber
Director, Facilities Services

Dear Office of Community Technology and ROW Consultants,

Thank you so much for the opportunity to comment on the draft ROW/Franchise Code. Much of OHSU's infrastructure was built at the turn of the last century, resulting in our main campus having significant interconnections under and over the roadways serving our buildings. As changes to the existing franchise code have the potential of significantly impacting our ability to efficiently serve our patients, we went through the code to identify questions and concerns. Thank you in advance for considering these issues.

Franchise as an Alternative Approach

Based on our conversation with Reba from ROW Consultants and from reading the text, it seems clear that the city's primary purpose in revamping the code is to appropriately regulate utilities; i.e., businesses that charge customers for data, natural gas, electricity, etc. that travels through the right of way. As such, some of the code provisions might be a poor fit for regulating non-utilities (universities, hospitals, etc.). As such, we request that **the code provide a broad allowance for the city to negotiate unique franchise agreements with non-utilities as-needed to ensure the needs of the city and non-utilities are met. To be clear, OHSU is not asking to be exempt from the per linear foot costs as envisioned in rate exhibit, but we would hope that the other provisions in the code remain open for discussion should a franchise be the best fit for our work.**

Definition of who earns Gross Revenues

The text seems somewhat vague on which entities do, and which do not, generate gross revenues. The term "pass-through facility" is used at one point, but we couldn't find a definition of such a facility in the proposed code or through searching the internet. As such, we request that **the City clearly define who is exempt from the 5% gross revenue fee. Perhaps by adding "campuses" to the example in the existing sentence below?:**

"Any utility operator that owns facilities but does not earn gross revenues on the utility (i.e. pass-through facilities, university or medical **campuses with district utility systems**)"

Self-Insured

OHSU is a self-insured entity and administers a wholly owned Class 1 Captive Insurance Company domiciled in Arizona. OHSU is subject to the provisions of ORS 30.260 through 30.300 for its tort liabilities, including personal injury and property damage. Per the Oregon Tort Claims Act (ORS 30.260 through 30.300), OHSU maintains the necessary resources to manage OHSU claims as evidenced

in OHSU's Certificate of Insurance. Because of the structure of the Captive Insurance Company, OHSU cannot name others as additional insureds on the Captive policy. **As such, OHSU asks that the city take one of two approaches. We encourage the City to either make universities and hospitals that are self-insured exempt from naming the City as an additional insured on the Captive policy – or – make public entities (of which OHSU is one) exempt from naming the City as an additional insured on the Captive policy.**

Indemnification

The indemnification section seems very broad. It seems like this would require an analysis into whether the Oregon Tort Claims Act permits a public entity, like OHSU, to indemnify for the acts of contractors, subcontractors or lessees if they are not acting within the scope of work assigned by OHSU. It is our understanding that many utility owners have the protection of the Oregon Tort Claims Act and **we therefore recommend removing the affiliates, contractors, subcontractors or lessees from this provision.**

Perpetuity

It seems unreasonable to forever defend and indemnify the city. At some point, incursions within the right of way might end (for example, filling an abandoned underground water pipe with concrete) and therefore risks the city might face from these decommissioned utilities would cease. **We suggest limiting the liability to operational utilities - and - unused utilities that have not been recognized as decommissioned by the relevant city bureau**.

Thank you for considering our requests. We recognize that OHSU does not specialize in this area of law and appreciate your focus on the intent of our suggested code changes even if our recommended language is unworkable. Perhaps at the end of the day the best the city can do is provide non-utility companies a franchise pathway, so the many issues raised above can be addressed institution by institution.

Please don't hesitate to let me know if you have any questions about our comments,

Chad Sorber
Director of Facilities Services

From:
To: RE: ROW code- stakeholder feedback due June 1
Cc: Wednesday, June 1, 2022 7:50:46 AM
Subject:
Date:

Please see questions below regarding gross revenues:

1. Reimbursements of expenses – Refunds, reimbursement from damages (hit hydrants are typical), work on water system that are cost shared with external partner and consortium dues where we're the managing member
2. Proceeds from sales of scrap materials or sale of properties/assets
3. Interest earnings
4. Transfers between Funds – These are not revenues, but that is how they are "recognized" in the budget. So would be good to specifically call out to clarify.

These were some of the questions we had raised back in August of 2021 during the initial review of the Administrative Rule that does not appear to have been addressed in this latest draft.

Please let me know if I can help clarify any of these questions.

Thanks.

Cecelia

Cecelia Huynh
Director of Finance and Support Services
Portland Water Bureau
1120 SW 5th Ave, Suite 600
Portland, Oregon 97204-1926
Phone: 503-823-7417
Fax: 503-823-7024
Email: cecelia.huynh@portlandoregon.gov
www.PortlandOnline.com/water
"From forest to faucet, the Portland Water Bureau delivers the best drinking water in the world."

From: Daschel, Kim <Kimberly.Daschel@portlandoregon.gov>
Sent: Thursday, May 26, 2022 10:42 AM
To: Perez, Elisabeth <Elisabeth.H.Perez@portlandoregon.gov>
Cc: Solmer, Gabriel <Gabriel.Solmer@portlandoregon.gov>; Huynh, Cecelia <Cecelia.Huynh@portlandoregon.gov>; Inman, Jodie <Jodie.Inman@portlandoregon.gov>
Subject: RE: ROW code- stakeholder feedback due June 1

Yes. The recent updated ROW code info was sent to Turner Harty. I just forwarded a copy to the folks here, and have added them to our mailing list for future communications.

OCT | MHCRC | Franchises | Utility Licenses | Broadband & Digital Equity

Address: 1120 SW 5th Ave, Suite 405, Portland, OR 97204
Mail: Office for Comm Tech/MHCRC, PO Box 745, Portland, OR 97207-0745

(503) 823-1125: 口笔译服务 | Chiaku me Awewen Kapas | अनुवादन तथा व्याख्या |Устный и письменный перевод | Turjumaad iyo Fasiraad | Traducción e Interpretación | Письмовий і усний переклад | Biên Dịch và Thông Dịch

The City of Portland ensures meaningful access to city programs, services, and activities to comply with Civil Rights Title VI and ADA Title II laws and reasonably provides: translation, interpretation, modifications, accommodations, alternative formats, auxiliary aids and services. To request these services, contact 503-823-5185, City TTY 503-823-6868, Relay Service: 711

Exhibit B

Chapter 12.15 (Utility Access to and Use of the Right-of-Way) Fees

UTILITY SERVICE	FEE
Electricity	5% of gross revenues
Natural gas	5% of gross revenues
Communications provided by a utility operator that does not own facilities	5% of gross revenues
Communications provided by a utility operator that owns facilities	5% of gross revenues or $10,000*, whichever is greater
Wireless communications provided by small wireless facilities	$1,408*/small wireless facility
Wireless communications provided by macro facilities	$9,004*/macro facility
Cable	5% of gross revenues
Water	5% of gross revenues
Sewer	5% of gross revenues
Storm sewer	5% of gross revenues
Pipeline	5% of gross revenues
Other utility service	5% of gross revenues
Any utility operator that owns facilities but does not earn gross revenues (i.e. pass-through facilities)	$4.75*/linear foot of facilities or $10,000*, whichever is greater
Electric vehicle charging stations	5% of gross revenue or $3,000, whichever is greater
ADMINISTRATION	**FEE**
Registration	$50*
Initial license application	$300*
Renewal license application	$250*
Franchise application	$10,000*

*Fee shall increase three percent (3%) annually on January 1 of each calendar year, beginning on January 1, 2024. All fees will be rounded to the nearest five (5) cents.

Commented [KJ1]: The City should clarify if the utility service fees are recurring fees.

Commented [KJ2]: As stated in our comments to the draft ordinance, pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. Gross revenue-based fees are not cost-based and are therefore preempted and prohibited by federal law.

Commented [KJ3]: Same comment as above.

Commented [KJ4]: If this is a recurring fee, the fee drastically exceeds the presumptively reasonable safe harbor fees set forth in the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order.* The City should reduce the fee to $270 to bring it into compliance with the FCC Order.

Commented [KJ5]: This fee is unreasonable and is not based on the City's costs caused by administration of a telecommunications provider's occupation of the right of way.

Commented [KJ6]: The combination of these administration fees exceeds the presumptively reasonable safe harbor fees set forth in the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order.* The sum of non-recurring administration fees charged by the city must comply with the FCC Order.

Exhibit A – Chapter 12.15

Chapter Index

12.15.010 Short Title.

The ordinance codified in this Chapter will be known and may be referenced as the "Utility Access to and Use of the Right-of-Way" ordinance.

12.15.020 Purpose and Intent.

The purpose and intent of this Chapter is to:

A. Grant and manage reasonable access to and use of the right-of-way, held in trust by the city, for utility purposes and to conserve the limited physical capacity of the right-of-way consistent with applicable state and federal law;

B. Ensure that the city's current and ongoing costs of granting and managing access to and the use of the right-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, who have invested millions of dollars in public funds to build and maintain the right-of-way, from persons who generate revenue by placing or using facilities in the right-of-way;

D. Ensure 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. Ensure that the city can continue to fairly and responsibly protect the public health, safety and welfare of its residents, and ensure the structural integrity of its right-of-way when a primary cause for the early and excessive deterioration of the right-of-way is its frequent excavation by persons whose facilities are located in the right-of-way;

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

G. Provide an equal and level playing field for all utility companies, persons and other entities who provide services within the city.

12.15.030 Definitions.

For the purposes of this Chapter the following terms, phrases, words and their derivations will have the meaning given below. 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.

A. "Business License Appeals Board" means the board in Section 7.02.295 of the City Code.

B. "Cable service" is 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.

C. "City" means the City of Portland, an Oregon municipal corporation, and individuals authorized to act on the city's behalf.

D. "City Council" means the elected governing body of the city.

E. "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: (i) cable service; (ii) open video system service, as defined in 47 C.F.R. 76; (iii) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor; (iv) public communications systems; and (v) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act (47 U.S.C. 151 et seq.).

F. "Director" means the director for the City's Office for Community Technology or any successor City bureau.

G. "Fossil fuels" means petroleum products (such as crude oil and gasoline), coal, methanol and gaseous fuels (such as natural gas and propane) that are made from decayed plants and animals that lived millions of years ago and are used as a source of energy. Denatured ethanol and similar fuel additives with less than five percent (5%) fossil fuel content, biodiesel/renewable diesel with less than five percent (5%) fossil fuel content, and petroleum-based products used primarily for nonfuel uses (such as asphalt, plastics, lubricants, fertilizer, roofing and paints) are not fossil fuels.

H. "Gross revenue" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectables, derived from the use or operation of utility facilities in the city, subject to all applicable limitations in state or federal law. Examples of gross revenue may be identified in administrative rules.

Commented [A1]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. Gross revenue-based fees are not cost-based and are therefore preempted and prohibited by federal law.

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

J. "Licensee" means a utility operator to subject to the provisions of this Chapter.

K. "Macro wireless facility" or "macro site" means any wireless communications facility that is not a small wireless facility. A macro wireless facility does not include fiber, coaxial cable or similar equipment located within the right-of-way.

L. "Notice" means any written communication sent to licensee's address listed on their license application or the address listed on licensee's most recent tax filing

with the city. Notice also includes any electronic communication sent to an agent of licensee and that agent both acknowledges and holds themselves out to be the relevant point-of-contact.

M. “Office” means the Office for Community Technology or any successor city bureau, along with its employees and agents.

N. "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.

O. “Pipeline system” means all pipeline facilities, together with pump stations, gathering lines and distribution facilities for the transportation of petroleum or petroleum products, including asphalt, aviation gasoline and distillate fuel oil, located in or below the right-of-way.

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

Q. "Right-of-way" means and includes, but is not limited to, the surface of and the space above and below any street as defined in City Code Section 17.04.010, road, alley or highway within the city, used or intended to be used by the general public, to the extent the city has the right to allow for their use.

R. “Small wireless facility” or “small cell” means any wireless communications facility that has antenna no more than 3 (three) cubic feet in volume that is mounted on a structure 50 (fifty) feet or less in height. A small wireless facility does not include fiber, coaxial cable or similar equipment located within the right-of-way.

S. "State" means the State of Oregon.

T. "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, plants, structures, equipment and other facilities, located within, under or above the right-of-way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service(s).

U. "Utility operator" or "operator" means any person who uses, owns, places, operates or maintains a utility facility within the city, whether or not such facilities are owned by the service provider.

Commented [A2]: This definition should be changed as follows to make it consistent with 47 CFR § 1.6002:

“Small wireless facilities” or “small cell” means facilities that meet the following conditions:
(1) The facilities—
(i) are mounted on structures 50 feet or less in height including their antennas, or
(ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or
(iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
(2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and
(3) All other wireless equipment associated with the structure is no more than 28 cubic feet in volume.”

V. "Utility service" means the provision of electricity, natural gas, communications services, wireless communications services, cable services, water, sewer or storm sewer, pipeline, public pay phones or other services 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.

W. “Wireless communications facilities” means the equipment, and associated structures, needed to transmit or receive electromagnetic signals. A wireless communications facility typically includes antennas, supporting structures, enclosures or cabinets housing associated equipment or cable and may be attached to utility or city-owned structures or poles in the right-of-way. Wireless communications facilities include strand-mounted devices. A wireless communications facility does not include fiber, coaxial cable or similar equipment located within the right-of-way.

X. “Wireless communications services” means any wireless service using Federal Communications Commission-licensed or unlicensed spectrum including ~~without limitation~~ but not limited to any personal wireless services, as defined in 47 U.S.C. § 332(c)(7)(C).

Y. "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.

Commented [A3]: The following revision should be made to clarify that wireless communications services is not limited to personal wireless communications services: “…including but not limited to ~~without limitation~~ any personal wireless services, as defined in 47 U.S.C. § 332(c)(7)(C).”

12.15.040 Jurisdiction and Management of the Public Right-of-Way.

A. The city has jurisdiction and exercises regulatory management over and controls access to all right-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.

12.15.050 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 right-of-way provided for in this Chapter, are separate from, and in addition to, any and all other city, local, state and federal charges, including any permit fee, or any other generally applicable fee, tax or charge on the business, occupation, property or income, as may be levied, imposed or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery or transmission of utility services.

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 state and federal laws.

12.15.060 Administration.

A. This Chapter will be administered by the Director. General management of the right-of-way will be administered by the Bureau of Transportation pursuant to City Code Title 17 and its accompanying rules, regulations, and policies.

B. The Director may adopt procedures, forms and written policies for administering this Chapter.

C. Authority granted to the Director may be delegated, in writing, to employees or duly authorized agents of the Office.

D. The Director may, upon request, issue written interpretations of how this Chapter applies in general or to specific circumstances.

E. Nothing in this Chapter precludes the informal disposition of controversy by the Director, in writing, whether by stipulation or agreed settlement.

F. The Director may adopt, amend and repeal administrative rules relating to matters within the scope of this Chapter.

1. Before adopting, amending or repealing a rule, the Director must notify interested parties and hold a public comment period. Such notice, which may be provided by mail or electronic means, such as posting on the Office's website, must be published at least four (4) weeks before the close of the public comment period. The notice must include instructions on how an interested party may comment on the proposed rule, a brief description of the subjects covered by the proposed rule and how to access the full text of the proposed rule.

2. During the public comment period, the Director will receive written comments concerning the proposed rule. At the conclusion of the public comment period, the Director will either adopt the proposed rule, modify it or reject it, taking into consideration the comments received. If a substantial modification is made, an additional public comment period will be held. Unless otherwise stated, all rules are effective upon adoption by the Director. All rules adopted by the Director will be filed in the Office. Copies of all current rules will be posted on the Office's website.

3. Notwithstanding Subsections 1 and 2 above, the Director may adopt an interim rule without prior public notice upon a finding that failure to act promptly will result in serious prejudice to the public interest or the interest of the affected parties, stating the specific reasons for such prejudice. An interim rule adopted pursuant to this Subsection is effective for a period of not longer than one-hundred eighty (180) calendar days. The Director may extend the interim rule past the one-hundred eighty (180) calendar days for good cause, as determined in the Director's sole discretion.

G. Specific Controls the General. If a conflict exists between two City Code provisions, one of them a general requirement and the other a specific requirement, the more specific requirement will operate as an exception to the general requirement regardless of the priority of enactment.

12.15.070 Registration.

A. Registration Required. Every person who desires to provide utility services to customers within the city will 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 will register within forty-five (45) calendar 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 will, by December 31 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 30 will not be required to file an annual registration until December 31 of the following year.

C. Registration Application. The registration will be on a form provided by the city and will be accompanied by any additional documents required by the city, in the city's sole discretion and at no cost to the city, to identify the registrant and its legal status, describe the type of utility services provided or to be provided by the registrant and list the facilities over which the utility services will be provided. Failure to receive or secure a form will not relieve any person from the obligation to register and pay the associated fees under this Chapter.

D. Registration Fee. Each application for registration will be accompanied by a nonrefundable registration fee in an amount to be determined by the City Council.

Commented [A4]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation.

12.15.080 Licenses.

A. License Required.

1. Except those utility operators with a valid franchise agreement from the city, every person will obtain a license from the city prior to conducting any work in the right-of-way.

2. Every person that ~~uses,~~ owns or controls utility facilities in the right-of-way as of the effective date of this Chapter will apply for a license from the city within forty-five (45) calendar days of the later of: (i) the effective date of this Chapter, or (ii) 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.

Commented [A5]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. The City may not collect license fees for the same facilities from multiple communications providers. The costs to the City are the same regardless of how many communications providers are using the utility facilities. Any attempt to "double dip" on fees would be preempted and prohibited by federal law.

3. Every person that owns facilities within the city will provide a comprehensive map showing the location of all facilities within the city. Such map will be provided in a format acceptable to the city, with accompanying data sufficient enough for the city to determine the exact location of the facilities, currently Shapefile or Geodatabase format. Such map will not be required more than once per year and will be provided at no cost to the city.

B. License Application. The license application will be on a form provided by the city, and will be accompanied by any additional documents required, at the sole discretion of the city, at no cost to the city, that allows the city easily by the city, in the city's sole discretion and no cost to the city, to identify the applicant and its

Commented [A6]: "at the sole discretion of the city" must be deleted. This is unreasonably broad and overly burdensome on the applicant.

Commented [A7]: What is the City's intent by including "at no cost to the City"? Is the City planning on charging applicants fees in addition to the license application fee? In addition, please see comment below regarding federal law limitations on ROW fees.

legal status, including its authorization to do business in Oregon, a description of the type of utility service provided or to be provided by the applicant, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this Chapter.

If any information in the license application changes, the applicant will submit an updated application within thirty (30) calendar days of the change.

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

Commented [A8]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation.

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 right-of-way to accommodate the applicant's proposed utility facilities and the applicable local, state and federal laws, rules, regulations and policies.

E. Franchise Agreements. If the public interest warrants, the city and utility operator may enter into a written franchise agreement or written interagency agreement if the utility operator is a city bureau, that includes terms that clarify, enhance, expand, waive or vary the provisions of this Chapter, consistent with applicable state and federal law. The franchise agreement may conflict with the terms of this Chapter with the review and approval of the City Council. The interagency agreement may conflict with the terms of this Chapter with the review and approval of the Director and the directors of bureaus who are parties to the agreement. The franchise agreement or interagency agreement will be subject to the provisions of this Chapter to the extent such provisions are not in conflict with the franchise agreement or interagency agreement. In the event of a conflict between the express provisions of an agreement and this Chapter, the agreement will control. A franchise application will be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council.

F. Rights Granted.

1. The license will authorize the licensee, subject to the provisions of the City Code including without limitation Title 17, and applicable provisions of state or federal law to utilizes, lease capacity, construct, place, maintain and operate utility facilities, for the purpose of provision utility service(s) in the right-of-way for the term of the license.

2. Any license granted pursuant to this Chapter will not convey equitable or legal title in the right-of-way and may not be transferred or assigned except as authorized in Subsection K of this Section.

3. Neither the issuance of the license nor any provisions contained in the license will 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, as it may exist at the time the license is issued or thereafter obtained.

G. Term. ~~Subject to the termination provisions in Subsection N of this Section, t~~The license granted pursuant to this Chapter will be effective on the date issued by the city or the date utility service ~~began~~begins, whichever is ~~first~~later, and ~~will have a term beginning either: (i) January 1 of the effective year for those licenses effective between January 1 and June 30; or (ii) January 1 of the year after the effective year for those licenses effective between July 1 and December 31. The license will have an initial term of one (1) year with four (4) automatic one (1)-year renewals for a total term of five (5) years. After its term, the license~~ will terminate ~~on December 31~~10 years after the effective date. Licensee may apply for renewal of the license for additional 10--year terms at any time.

H. License Nonexclusive. No license granted pursuant to this Section will confer any exclusive right, privilege, license, or franchise to occupy or use the right-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 right-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 right-of-way. Nothing in the license will 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. The city may, without charge, install and maintain city-owned streetlights, signs and equipment, including but not limited to government-owned wireless communications systems operated by the city and used for governmental infrastructure management, fire or police communications or internal government communications, to be attached to any utility operator's utility facilities. If applicable, these attachments will be subject to the requirements of the utility operator's tariffs on file with the Oregon Public Utility Commission. Whenever required by state or federal occupational safety and health laws or rules, the city will use qualified workers for all such work.~~

~~J. Multiple Services.~~

Commented [A9]: We request that the City revise this section to state that the license will be effective on the date issued by the City or the date utility service begins, whichever is later, and will terminate 10 years after the effective date. It is not practical to have a license term for less than 10 years. Requiring a licensee to submit a new application every 5 years is unreasonably burdensome on the licensee and creates extra work for city staff.

Commented [A10]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. This "reservation of city rights" to a utility operator's facilities is essentially an additional fee that is not cost-based and as such it is preempted and prohibited by federal law. Furthermore, any use of a utility operator's facilities must be subject to availability and a mutually acceptable agreement.

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~~1. A licensee 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 fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities, whether or not those facilities are owned by the utility operator. Nothing in this paragraph requires a licensee to pay the registration, license or fee requirements owed to the city by a third party using the licensee's facilities.~~

~~2. A licensee 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 fees for each utility service.~~

K. Transfer or Assignment. Unless exempted by applicable state and federal laws, the licensee will obtain the written consent of the city prior to the transfer or assignment of the license. The license will 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 state or federal laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee will become responsible for fulfilling all the obligations under the license. A transfer or assignment of a license does not extend the term of the license. The city's granting of consent in one instance will not render unnecessary any subsequent consent in any other instance. No transfer or assignment may occur until the successor transferee has provided proof of insurance pursuant to Section 12.15.100

L. Leases and Sales of Utility Facilities.

1. ~~Leases. The licensee will obtain the written consent of the city prior to leasing any portion of, or capacity on, its utility facilities, which consent will not be unreasonably withheld, conditioned, or delayed. However, the licensee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of the utility facilities. A lessee of any portion of the licensee's utility facilities will not obtain any rights under this Chapter and will be required to register pursuant to Section 12.15.070. Upon written request from the city, a licensee will provide to the city the name and business address of any lessees of its utility facilities. A licensee is not required to provide such information if disclosure is prohibited by applicable law. The licensee will take reasonable steps to ensure that its lessees are in full compliance with this Chapter.~~

2. Sales. A licensee may sell portions of its utility facilities in the ordinary course of its business, without otherwise obtaining the city's written consent, so long as the licensee complies with the following conditions:

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Commented [A11]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. The City may not collect license fees for the same facilities from multiple communications providers. The costs to the City are the same regardless of how many communications providers are using the utility facilities. Any attempt to "double dip" on fees would be preempted and prohibited by federal law.

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Commented [A12]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation.
The costs to the city are the same regardless of the type or quantity of utility service provided, therefore the city is prohibited from charging multiple fees for the same facilities.

Commented [A13]: This section should be deleted. Since the licensee is solely responsible for locating, servicing, repairing, relocating or removing the utility facilities, it is an unreasonable burden and delay to require City consent for the licensee to operate in its ordinary course of business. Furthermore, there is no reason why the City needs to know the name of a third party utilizing the facilities if the licensee will be in sole control of the utility facilities.

a. The sale is to the holder of a current and valid franchise, license, permit or other similar right granted by the city;

b. Within fourteen (14) calendar days of the sale being executed and becoming final, the licensee will provide written notice to the city, describing the portions of the utility facilities sold by the licensee, identifying the purchaser of the utility facilities, the location of the utility facilities and providing an executed counterpart or certified copy of the sales documents;

c. The licensee remains solely responsible for locating, servicing, repairing, relocating, or removing its remaining utility facilities; and

d. Within fourteen (14) calendar days of the sale being executed and becoming final, the purchaser of such utility facilities will file written notice to the city that it has assumed sole responsibility for locating, servicing, repairing, relocating, or removing the purchased utility facilities under the purchaser's current and valid franchise, license, permit or other similar right granted by the city. The purchaser will not obtain any of the licensee's rights under this Chapter.

M. Renewal. At least thirty (30) but no more than one-hundred twenty (120) calendar days prior to the expiration of a license granted pursuant to this Section, a licensee seeking renewal of its license will 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 ninety (90) calendar days, or such longer period as determined in the city's sole discretion, 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(s) or submit a detailed plan to cure the violation(s) within a reasonable period of time, as determined in the city's sole discretion 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(s), the city will grant or deny the license application within ninety (90) calendar days of confirming that the violation has been cured or of accepting the licensee's plan to cure the violation. If the licensee does not complete its cure within the time designated in the plan, the city may terminate the license.

N. Termination.

1. Revocation or Termination of a license. Subject to 12.15.080 N. 3., ~~The~~ the Director may revoke or terminate a license granted pursuant to this Chapter for any of the following reasons:

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Commented [A14]: Licensee must be given the opportunity to cure.

a. Violation of any of the provisions of this Chapter;

b. Violation of any provision of a license;

c. Intentional ~~Misrepresentation~~ misrepresentation in a license application;

Commented [A15]: Only intentional misrepresentations should be included in this section.

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 right-of-way after construction as required by City Code or other applicable local or state laws, ordinances, rules and regulations;

f. Failure to comply with technical, safety or engineering standards related to work in the right-of-way;

g. Failure to obtain or maintain a license, permit, certification or other authorization required by state or federal law for the use, placement, maintenance or operation of a utility facility; or

h. A receiver or trustee is appointed to take over and conduct a licensee's business, or a receivership, reorganization, insolvency or other similar action or proceeding is initiated, unless the licensee or its receiver or trustee timely and fully performs all obligations, until such time as the license is either rejected or assumed by the licensee or its receiver or trustee.

2. Standards for Revocation or Termination. In determining whether revocation, termination or some other sanction is appropriate, the Director will consider the following factors:

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 licensee written notice of any apparent violations before revoking or terminating a license. The notice will include a

clear and concise statement of the nature and general facts of the violation and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar 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 that it would be in the public interest to impose a penalty or sanction less than revocation or termination. If the licensee is in the process of curing a violation, the licensee must demonstrate that it acted promptly and continues to actively work on compliance. If the licensee does not respond, the Director may determine whether the license will be revoked or terminated. If the licensee does not complete its cure within the time designated in the plan, the city may terminate the license.

a. Violations of Section 12.15.090 B will not be subject to notice by the city and cure by the licensee, and the Director may immediately revoke or terminate a licensee's license who expands or increases capacity to transport fossil fuels in violation of City Code and binding city policies.

4. Removal of Utility Facilities. If the city has revoked or terminated a license or if a license has expired without being renewed or extended, all the licensee's rights under the license will immediately cease and be divested. Thereafter, except as otherwise provided in writing by the Director, the licensee will obtain permits and other permissions and at its own expense remove its utility facilities from the right-of-way and restore the right-of-way to the standards provided in applicable regulations of the city.

12.15.090 Utility-Specific Provisions.

A. Wireless Services.

1. Licensee will comply with the design and aesthetic requirements for wireless communications facilities adopted by the Bureau of Transportation.

2. Collocation. Wireless communications facilities will be attached to poles and other infrastructure located within the right-of-way. Licensee will allow and encourage providers of wireless communications services to collocate wireless communications facilities on poles and other infrastructure with existing wireless communications facilities.

3. Radio Frequency Emission Levels. All existing and proposed wireless communications facilities are prohibited from exceeding~~, or causing other wireless communications facilities to exceed,~~ the radio frequency emission standards specified in 47 C.F.R. 76 § 1.1310.

4. Interference. A licensee will install wireless communications facilities of the type and frequency that will not cause harmful interference

Commented [A16]: Licensee can't be held responsible for the actions of other facility owners. Licensee can only control its own equipment. Licensee is not responsible for any failure by other facility owners to comply with radio frequency emissions standards.

that is measurable in accordance with then-existing industry standards to any equipment of the city that is operating within its licensed frequencies, if any. In the event any wireless communications facilities cause such interference, and after the city has notified the licensee of such interference by a written communication, the licensee will take all reasonable steps necessary to correct and eliminate the interference including but not limited to powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of forty-eight (48) hours following notification, the city may require the licensee to reduce power or cease operations until the licensee can repair the interfering equipment. If, after a period of six (6) months, the utility operator is unable to fully eliminate the interference, the city may require the licensee to relocate the equipment to a feasible location.

5. No diminution of light, air or signal transmission by any structure (whether or not erected by the city) will entitle a licensee to any reduction of the fee, nor result in any liability to the city.

B. Pipeline Services.

1. Licensee will operate in a manner that is consistent with City Code and Binding City Policy, including Resolution No. 37168, which prohibits additions or alterations to facilities that expands or increases the capacity to transport fossil fuels.

2. At any point during the term of a license, a licensee may seek to amend, alter or add to its pipeline system by filing with the City's Office for Community Technology a map showing such proposed changes. The Office will respond in writing with its approval, modifications or denial (and its reasoning for any modifications or denial) within forty-five (45) calendar days from receiving the proposal.

C. Public Pay Phones Services.

1. At the city's request, any licensee providing public telephone service will:

a. Disable the ability of a specified public telephone to receive incoming calls;

b. Disable the ability of a specified public telephone to process telephone calls made to pagers;

c. Disable the total operation of a specified public telephone on a temporary basis to discourage unlawful activity; or

Commented [A17]: Please make the following revision in the 11th and 12th lines: "If the interference continues for a period in excess of forty-eight (48) hours following notification, or a period of seven (7) days following notification if the licensee has been diligently attempting to resolve the interference, the city may require…" The foregoing suggested revision should be made because Licensee might need more time than 48 hours to resolve the interference.

Commented [A18]: "…to a feasible location." should be added to the end of the last sentence.

d. Relocate a specified public telephone on a temporary or permanent basis to discourage unlawful activity.

2. Removal of Public Telephones. The city, upon twenty (20) calendar days' written notice, may require a licensee to remove or relocate any public telephone installed in the right-of-way. A licensee will comply with applicable City Code and regulations to obtain permits and other permissions and may otherwise remove any public telephone after twenty (20) calendar days' written notice to the city; and may otherwise relocate any public telephones with the city's approval. When any telephone booth installed is removed or relocated, the licensee will restore the location site to a condition satisfactory to the Bureau of Transportation. If the licensee fails to remove any public telephone when required to do so, the city may remove the public telephone, restore the affected area, and the licensee will reimburse the city for its full costs.

12.15.100 Insurance and Indemnification.

A. Insurance. Work will not commence until all insurance requirements listed below have been met and certificates have been approved by the City Attorney and filed with the City Auditor. All required insurance must be issued by companies or financial institutions with an AM Best rating of A- or better and dully authorized to do business in the State of Oregon.

1. Insurance Certificate. As evidence of the required insurance coverage, a licensee will furnish compliant insurance certificates, including required endorsements, to the city. The certificates will list the city as a Certificate Holder. There will be no cancellation of the insurance without thirty (30) calendar days' prior written notice to the city. If the insurance is cancelled or terminated prior to the end of a license, the licensee will provide a new policy with the required coverage. Failure to maintain insurance as required may be considered a breach of the license.

2. Additional Insureds. The coverage will apply as to claims between insureds on the policy. The insurance will be without prejudice to other coverage. For liability coverage, the insurance certificate will list the city as a Certificate Holder and include as additional insureds "the City of Portland, Oregon and its officers, employees and agents" and an endorsement to the liability policy will confirm the listing of the city as an additional insured. Notwithstanding the listing of additional insureds, the insurance will protect each additional insured in the same manner as though a separate policy had been issued to each, but nothing herein will operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured.

3. Insurance Costs. The licensee will be financially responsible for all pertinent deductibles, self-insured retentions or self-insurance.

4. Required Coverage. The limits provided below will be subject to any changes as to the maximum limits imposed on municipalities of the State of Oregon, by Oregon state law during the term of a license.

   a. Commercial General Liability. A licensee will provide and maintain commercial general liability and property damage insurance in the amount of $2,000,000 (two million dollars) per occurrence, and aggregate limit of $4,000,000 (four million dollars) that protects the licensee and the city and its officers, employees and agents from any and all claims, demands, actions and suits for damage to property or personal injury arising from the licensee's work under this Chapter.

   b. Automobile Liability. A licensee will carry automobile liability insurance with a combined single limit of $1,000,000 (one million dollars) each occurrence, and an umbrella or excess liability coverage of $2,000,000 (two million dollars), for bodily injury and property damage. The insurance will include coverage for any damages or injuries arising out of the use of automobiles or other motor vehicles by the licensee.

   c. Workers' Compensation. A licensee will comply with the workers' compensation law, ORS Chapter 656, as it may be amended. If required, a licensee will maintain coverage for all subject workers as defined by ORS Chapter 656 and will maintain a current, valid certificate of workers' compensation insurance on file with the City Auditor for the entire period during which work is performed within the city limits.

5. Self-Insurance. At the request of a licensee, the city will determine, in its sole discretion, whether a licensee may self-insure. A licensee whose request has been granted will provide the city proof of insurance through a letter of self-insurance or an insurance certificate, listing the city as an additional insured.

B. Indemnification.

1. To the fullest extent permitted by law, each licensee will defend, indemnify and hold harmless the city and its officers, employees and agents 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 licensee or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the use, construction, operation, maintenance, repair or removal of its facilities, and in providing or offering utility services, 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 12.15.080 of this Chapter will constitute such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the city will notify the licensee and provide the licensee with an opportunity to provide defense regarding any such claim.

2. Every licensee 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 licensee's failure to remove or relocate any of its facilities in the right-of-way or easements in a timely manner, unless the licensee's failure arises directly from the city's negligence or willful misconduct.

3. Every licensee will also forever defend, indemnify and hold harmless the city and its officers, employees and agents from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law, statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of hazardous substances related to the licensee's work in the right-of-way or presence of licensee's facilities. Hazardous substances will have the meaning given by ORS 465.200(16).

12.15.110 Financial Assurance.

A. Unless otherwise agreed to in writing by the city, before a franchise is granted or a license issued pursuant to this Chapter is effective, and as necessary thereafter, the licensee will provide a financial assurance, such as a performance bond or other 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 licensee to comply with this Chapter and accompanying ordinances, resolutions, rules, regulations or policies. The licensee will also provide, upon request, written evidence of payment of the required premium.

B. The amount of such financial assurance will be in an amount of one-hundred thousand dollars ($100,000). A licensee will immediately replace or replenish to

the full amount any draw-down of the financial assurance by the city. The financial assurance will be in effect until the later of: (i) termination of a franchise or license; or (ii) removal of all or part of a licensee's utility facilities. This obligation is in addition to any performance guarantees required by applicable City Code and regulations.

C. The financial assurance will contain a provision that it will not be terminated or otherwise allowed to expire without thirty (30) calendar days' prior written notice first being given to the city. The financial assurance is subject to review and approval by the City Attorney.

D. In no event will the city exercise its rights under the financial assurance if a bona fide, good-faith dispute exists between the city and a licensee.

12.15.120 Confidential/Proprietary Information.

If any person is required by this Chapter to provide maps, records, books, diagrams, plans or other documents 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 documents to the extent authorized by the Oregon Public Records Law, provided that all documents are clearly marked as confidential by the person at the time of disclosure to the city. The city will not be required to incur any costs to protect such documents, other than the city's routine internal procedures for complying with the Oregon Public Records Law.

12.15.130 Equal Employment Opportunity/Affirmative Action/Minority Business Enterprises.

A. The licensee will fully comply with ~~the~~ applicable equal employment opportunity requirements of local, state and federal law, and, in particular, Federal Communications Commission (FCC) rules and regulations relating thereto. Upon request by the city, a licensee will furnish the city a copy of the licensee's annual statistical report filed with the FCC, if applicable, along with proof of ~~the licensee's annual certification of compliance~~such filing. The licensee will immediately notify the city in the event the licensee is at any time determined to be out of compliance with the FCC or another regulatory body.

B. The licensee will maintain a policy that all employment decisions, practices and procedures are based on merit and ability without discrimination on the basis of an individual's race, color, religion or nonreligion, age, sex, gender identity, national origin, sexual orientation, limited English proficiency,

Commented [A19]: Suggested revision to provide clarification.

Commented [A20]: It is our understanding that the FCC does not issue a certificate of compliance, therefore we suggest revising the language to require "proof of such filing".

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marital status, family status or physical or mental disability. The licensee's policy will apply to all employment actions including advertising, recruiting, hiring, promotion, transfer, remuneration, selection for training, company benefits, disciplinary action, lay-off and termination.

C. Affirmative Action. The licensee will carry out its equal employment opportunity policy by making a determined and good-faith effort at affirmative action to employ and advance in employment women, minorities and the physically and mentally disabled.

D. Minority and Female Business Enterprises. The licensee will make determined and good-faith efforts to use minority and female business enterprises in its contracted expenditures including without limitation contracts for the acquisition of goods, services, materials, supplies and equipment used in the construction, maintenance and operation of its utility service system. ~~If directed by the city, t~~The licensee ~~will~~ may elect to participate in the City's Minority and Female Business Enterprise Certification Program.

12.15.140 Fee to Access and Use the Right-of-Way.

A. Every person subject to this Chapter will pay the fee to access and use the right-of-way for every utility service provided in the amount determined by ordinance of the City Council.

B. Fee payments required by this Section will be reduced by any franchise or Utility License Law (Chapter 7.14) fee payments received by the city, but in no case will be less than zero dollars ($0).

C. Unless otherwise agreed to in writing by the city, the fees set forth in this Section will be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) calendar days after the end of each calendar quarter and will be accompanied by an accounting of gross revenue, if applicable, and a calculation of the amount payable, and be in a form satisfactory to the Director.

D. The calculation of the fee required by this Section will be subject to all applicable limitations imposed by state or federal law.

E. The city reserves the right to enact other fees and taxes applicable to the utility operators subject to this Chapter. Unless expressly authorized 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 fees required by this Chapter.

Commented [A21]: Does the City currently have a Minority and Female Business Enterprise Certification Program? If so, please provide a website link and any other relevant information so that we may review this requirement.

Commented [A22]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation.

Commented [A23]: Pursuant to the FCC's September 27, 2018 *Declaratory Ruling and Third Report and Order*, state and local government right of way fees are limited to recovery of the government's costs caused by administration of a telecommunications provider's right of way occupation. Gross revenue-based fees are not cost-based and are therefore preempted and prohibited by federal law.

F. Interest amounts properly assessed in accordance with this Section may only be reduced or waived by the Director for good cause, according to and consistent with written policies.

G. No Accord. The city's acceptance of payment will not be construed as an accord that the amount paid is, in fact, the correct amount, nor as a release of any claim the city may have for further or additional sums payable.

H. Fines on late remittances. Penalties and interest imposed by this Section are in addition to any penalties that may be assessed under other ordinances or regulations of the city.

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

i. First occurrence during any one calendar year; ten percent (10%) of the amount owed, or twenty-five dollars ($25.00), whichever is greater.

ii. Second occurrence during any one calendar year; fifteen percent (15%) of the amount owed, or fifty dollars ($50.00), whichever is greater.

iii. Third occurrence during any one calendar year; twenty percent (20%) or the amount owed, or seventy-five dollars ($75.00), whichever is greater.

iv. 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, will be added thereto in addition to other penalties allowed by law.~~

Commented [A24]: Section 12.15.140 H.2. should be deleted in its entirety. There is no due process afforded to the accused in the City's defemination of whether "fraud or intent to evade" has occurred.

~~3.~~2. In addition to the penalties imposed, any person who fails to remit any fee when due as provided in this Section will 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 and fines), from the date on which the remittance first became delinquent, until received by the city.

~~4.~~3. Every penalty imposed, and such interest as accrues under the provision of this Section, will be merged with, and become part of, the fees required to be paid.

The city or its designee, in their sole discretion, will have the authority to reduce or waive the penalties, fines and interest due under Section 12.15.140.

12.15.150 Audits, Review and Information Requests.

A. Payment of the fee(s) under this Chapter will be subject to audit and review by the city for compliance. Any information requested or required by this Chapter will be delivered to the city, at no cost to the city.

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

1. Every licensee will deliver to the city information sufficient to easily demonstrate that the licensee is in full compliance with all the requirements of this Chapter, its franchise agreement, if any, including but not limited to payment of any applicable fees.

2. Every licensee will make available for inspection by the city at reasonable times and intervals all maps, records, books, diagrams, plans and other documents with respect to its use of the right-of-way. Access will be provided within the city unless prior written arrangement for access elsewhere has been made and agreed to by the city.

3. If any licensee fails, refuses or neglects to provide or make records available to the Director for determining licensee's compliance with this Chapter, including but not limited to the amount of fees due or payable, the Director may determine the amount of the fees due or payable based upon readily available facts and information. The Director will notify the licensee in writing of the amount of such fee so determined, together with any penalty or interest due. The total of such amounts will become immediately due and payable, together with any penalties or fines assessed by the Director.

4. Final audit determinations appealable to the Business License Appeals Board using the process set forth in City Code Section 7.02.290. The licensee must file a written appeal within thirty (30) calendar days of the date of the final audit determination letter. In such an appeal, the licensee will have the burden of establishing that the Director's determination is incorrect, either in whole or in part.

~~5.~~4. The filing of any notice of appeal to the Business License Appeals Board will not stay the effectiveness of the Director's determination unless the Business License Appeals Board so directs.

C. Any underpayment, including any interest, penalties or fines, will be paid within thirty (30) calendar days of the city's notice to the licensee of such underpayment.

D. Penalties. A penalty of five percent (5%) of any underpayment will be due within forty-five (45) calendar days of written notice from the city, if the city's review of payments under this Chapter discloses that a licensee has paid ninety-five percent (95%) or less of the principal amount owing for the period under review.

E. If the city's review of payments under this Chapter discloses that a licensee has paid ninety-five percent (95%) or less of the principal amount owing for the period, the licensee will pay all costs incurred by the city for conducting the review.

F. The Director may issue and seek enforcement of an administrative subpoena for the purpose of collecting any information necessary to enforce any provision of this Chapter. Licensee will comply with the administrative subpoena within sixty (60) days.

12.15.160 Compliance.

A. Every licensee will comply with all applicable state and federal laws and regulations, including regulations of any administrative agency, as well as all applicable ordinances, resolutions, rules, regulations and binding policies of the city, heretofore or hereafter adopted or established during the term of any license granted under this Chapter.

B. No licensee will be relieved of its obligations to comply promptly with this Chapter by reason of any failure of the city to enforce prompt compliance. The city's failure to enforce will not constitute a waiver of any term, condition or obligation imposed upon the licensee, nor a waiver of rights by the city or acquiescence in the licensee's conduct. The acts or omissions of affiliates are not beyond the licensee's control, and the knowledge of affiliates will be imputed to the licensee.

12.15.170 Penalties.

A. The city will give the licensee written notice of any violations and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar days) for the licensee to remedy the violations. If the Director determines the licensee is guilty of violating any of the provisions of this Chapter or the license after the time to remedy has passed, the Director will consider the standards found in Subsection C of this Section and: (i) issue a hold on any permit

applications filed by the licensee for work in the right-of-way; (ii) fine the licensee not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each offense; or (iii) both (i) and (ii). A separate and distinct offense will be deemed committed each day on which a violation occurs or continues.

B. Violations of this Chapter include but are not limited to:

1. Any failure to file a registration or license application at the time required under this Chapter or to promptly update registration or license information;

2. Any failure to pay any fee required by this Chapter when due;

3. Any failure to file the documentation required, or fees;

4. Any failure to provide or make available all maps, records, books, diagrams, plans or other documents with respect to its utility services and facilities within the right-of-way;

5. Any repeated failure to comply with this Chapter; and

6. Any intentionally false statement on any registration or license application, on any documentation required, or in response to any audit or compliance investigation conducted under this Chapter.

Commented [A25]: Only intentionally false statements should be included in this section.

C. In assessing civil penalties under this Section, the Director will produce a written decision identifying the violation, the amount of the penalty and the basis for the decision. In making such determination, the Director will consider the following criteria:

1. The extent and nature of the violation;

2. Any impacts to the city or the general public resulting from the violation;

3. Whether the violation was repeated and continuous, or isolated and temporary;

4. Whether the violation appeared willful or negligent;

5. The city's costs of investigating the violation and correcting or attempting to correct the violation; and

6. Any other factors the Director deems relevant.

D. The Director may reduce or waive any civil penalty for good cause, according to and consistent with written policies.

E. Except as provided in Section 12.15.150 B.4., a determination made by the Director is a quasi-judicial decision and is not appealable to the City Council. Appeals from any determination made by the Director will be solely and exclusively by writ of review to the Circuit Court of Multnomah County, as provided in ORS 34.010 to 34.100.

F. Nothing in this Chapter will be construed as limiting any judicial or other remedy the city may have at law or in equity for enforcement of this Chapter.

12.15.180 Enforcement.

In addition to other enforcement authority, upon written approval of the Commissioner in Charge, the Director may have the City Attorney institute legal proceedings to enforce this Chapter, or any determinations made by the Director under this Chapter.

12.15.190 Severability and Preemption.

A. The provisions of this Chapter will be interpreted to be consistent with applicable state and federal law, and will be interpreted, to the extent possible, to cover only matters not preempted by state or federal 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, and such holding will not affect the validity of the remaining portions hereof, and each remaining article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter will be valid and enforceable to the fullest extent authorized by law. In the event any provision is preempted by state or federal laws, rules, regulations or decision, the provision will be preempted only to the extent required by law and any portion not preempted will survive. If any preemptive state or federal law is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision of this Chapter will thereupon return to full force and effect and will thereafter be binding without further action by the city.

12.15.200 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 will apply to all existing franchise agreements granted to utility operators by the city.

Davis Wright Tremaine LLP

Suite 2400
1300 SW Fifth Avenue
Portland, OR 97201-5610

Alan J. Galloway
503 778 5219 tel
alangalloway@dwt.com

Via electronic mail to: ComTech@PortlandOregon.gov

June 1, 2022

Carmen Rubio, City Commissioner
Jillian Schoene, Chief of Staff, Office of Commissioner Carmen Rubio
Director Elisabeth Perez, Office of Community Technology
City of Portland
c/o City Hall
1221 SW 4th Avenue
Portland, OR 97204

Re: Proposed Changes to Portland Right-of-Way Management and Fees

Dear Commissioner Rubio, Director Perez, and Ms. Schoene:

T-Mobile West, LLC ("T-Mobile") appreciates the opportunity to provide the City of Portland ("City") with its comments regarding proposed new Chapter 12.15 of the Portland City Code, the associated fee ordinance, and the related administrative rules (collectively, the "Code"). T-Mobile appreciates that it has taken a major effort by the City staff to move this initiative forward despite extremely challenging circumstances and commends all involved for their efforts.

That said, after carefully reviewing the materials that were made available on April 29, 2022, and discussing the Code with the City's consultant, Reba Crocker, T-Mobile has serious substantive concerns about the current Code proposal. Several provisions of the draft Code are contrary to federal law and impose right-of-way ("ROW") fees that are not tied to costs, or that apply even where the "use" involves no meaningful burden on the ROW or the City. In the sections below, T-Mobile has set forth a number of its concerns. T-Mobile hopes that raising these issues now will help the City to ultimately produce a lawful regulatory framework that will effectively serve the needs of the City, its residents, and its businesses—including the City's ever-growing demand for mobile communications.

A. Overview of Applicable Federal Law

Municipal regulation of the ROW must take into account key limitations imposed by federal law. For example, Section 332(c)(7) of the Communications Act of 1934, as amended (the "Act") provides that "regulation of the placement, construction, and modification of

personal wireless service facilities by any . . . local government . . . (I) shall not unreasonably discriminate among providers of functionally equivalent services; and (II) shall not prohibit or have the effect of prohibiting the provision of personal wireless services."[1] Similarly, Section 253(a) provides that "[n]o . . . local statute or regulation, or other . . . local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[2] Section 253(c) requires that compensation be "fair and reasonable."[3]

The Federal Communications Commission ("FCC") clarified these provisions in its September 2018 Declaratory Ruling and Third Report and Order (the "*Small Cell Order*").[4] The *Small Cell Order* made deployment of such infrastructure a national priority, clarified the meaning of Sections 253 and 332, determining that local regulations violate Section 253 and Section 332 if they "'materially limit[] or inhibit[] an entity's ability to compete in a 'balanced' legal environment for a covered service."[5] The *Small Cell Order* also established limits on fees that may be charged for access to and use of the ROW, holding that the ROW fees imposed by a municipality must be based on a local government's reasonable *costs*. The Order found that above-cost fees have a prohibitive effect on wireless deployment, both on a national and local level,[6] and established presumptively reasonable levels for recurring and non-recuring fees.

As the City knows, in *City of Portland*, the Ninth Circuit Court of Appeals largely affirmed the *Small Cell Order*, with certain exceptions that are not directly relevant to the comments herein.[7] The Ninth Circuit held that "[t]he FCC's approach to fees is consistent with the language and intent of Section 253(c)."[8] The Ninth Circuit further agreed that Section 253(c)'s requirement that compensation be "fair and reasonable … does not mean that state and local governments should be permitted to make a profit by charging fees above costs."[9] *City of Portland* also upheld the FCC's conclusion that municipalities do not regulate rights-of-way in a proprietary capacity.[10] As the court explained, the rights-of-way are regulated in the public

[1] 47 U.S.C. § 332(c)(7).

[2] 47 U.S.C. § 253(a).

[3] 47 U.S.C. § 253(c).

[4] *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Report and Order, 33 FCC Rcd 9088, FCC 18-133 (2018), *affirmed in part and vacated in part, City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) ("*Small Cell Order*").

[5] *Small Cell Order*, para. 57.

[6] *See Small Cell Order* at para. 53 ("even fees that might seem small in isolation have material and prohibitive effects on deployment"); *City of Portland*, 969 F.3d at 1038.

[7] *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

[8] *City of Portland*, 969 F.3d at 1039.

[9] *City of Portland*, 969 F.3d at 1039.

[10] *City of Portland*, 969 F.3d at 1045

interest, not the financial interests of cities.[11] Finally, the Ninth Circuit upheld the FCC's conclusion that the effective prohibition standard extends to fees for all government-owned property in the right-of-way, including utility poles."[12]

B. Gross revenue-based fees should not apply to wireless carriers.

1. Federal law preempts ROW fees that are not based on costs.

Federal law prohibits cities from imposing ROW fees that are based on gross revenues rather than the city's actual reasonable costs. While the *Small Cell Order* leaves no doubt that this limitation applies to small wireless facilities, as defined by the FCC, the same principle applies to other wireless deployments, and even to wireline facilities in the ROW. In the *Small Cell Order* the FCC concluded that "ROW access fees . . . violate Sections 253 or 332(c)(7) unless [three] conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations."[13] The *Small Cell Order* concluded that "fees not reasonably tethered to costs appear to violate Sections 253(a) or 332(c)(7) in the context of Small Wireless Facility deployments."[14]

That conclusion, however, was expressly rooted in broader "principles" established by the FCC's interpretation of Sections 253 and 332 in the same order. Under those principles, *any* gross revenue-based fees for ROW access—whether for small cells, macros, or other carrier facilities in the ROW—are untethered from costs, and therefore unlawful, because carrier *revenues* bear no relation to the City's *costs* in administering the ROW. Assuming that physical facilities in the ROW impose certain cost burdens on the City, such burdens are not correlated with carrier revenues. For instance, if a carrier spends its entire budget on deploying new facilities, and zero dollars on advertising its services, then revenues would go down, but the impact on the ROW would have increased due to the additional facilities. Applying these principles, the *Small Cell Order* expressly recognized that gross revenue-based fees are generally invalid, stating that "we agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW, and where that is the case, are preempted under Section 253(a)."[15]

[11] *City of Portland*, 969 F.3d at 1045.

[12] *City of Portland*, 969 F.3d at 1046.

[13] *Small Cell Order*, para. 50.

[14] *Small Cell Order*, para. 70.

[15] *Small Cell Order*, para. 70.

2. The administrative rules create unlawful, non-cost-based fees.

The latest Code revision also states that "[e]xamples of gross revenue may be identified in administrative rules."[16] Examples in the administrative rules indicate that the City plans to impose the 5% gross revenue fee on late charges,[17] insufficient funds charges, and even pass-through of the ROW fees to customers. But under the *Small Cell Order* and *City of Portland*, there is no lawful basis for fees on those items. The reason is simple: Such charges are not tied to costs incurred by the City, or indeed, any activities that impose any additional burden on the ROW. Whether a customer pays late does not affect the City's costs of managing the ROW, and neither does whether T-Mobile assesses a late fee on that customer. Nor does it affect the City's costs if T-Mobile imposes a fee for insufficient funds, or if T-Mobile recovers the City's ROW Fee by passing it through to its customers. Accordingly, subjecting those items to fees is preempted by Sections 253 and 332, which only permit fees "to the extent that they represent a reasonable approximation of the local government's objectively reasonable costs, ...[18]

3. Imposing gross revenue fees *plus* recurring attachment fees, as the Code appears to do, is unlawful.

Although the Office of Community Technology ("OCT") had previously stated in meetings with wireless carrier representatives that wireless carriers would be subject to the same fees currently paid under written agreements, the new draft of the Code appears inconsistent with those assurances. On May 19th, the City's consultant, Reba Crocker, confirmed that the Code would at least *allow* the City to require attachment fees from wireless providers for infrastructure in the right-of-way (e.g., small wireless facilities attached to utility poles) and then gross revenue fees for other "use" of facilities in the right-of-way. Although Ms. Crocker told T-Mobile and other wireless carriers that the City will not *immediately* charge gross revenue fees for the use of the right-of-way, she stated that the City was authorized to do so under the Code.

That would not only be an extremely significant change; it would also be inconsistent with federal law. First, as explained above, as interpreted by the FCC in the *Small Cell Order*, Sections 253 and 332 generally prohibit gross revenue-based fees. Adding a gross revenue fee would result in an aggregate fee that is not cost-based. Second, even if non-cost-based fees were allowed for certain types of facilities, the *Small Cell Order* strongly implies that they could not be imposed *in addition to* annual fees on deployment. That is clear from the FCC's language establishing a presumptively reasonable "safe harbor" fee of $270 per year per small wireless facilities, because the FCC stated that that $270 would include "all recurring fees, including *any*

[16] *See* Code, sec. 12.15.030.H.

[17] *See* Code, sec. 12.15.140.H.

[18] *Small Cell Order*, para. 32; *City of Portland*, 969 F.3d at 1037–39 (upholding this aspect of the *Small Cell Order*).

possible ROW access fee or fee for attachment to municipally-owned structures in the ROW."[19] That implies that where recurring fees are paid on a per attachment basis for small wireless facilities—whether at the "safe harbor" level or a higher fee—those recurring fees are the *only* ROW fee.

C. The recurring attachment fees in the fee ordinance exceed any reasonable approximation of objectively reasonable costs and are therefore unlawful.

Moreover, the high recurring attachment fees in the Code appear unlawful. The proposed fee ordinance sets the annual recurring fee for a single small cell attachment at $1,408. The *Small Cell Order* established that the presumptively reasonable annual recurring ROW access fees for a small cell pole attachment is $270. Thus, the City's fee is over five times the FCC's presumptively reasonable amount.

Yet, to-date the City has not identified any data indicating that that amount reflects costs incurred by the City. Although earlier in the process the City made reference to a "cost study" justifying these fees, the City made no such cost study available to T-Mobile prior to the day that comments were due. To avoid federal preemption of such fees, the City will need to show that the $1,408 amount reflects a reasonable approximation of *objectively reasonable* costs directly incurred by the City. That is, even if a cost study exists showing that the City's expenses are roughly $1,400 per month, the City would need to show that each of the listed costs was objectively reasonable. As the FCC has explained:

> Thus, fees must not only be limited to a reasonable approximation of costs, but in order to be reflected in fees, the *costs themselves* must also be reasonable. Accordingly, any unreasonably high costs, such as excessive charges by third party contractors or consultants, may not be passed on through fees even though they are an actual "cost" to the government. If a locality opts to incur unreasonable costs, Sections 253 and 332(c)(7) do not permit it to pass those costs on to providers. Fees that depart from these principles are not saved by Section 253(c), ...[20]

The Code also sets the annual recurring fee for a macro-cell attachment at $9,004, which again does not appear to be based on a reasonable estimate of objectively reasonable costs, which would make such a fee unlawful because under the interpretation of Sections 253 and 332 set forth in the *Small Cell Order*, all valid fees on carrier infrastructure must approximate objectively reasonable costs. That conclusion follows from the FCC's interpretation of those

[19] *Small Cell Order*, para. 79.

[20] *Small Cell Order*, para. 70.

sections in the *Small Cell Order*, an interpretation which is entitled to *Chevron* deference,[21] coupled with the fact that those statutory provisions plainly are not limited in scope to what are now called Small Wireless Facilities.

D. The City may not impose ROW "use" fees on carriers for merely receiving services over third-party facilities, including cell backhaul.

The Code expands the definition of "gross revenue" to expressly include revenues not only from operation of facilities in the ROW but from the "use" of facilities in the City. Since the prior draft's definition already covered "operation of utility facilities" in the City, T-Mobile interprets "use" here as intended to separately cover "use" that does not involve operation of utility facilities. That is consistent with the City's FAQ, which says, "Resellers and voice over IP providers will also be subject to the new code." Ms. Crocker also confirmed that, subject to limitations of state and federal law, the Code would allow the City to impose fees on providers whose Internet traffic merely travels through others' facilities in the right-of-way, such as streaming providers and internet platforms.

So, although "use" is not defined, it appears that "use" is intended to apply broadly to the provision of any "utility service," independent of the service provider's ownership or operation of physical infrastructure in the right-of-way. Yet that position is not consistent with the law. Both state and federal courts, and the FCC, have rejected the concept that purchasing telecommunications transport services delivered through third-parties' fiber or cables in the ROW amounts to "use" of the ROW that would justify imposition of ROW fees.

First, Oregon courts have addressed what constitutes "use" of the ROW. In *Qwest Corp. v. City of Portland*, 275 Or. App. 874, 888 (2015), Qwest argued that Portland's utility license fee amounted to a privilege tax based on use of the public rights-of-way. In making that argument, Qwest asserted that "resellers" – *i.e.*, companies without facilities in the ROW that purchase transport service from other company that do have facilities in the ROW – were "using" the public rights-of-way through such arrangements. The Court of Appeal rejected that argument. Yet the City appears to be embracing that same overbroad concept of "use."

Second, the federal court in *AT&T Commc'ns., Inc. v. City of Austin*, 40 F. Supp. 2d 852, 855 (W.D. Tex. 1998) *vacated on other grounds sub nom. AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241 (5th Cir. 2000), reached the same conclusion. In *Austin*, the municipality advanced the theory of "use" that the City appears to rely on now. Austin argued that AT&T, which was purchasing transport from companies who actually owned lines in the right-of-way, was subject to the ordinance at issue because it "transmits signals consisting of electrons and

[21] The FCC's interpretation of the Communications Act is authoritative and entitled to judicial deference because "Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 307 (2013).

lightwaves . . . through copper and fiber optic lines, cables, and link switches located *in* . . . the City's rights-of-way." (Emphasis in original). The court characterized the argument as "border[ing] on the absurd." *Id.* at 856. The court reasoned that because AT&T would not erect poles, dig holes, or otherwise construct or repair the third-party network, there was no basis for charging AT&T for "using" the ROW. *Id.* The court "reject[ed] the City's bizarre definition of the term 'use.'" *Id.*

The FCC reached the same conclusion in *In the Matter of Entertainment Connections, Inc.*, 13 FCC Rcd. 14277 (1998). There, Entertainment Connections, Inc. ("ECI") sought a declaratory ruling that it was not a "cable operator," the definition of which required use of the public rights-of-way. ECI provided satellite video service to apartment buildings, and to deliver its service to customers, it contracted with a third-party carrier that carried ECI's satellite video signals across public rights-of-way in the carrier's own fiber. *Id.* at 14279. Citing the fact that the third-party carrier, not ECI, "exercise[d] complete stewardship over the transmission facilities that actually traverse the public right-of-way," the FCC held that ECI was not a cable operator. *Id.* at 14304. The FCC held that "[i]t is [the carrier], not ECI, that uses the rights-of-way, as the Commission and courts have interpreted the term . . . ." *Id.* at 14306-07. The FCC cited *City of Austin* and its own prior decisions holding that companies that use transport services provided by companies that own fiber in the right-of-way are not using the right-of-way. *Id.* at 14307-08.

Finally, the *Small Cell Order* has provided further clarification, holding that ROW fees that exceed the municipality's actual, direct, and reasonable costs related to and caused by the deployment in the public rights-of-way violate Section 253.[22] Where there is no deployment in the ROW, there is necessarily no extra burden on the ROW, and no such costs. The City could lawfully recover its actual costs caused by a fiber owner deploying fiber in the ROW, but cannot recover "costs" from customers who do not deploy, operate or maintain the facilities, but merely receive services provided over them by third parties. Such customer use lacks any meaningful connection to actual costs to the City.

For wireless facilities to function (whether such facilities are "small cell" or "macro" sites), such sites must be interconnected with the public switched telephone network (PSTN) and the Internet. T-Mobile typically contracts for that connectivity, known in the wireless industry as "backhaul," from third-party providers (e.g., cable operators or telecommunications carriers). In purchasing backhaul, T-Mobile is just a customer, situated like any other customer that buys telecommunications services from telephone or cable companies (or others that own communication lines in the public rights-of-way). T-Mobile does not operate or control the fiber optic cable over which the backhaul is provided; nor does it generally construct or even access that fiber as it travels through the ROW. Accordingly, under *Qwest*, *City of Austin*,

[22] *Small Cell Order* paras. 50, n. 131, 55.

Entertainment Connections, Inc., and the *Small Cell Order*, there is no basis for treating backhaul as equivalent to operating facilities in the rights-of-way. Doing so would be treating backhaul as "use" of the ROW that would trigger fees. Doing so would embrace a "bizarre definition of 'use'" rejected by the FCC and the courts.

E. The Code's "double-dipping" on fees results in unlawful, non-cost-based fees.

The Code appears to deliberately impose fees at multiple levels of revenue streams involving the same facility (e.g., wholesale and retail, facilities-based and over-the-top providers, lessors and lessees—even where a lease is only for capacity, rather than specific facilities). Put another way, if Company A owns 2 fiber pairs, and leases them to B, who then leases capacity on them to C, then the gross revenue fee would apply to: (i) revenue A receives on the lease to B, and (ii) any revenue that B receives from C. Although there is no express discussion of "double-dipping," in the *Small Cell Order*, it is unlawful based on the principle that fees should reflect the City's objective costs. Such costs are tied to the facilities in the ROW, and the impact of installing, maintaining, relocating or removing such facilities. The costs the City incurs do not, or at least should not, multiply with each additional layer of resale/leasing/services that are provided over those same facilities. Far from an estimate of actual City costs, the fees imposed appear aimed only at generating revenue. That approach drives up costs for carriers, and ultimately, customers, who will foot the bill for such double- or even triple-dipping. Those increases in carrier's costs threaten, in the aggregate, to "'materially limit[] or inhibit[] an entity's ability to compete in a 'balanced' legal environment" for services,"—just what the *Small Cell Order* aimed to prevent.[23]

F. The Code should define "Small Wireless Facility" per federal law.

The FCC has established a definition of "Small Wireless Facility," which is codified at 47 C.F.R. 1.6002. That definition is as follows:

> (l) Small wireless facilities are facilities that meet each of the following conditions:
>
> (1) The facilities -
>
> (i) Are mounted on structures 50 feet or less in height including their antennas as defined in § 1.1320(d); or
>
> (ii) Are mounted on structures no more than 10 percent taller than other adjacent structures; or

[23] *See Small Cell Order* at para. 57; *City of Portland*, 969 F.3d at 1038.

> (iii) Do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater;
>
> (2) **Each antenna** associated with the deployment, excluding associated antenna equipment (as defined in the definition of antenna in § 1.1320(d)), is no more than three cubic feet in volume;
>
> (3) All other wireless equipment associated with the structure, including the wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume;
>
> (4) The facilities do not require antenna structure registration under part 17 of this chapter;
>
> (5) The facilities are not located on Tribal lands, as defined under 36 CFR 800.16(x); and
>
> (6) The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in § 1.1307(b).

Instead of adopting this definition, the current Code proposes a definition that is similar, but narrower in three key respects. First, the definition appears to apply the 3-cubic-foot limitation to just one "antenna" rather than "each antenna." Second, while the federal definition allows heights over 50 feet in some circumstances, the Code's definition does not. Third, the Code's definition excludes fiber/cable or "similar equipment" in the ROW.

> "Small wireless facility" or "small cell" means any wireless communications facility that has **antenna** no more than 3 (three) cubic feet in volume that is mounted on a structure **50 (fifty) feet or less in height**. A small wireless facility **does not include fiber, coaxial cable or similar equipment located within the right-of-way.**

The first two differences, while they do not appear to have been intentional, should be eliminated to avoid problems. For example, the inconsistency could result in facilities that are "Small Wireless Facilities" under federal law being treated as "macro" facilities under the Code, which would serve no purpose and likely result in violations of federal law due to the discrepancy in the definitions.

The third difference seems intended to allow the City to impose additional ROW access charges on the fiber that provides backhaul to Small Wireless Facilities. Yet doing so would be inconsistent with the FCC's *Small Cell Order*. First, in the FCC's discussion of recurring attachment fees for facilities, it made clear that to be presumptively reasonable such recurring fees not only must be $270 or less, but must "includ[e] any possible ROW access fee."[24] Charging the wireless provider an additional ROW access fee for backhaul would therefore violate the *Small Cell Order*. Second, as discussed above, purchases of backhaul from third party carriers do not constitute a true "use" of the ROW at all, and the use of such third-party facilities for backhaul does not increase the burden on the ROW or the City's costs. In sum, even if the intent was to allow new fees on backhaul, the discrepancy will not accomplish that aim, and the definition should be harmonized with the federal one. Even if fiber running to a small wireless facility were a separate use of the ROW, because the logic of the FCC's statutory interpretation in the *Small Cell Order* implies that under Sections 253 and 332 *all* fees on telecommunications infrastructure—not just those on "small wireless facilities"—must be cost-based, there should be no room for gross revenue-based fees on the fiber.[25]

G. The City should not impose a consent requirement for leases.

Finally, in the new draft Ordinance, the City purports to not only impose its ROW Fee on leasing of facilities or capacity, but also to require that any such leases be subject to approval by the City. This is implied by the scope of the license granted, which now includes the right to lease capacity, and it is made explicit in Section 12.15.80.L, which now states that a licensee must "obtain the written consent of the city prior to leasing any portion of, or capacity on, its utility facilities…." In contrast, the last draft expressly stated that leasing any portion was okay without the City's permission, so long as the lessor remained responsible for maintaining its facilities. In the May 19th meeting with Ms. Crocker, she appeared to confirm that new approach. T-Mobile does not see any benefit to requiring carriers to obtain City permission for lease arrangements and believes that allowing the City to veto leasing arrangements would itself constrain competition for backhaul and other key services that would, in effect, materially inhibit

[24] *Small Cell Order*, para. 79.

[25] *See, e.g.*, *Small Cell Order*, note 167 ("While the relevant language of Section 253(a) and Section 332(c)(7)(B)(i)(II) is not limited just to Small Wireless Facilities, we proceed incrementally in our Declaratory Ruling here and address the record before us, which indicates that our interpretation of the effective prohibition standard here is particularly reasonable in the context of Small Wireless Facility deployment."), para. 67 ("we reiterate that in the fee context, as elsewhere, the statutory phrase "prohibit or have the effect of prohibiting" in Section 332(c)(7)(B)(i)(II) has the same meaning as the phrase "prohibits or has the effect of prohibiting" in Section 253(a)."), and para. 68 ("Ultimately, we need not resolve here the precise interplay between Sections 253 and 332(c)(7). It is enough for us to conclude that, collectively, Congress intended for the two provisions to cover the universe of fees charged by state and local governments in connection with the deployment of telecommunications infrastructure.").

competition for wireless services. Accordingly, T-Mobile requests that the City restore the language of the prior draft on this point.

H. Conclusion

In closing, T-Mobile again commends the efforts of the City staff to continue to move the Portland ROW Code changes forward amidst extremely trying circumstances. T-Mobile greatly appreciates this opportunity for input and believes that addressing the concerns raised in this letter will help the City modernize its ROW Code in a manner that serves the City's needs, including by facilitating the deployment of next-generation wireless infrastructure for the benefit of all who reside, work, and visit Portland. T-Mobile believes that achieving a positive long-term solution that works for all will require additional dialog between City staff, wireless carriers, and other stakeholders. Accordingly, T-Mobile respectfully urges the City to pause the current schedule to allow those critical discussions to occur, unconstrained by artificial deadlines. T-Mobile looks forward to continuing to engage with the City on these issues in an open and constructive spirit.

Sincerely,

Davis Wright Tremaine LLP

Alan J. Galloway
Counsel for T-Mobile

cc: Tim Halinski, Corporate Counsel, T-Mobile

Donna Barrett
Network Counsel
Public Policy, Law and Security

June 1, 2022

Commissioner Carmen Rubio & Director Elisabeth Perez
Office for Community Technology
111 SW Columbia Ste., Suite 600
Portland, OR 97201

Via Email

Re: Comments to the Draft Utility Access to the Right-of-Way Ordinance (Chapter 12.15)

Dear Commissioner Rubio and Director Perez,

Verizon has very serious concerns about the City of Portland's ("City's") proposed draft Utility Access to the Right-of-Way ordinance (Chapter 12.15) (the "Proposed Ordinance"), which, if enacted as written, would both violate federal law and have a profoundly negative impact on telecommunications services for residents, businesses, and others in and around the City. The availability and affordability of advanced broadband infrastructure and services has a direct impact on economic development, innovation, and equity. The Proposed Ordinance, as written, would dramatically increase the cost of critically needed infrastructure, delay the expansion of high-speed wireless broadband services, limit consumer choice, and raise costs for all wireless customers.

The Proposed Ordinance is, on its face, inconsistent with state and federal law in multiple respects, including the following:

1. **12.15.030 Definitions.**

   The Proposed Definition of Small Wireless Facilities Is Inconsistent with Federal Law. Section 12.15.030.R. of the Proposed Ordinance includes a definition for a "Small Wireless Facility" ("SWF") that is substantively different from the SWF definition promulgated by the Federal Communications Commission ("FCC") and thus, contrary to federal law.

2. **12.15.020 Purpose and Intent.**

   No Cost Study. Per the FCC's 2018 Infrastructure Order (the "Order"), fees associated with right-of-way ("ROW") use must reflect a reasonable approximation of the objectively reasonable associated costs that the City incurs. As more fully explained by CTIA, the trade association for the wireless communications industry, in its comment letter to Elisabeth Perez dated May 25, 2022 (the "CTIA Letter"), the Proposed Ordinance contravenes federal law because the proposed fees are not cost-based, a fact underscored by the omission of language requiring a cost study to provide proof that fees are based on the City's recovery of its costs. Indeed, industry

representatives asked the City on numerous occasions if it had conducted a cost study, and no definitive answer was ever given. While comments included in ordinance-related documents provided by the City state that the City's proposed fees are a reasonable approximation of its costs, no support is provided for that statement. To the contrary, other stakeholder comments included in the latest ordinance-related documents from the City state that the proposed fees are not based on the utilities' impacts to the right-of-way. Since the fees must be cost-based under federal law, the City should require a cost study, state whether any cost study has been done to date, and otherwise provide any support for any contention that the fees contained in the Proposed Ordinance are cost-based.

Non-compliant Fees. More confusing is the language in Section 12.15.020.C that asserts the proposed fees are meant to compensate the City for the cost to build, not manage, the right-of-way, contrary to the Order, which limits fees for use of the right-of-way to that amount necessary for the City to recover any increased costs for maintaining the right-of-way attributable to the additional user. Specifically, in the Order, the FCC stated, *"that ROW access fees, and fees for the use of government property in the ROW...as well as application or review fees and similar fees imposed by a state or local government as part of their regulation of the deployment of Small Wireless Facilities inside and outside the ROW, violate Sections 253 or 332(c)(7) unless these conditions are met: (1) the fees are a reasonable approximation of the state or local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations."* As already discussed above, the City hasn't met any of the above requirements demonstrating that its fees are lawful.

3. 12.15.040 Jurisdiction and Management of the Public Right-of-Way.

Clarification of City's Objective. Section 12.15.140 (A) of the Proposed Ordinance states that "the city has jurisdiction and exercises regulatory management over and controls access to all right-of-way..." but paragraph (C) of the same section goes on to state that "*[t]he 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."* This provision is confusing and needs to be clarified because, as currently written, it could be interpreted that the City's objective is to require payment for the use of the right-of-way, even though the City has no intent of maintaining it. If the City is not obligated to and not resolved to maintain or repair the right-of-way, what is the right-of-way use fee for? Alternatively, if the City's aim is to state it has no obligation to, but voluntarily exercises jurisdiction over and agrees to maintain the right-of-way, that needs to be made clear.

4. 12.15.080 Licenses.

Discriminatory Application of Ordinance. The Proposed Ordinance is also facially discriminatory inasmuch as the effective date is delayed for some providers with an existing franchise, who will apparently be exempt from paying these duplicative and exorbitant fees for years to come, in direct violation of the requirement in the Telecommunications Act of 1996 ("TCA"") that a municipality not unreasonably discriminate among providers.

Discriminatory Use of Franchise Agreements. The Proposed Ordinance states, "...[i]f the public interest warrants, the city and utility operator may enter into a written franchise agreement...that

includes terms that clarify, enhance, expand, waive or vary the provisions of this Chapter, consistent with applicable state and federal law". Verizon sought a new franchise, and the City declined to agree to execute one based on the fact that it was going to transition to this ordinance model. However, AT&T, a direct competitor of Verizon, will continue to reap the benefits of its existing franchise, including reduced fees, for years to come, in violation of the TCA requirement that all fees be non-discriminatory.

Non-compliant Shot Clock. Section 12.15.080 (M) states that the City will review license renewal applications and act within 90 days. This provision is in violation of federal regulations as to the shorter shot clocks applicable to some small wireless facilities and eligible facilities requests contemplated under Section 332 of the TCA and Section 6409 of the Spectrum Act, as applications for such projects must be acted on within time periods that are shorter than 90 days.

In Kind Requirement. Section 12.15.080(I) appears to reserve to the City broad rights to attach its facilities, including wireless facilities, to poles owned by utility providers, at no cost to the City. As discussed in further detail in the CTIA Letter, this requirement is tantamount to an unlawful government taking under Oregon law. Moreover, this provision violates federal law because the fees contemplated herein are not cost-based and are in addition to the other already excessive fees that have no nexus to a utility provider's proportionate impact to the ROW.

Fees Levied on Mere Users of ROW Facilities. In addition to owners or controllers of communications facilities, Section 12.15.080.A.2 also requires "users" of communications facilities to secure licenses. "Use" is an undefined term that needs to be clarified if the breadth of the Proposed Ordinance is to be clearly understood. Requiring mere users of facilities in the ROW to obtain licenses suggests that this fee is not intended to compensate the City for impacts to the right-of-way based on right-of-way use. The inclusion of all of the utility operators who use the existing infrastructure to provide service will enable the City to collect multiple fees for the same fiber and power infrastructure in the right-of-way, despite the fact that there are no measurable additional impacts generated by multiple users of the same fiber and power runs. Moreover, the actual owner/operator of the physical infrastructure will also be charged this right-of-way access fee and will most likely pass this cost on to the very utility customer "users" this Proposed Ordinance already seeks to tax.

City's Consent Required to Lease. Section 12.15.080.L requires a utility operator to obtain the City's consent for a utility operator to lease its facilities, including "capacity on" the facilities. However, localities have no jurisdiction over such matters, which are regulated by the FCC, thus the consent requirement is unlawful.

5. Administrative Rule Update

Unlawful Bifurcation of Fiber Fee from SWF Fee. Throughout this process, City staff asserted that the right-of-way fees imposed under the Proposed Ordinance would be the same as are currently charged, but this assertion was false. Administrative Rule 9 specifically provides that "*attachment fees do not include any fees for placement of equipment or facilities within the right-of-way*." Additionally, contrary to the definition of a SWF in the Order, the City's definition expressly excludes the fiber and power facilities required to operate a SWF.

Gross Revenues**.** The definition of gross revenue is unprecedented in its scope and includes:

- "*Any and all revenue*" including customer late fees and advertising revenue.
- Pass through charges- *"If a utility service provider passes any portion of this gross revenue fee onto their customers, that amount will be included in gross revenues."*
- Billing and collection fees*, "including but not limited to non-sufficient funds (NSF) charges, late fees, connection fees, upgrade fees, downgrade fees, service calls, shut off fees or disconnect fees, convenience fees, equipment rental fees and administrative fees will be included in gross revenues."*
- Equipment rentals. Example. "*Customer leases a telephone from a utility service provider which they use to consume telecommunications services. The telephone is considered a utility facility and all revenues generated from the lease of that equipment will be included in the gross revenues of the utility service provider."*
- Revenue from the lease of Rack space to other providers.
- Revenues from the lease of Dark fiber.
- Multiple Users- "*For a utility service provider providing multiple types of services via multiple lengths of infrastructure in the same trench, such as strands of fiber through a single trench or conduit, the utility service provider will count the linear feet per strand, which is dedicated to a separate line of service, even if the infrastructure is occupying similar space in the right-of-way."*

The use of gross revenues as a basis for a fee to access the ROW and the City's expansion of the definition of "gross revenues" are greatly concerning and represent yet another attempt by the City to impose massive, non-cost-based fees on utility service providers in the City in violation of federal law.

At the City's behest, and with the City's assurances that there would be no increase in fees or additional obligations imposed in the Proposed Ordinance, Verizon agreed not to further pursue a permanent franchise upon the same terms contained in AT&T's franchise with the City. Based on the City's false or misleading representations and to its detriment, Verizon accommodated the City's delays and unresponsiveness during its conversion from a franchise model to a ROW use ordinance framework. Given the circumstances, Verizon is continuing its evaluation and reserves any rights to seek judicial review of or otherwise challenge any provision of this Proposed Ordinance or other action by the City that is inconsistent with state or federal law.

Sincerely,

Donna Barrett
Network Counsel

verizon

May 18, 2022

Via email to ComTech@PortlandOregon.gov

Re: Wireless Industry Questions and Clarifications Regarding the City of Portland's (the "City") Draft Right-of-Way Code

Hi – Please see below a list of questions prepared by the wireless industry for our meeting on May 19th, 2022:

1. What is the City's intent with respect to the expansion of the definition of "gross revenues" to include "use" of the right-of-way?
    a. Is this intended to apply to wireless providers independent of their physical infrastructure (e.g. pole attachments) located in the right-of-way? Such that use of facilities in the right-of-way, such as backhaul, would subject those providers to gross revenue fees?
    b. Does the City intend to require payment from wireless providers for ***both*** its physical infrastructure in the right-of-way (e.g. attachments) ***and*** its use of facilities in the right-of-way (e.g. backhaul)?
    c. Will other providers whose data only travels through others' facilities in the right-of-way, such as streaming providers and internet platforms, be subject to those same fees?
2. Why does the City define "Small Wireless Facility" more narrowly than the FCC does?
    a. Would facilities that meet the federal definition of a small wireless facility, but not the City's definition, be subject to macro license fees?
3. Has the City conducted a cost study to assess the true cost of managing the public right-of-way?
    a. If so, can the City produce that cost study to the wireless providers?
    b. Is the gross revenue fee payment tied to reimbursing the City for its actual costs in managing the right-of-way?
    c. Is there justification for assessing fees on the late charges, insufficient funds charges, and fee recovery charges associated with licensees passing its costs along to its customers?
4. After the comment period has ended on June 1, what additional procedural steps will be taken before the Ordinance is reviewed by City Council? Will the wireless providers, and others, have additional opportunities for comment/review of revisions?
5. OCT has stated in prior meetings that the end result of this Ordinance would be that wireless carriers are subject to the same fees currently paid under Franchise Agreements, and that there would be no increase. Is it the City's belief that this is still true under the current draft?
6. The City also repealed the Utility License Law in the prior draft of the Ordinance. Under that Utility License Law, many wireline providers already pay the City a license fee of 5% of gross revenues earned within the City on communications services. Now, it appears

that Utility License Law fee payments would be deducted from the new ROW Fee imposed by the Ordinance. Is this the City's intent?

7. Section 12.15.80.L states that a licensee must "obtain the written consent of the city prior to leasing any portion of, or capacity on, its utility facilities…."
    a. Does the City intend to charge gross revenue fees on the revenue obtained by providers leasing capacity?
    b. Given this provision, must carriers get permission from the City to allow Netflix to be streamed over wireless networks (or to provide dedicated services like private 5G to Port of Portland or FirstNet)?
8. Under 12.15.080.I, the City reserves the right to install their own equipment on 3rd party poles, including "government-owned wireless communications systems," without charge:
    a. Is the City considering removing this provision?
    b. If not, please explain the intent of this provision, and what processes would govern such deployments.

Holli Johnson
Sr. Manager NW Region

June 1, 2022

Sent via E-mail to: ComTech@portlandoregon.gov

Commissioner Carmen Rubio & Director Elisabeth Perez
City of Portland Office for Community Technology
111 SW Columbia St, Suite 600
Portland, OR 97201

Re: Western States Petroleum Association Comment on the City of Portland Right-of-Way Code (the "ROW Code") Proposal

Dear Commissioner Rubio and City Leadership:

Western States Petroleum Association (WSPA) appreciates the opportunity to provide comments on the proposed amendments to the ROW Code.

WSPA believes that meaningful carbon-emissions reductions are best achieved through well-designed, market-based programs and policies. WSPA therefore opposes the proposed ROW Code amendments because they were developed and proposed without meaningful input from fuel suppliers, will interfere with statewide broadly applied carbon-reduction efforts, do not guarantee any greenhouse-gas reductions, and are outside the authority of the City.

A. City OCT leadership should pause this proposal until they can incorporate input from key ROW stakeholders and follow procedures specified in Resolution No. 37168.

It appears that most of the utilities and franchisees that regularly work in the City of Portland ROW oppose the current form of the ROW Code amendments. Those with the greatest knowledge about and interest in this problem have not been substantively included in the drafting that led to this proposal. The City should make a full stop on this process and reset around the comments received from various ROW stakeholders.

Further, Resolution No. 37168 calls for specific steps before the City Council considers adopting code implementing the fossil-fuel infrastructure policy therein. Specifically, the Resolution requires "that prior to any further Council action, the mayor shall schedule (1) a work session to

review any proposed code changes and (2) an executive session to review the legal considerations of any proposed code changes." (Emphasis added.) No proposal should go before City Council implementing Resolution No. 37168, as the ROW Code purports to do, without first completing these two steps.

B. The City should not raise franchise fees in the midst of record-breaking inflation; this is a highly regressive tax burden on Portland families.

The City has a massive budget surplus, but working Portlanders are struggling with record-breaking rising costs. This is an inappropriate time for the City to try to grab new revenue by increasing costs for basic services like energy, internet, and utilities. These costs are likely to hit Portland families already struggling with declining purchasing power. The City should either pause this effort or remove the new and increased costs on basic services. Increasing these costs now would be regressive and tone deaf.

C. Banning new and expanded fuel infrastructure in the city would result in increased carbon emissions in several ways.

The fuel infrastructure ban proposed in the ROW Code amendments will freeze current infrastructure in the City of Portland. This will prohibit infrastructure needed for lower-carbon and lower-emission renewable and transition fuels required by state and federal regulators. Ironically, this could result in greater carbon emissions. Indeed, given the extensive regulation on point sources and other emission sources in the United States, the fossil-fuel infrastructure ban may well have the exact opposite effect of increasing emissions, by shutting down local industry that produces goods with relatively fewer emissions. This can, and often does, result in the goods being made internationally at facilities with higher emissions, then adding additional emissions through transportation to the United States. Similarly, the fuel-infrastructure ban would also result in shipping more fuel by truck, instead of pipe, which dramatically increases the carbon intensity of transporting fuel.

Resolution No. 37168 explicitly exempts fuel infrastructure needed to supply local end users and to transition away from fossil fuels, but those exemptions are missing in the current draft ROW Code. As stated in Resolution No. 37168, the City Council directed that the fuel-infrastructure ban not restrict:

> 1. improvements in the safety, or efficiency, seismic resilience, or operations of existing infrastructure;
>
> 2. the provision of service directly to end users;

3. development of emergency backup capacity;

4. infrastructure that enables recovery or re-processing of used petroleum products; or

5. infrastructure that will accelerate the transition to non-fossil fuel energy sources[.]

For Portland's well-being, it is imperative that the ROW Code not prohibit this type of needed infrastructure. Other important City and state initiatives are working to improve safety, add emergency backup capacity, and reduce emissions that would be severely undermined if the City adopted the current proposal.

D. City OCT leadership should clarify and narrow the definition of *gross revenue*.

The proposed definition of *gross revenue* in the draft ordinance is both too broad and too vague. This definition is key for impacted service providers and the public to understand how much the City is trying to increase costs. Given the dollars at stake and limitations on City authority to assess fees on franchises, the current overbroad and vague definition will likely result in litigation. For the sake of clarity and functionality, the City should indicate how it plans to apply this cost. Similarly, attempting to leave such a weighty decision to the Director is bad public policy and probably an unauthorized delegation of authority, as discussed below.

E. City OCT leadership should resolve legal deficiencies in the proposed ROW Code before presenting it to City Council.

The City's rush to adopt ROW Code amendments jeopardizes the enforceability of the ROW Code. As outlined below, the City lacks authority to adopt the ROW Code amendments as proposed. City leaders would be wise to take the time to process the input received from ROW users and resolve these legal deficiencies before moving forward.

1. The ROW Code's regulation of fossil fuel-facilities and pipeline operators is unconstitutional and violates the City's comprehensive plan.

The ROW Code mandates that license holders must "operate in a manner that is consistent * * * Resolution No. 37168, which prohibits additions or alterations to facilities that expands or increases the capacity to transport fossil fuels." ROW Code, § 12.15.090(B)(1). The ROW Code further provides that "the Director may immediately revoke or terminate a licensee's license who expands or increases capacity to transport fossil fuels in violation of City Code and binding city

policies." *Id.*, 12.15.080(N)(3)(a). The determination of a violation is within the sole discretion of the Director, and a licensee has no right to be heard prior to the decision, cure the alleged violation, or appeal the Director's decision. *Id.*; § 12.15.170(E).

The broad language of these provisions is not limited to a pipeline operator's facilities or operations within the City. Rather, the mandate for compliance with Resolution No. 37168 is directed to a licensee's operations without qualification, and the code allowing immediate termination contains no geographical limitations. Obviously, this attempt to regulate a licensee's activities outside the City is a violation of the Dormant Commerce Clause in the United States Constitution,[1] and the regulations are unenforceable.[2]

Even for operations within the City, the restrictions are still invalid because they are land use regulations[3] that violate the City's comprehensive plan. The Oregon Land Use Board of Appeals has twice remanded a nearly identical prohibition because the City had failed to establish its compliance with the City's comprehensive plan. LUBA's holding would be no different because the City moved the restriction from its zoning regulations to right-of-way code.

Finally, the code section allowing immediate termination for an alleged increase in transportation capacity without an opportunity to be heard or right to appeal is a glaring violation of constitutional due-process rights[4] and will be invalidated when challenged.

2. The proposed license fees violate the City charter and the Dormant Commerce Clause.

Attached to the ROW Code is a proposed schedule of license fees to be contemporaneously adopted by City Council. The schedule proposes a charge of 5 percent on gross revenue from sales within the city and a fee on pass-through facilities of $4.75 per linear foot.

The City's charter regulates the use of right-of-way for utility and pipeline purposes in Chapter 10, Article 2. The City cannot avoid these charter sections by (incorrectly) referring to the grant of the rights in the ROW Code as "licenses"[5] when the substance of the charter chapter clearly applies.

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[1] *See Daniels Sharpsmart, Inc. v. Smith*, 889 F3d 608, 616 (9th Cir 2018) (California violated the Dormant Commerce Clause when it penalized a corporation located in California for legal operations outside the state).

[2] Courts prohibit cities from terminating or refusing to renew licenses based on a party's refusal to comply with an unlawful condition. *See Olympic Pipe Line Co. v. City of Seattle*, 316 F Supp 2d 900, 904 (WD Wash 2004), *aff'd*, 437 F3d 872 (9th Cir 2006); *Golden State Transit Corp. v. City of Los Angeles*, 475 US 608, 619, 106 S Ct 1395, 89 L Ed 2d 616 (1986)).

[3] The regulations fall under the definition of ORS 197.015(11) because they implement standards in the City's comprehensive plan, such as Policy 6.48 ("Fossil fuel distribution. Limit fossil fuels distribution and storage facilities to those necessary to serve the regional market.") in the City's comprehensive plan and modify the application of existing zoning code. *See Port of Hood River v. City of Hood River*, 47 Or LUBA 62, 68 (2004).

[4] *See Mullane v. Central Hanover Bank & Trust Co.*, 339 US 306, 313, 70 S Ct 652, 94 L Ed 865 (1950).

[5] This charter article regulates "franchises," which has the universally accepted meaning in the relevant context of a "right granted by the state or a municipality * * * to do certain things that a corporation or individual otherwise cannot do, such as the right * * * to use the street or alley underneath the surface for water pipes, gas pipes, or other conduits." McQuillin: The Law of Municipal Corporations, § 34:3 (3d ed); *Northwest Nat. Gas Co. v. City of*

Section 10-209(b) limits compensation for use of right-of-way to "fair compensation" or the "cash value" of the particular rights granted. The ROW Code patently violates this provision because it does not attempt to tie the license fees to the rights provided,[6] and the fee is far higher than the market/cash value of the property rights provided.

When the fees are applied to interstate commerce, they are also an unconstitutional exaction. The United States Supreme Court has repeatedly stated that the Dormant Commerce Clause requires local fees to be directly and proportionally tied to the benefits provided.[7] Here, there is simply no basis for demanding 5 percent of gross revenue from interstate commerce when the only service provided by the City is use of right-of-way—especially when the charge is imposed regardless of the amount of right-of-way used, and the length of pipeline in the city is likely a tiny fraction of the total length of the interstate pipeline required for delivery of the product.

The limit on right-of-way fees that a municipality may impose on interstate pipeline operators is an issue that has been directly and unambiguously answered by the Ninth Circuit. In the case *Western Oil & Gas Ass'n v. Cory*, 726 F2d 1340, 1344 (9th Cir 1984),[8] the court held that the charge for use of public land for subterranean pipeline must be tied to the value of the land and, thus, a fee based on the amount of product flowing through the pipeline was unconstitutional. The requirement that a fee be tied to the value of right-of-way occupied applies equally to fees based on a price per linear foot. In *Shell Oil Co. v. City of Santa Monica*, 830 F2d 1052, 1059 (9th Cir 1987), the Ninth Circuit upheld a linear-foot charge because "the fee was valued according to a reasonable percentage of the appraised value of land abutting the pipeline within the city [and was] based on an evenhanded formula and not graduated by the amount of business done." *Id.* at 1060.

The ROW Code clearly does not meet these standards. The City makes no attempt to tie the linear-foot price to the value of the land at issue. The fee is the same whether the right-of-way is located downtown or in brownfield industrial areas. Further, the charge is exorbitant. The formula approved in *Shell Oil Co.* applied to the land in the City primarily used by pipeline operations would dictate a linear price of approximately $1.00 per foot. There is no question that the City's four-times-higher rate is invalid.

Portland, 300 Or 291, 308, 711 P2d 119 (1985) ("The state or municipality also granted franchises to corporations to use these public streets and highways for providing public services[,]" which is "a special privilege granted by the government to a person or corporation * * *.").

[6] For example. the gross revenue charge is applied regardless of amount of right-of-way a licensee uses and the linear foot price does not differentiate between the location or types of right-of-way occupied.

[7] *Northwest Airlines, Inc. v. Cty. of Kent, Mich*., 510 US 355, 373, 114 S Ct 855, 127 L Ed 2d 183 (1994).

[8] The Court held that the fee was clearly an unconstitutional "disguised revenue raising measure" because (1) "the throughput charge is not directed toward compensating the State for the use of the land[,]" (2) the fees were not related to "services or facilities [ ] provided by the State in conjunction with the lease[,]" (3) the fee was not based on "the land's appraised value," and (4) the fees imposed "vary depending on the volume of petroleum substances travelling in interstate commerce, not on the "wear and tear" from use of the land." *Id*. at 1343, *aff'd*, 471 US 81, 105 S Ct 1859, 85 L Ed 2d 61 (1985).

3. The unbounded grant of authority and absolute discretion to the Director violates due process and the city charter.

The ROW Code grants broad authority to the Director and applies few standards or limits on the Director's exercise of this discretion. For example, the Director is authorized to terminate licenses, block transfers of facilities, determine the existence of violations and sufficiency of efforts to cure, and set the scope of records that licensees must produce—and all of these provisions are subject to few limitations and only general standards (and in many cases, no standards). Further, the definitions for several key terms are open-ended, allowing further policy setting through interpretation and application of these concepts—e.g., the administrative rules outlining what income falls within the unlimited, overexpansive definition of "gross revenue."

This overly general grant of authority and policy setting violates the City's charter because it allocated legislative powers to the Director that the charter vests exclusively with City Council.[9] The ROW Code governing violations and penalties also violates constitutional due-process rights.[10]

4. The ROW Code's treatment of confidential information violates the City charter and state trade-secret laws.

The ROW Code not only allows the City unlimited access to licensees' records, but also disclaims almost all responsibility for protecting the confidential information it demands is produced. Section 12.15.120 provides that the City "will take reasonable steps" to protect licensees' confidential and proprietary information, but expressly states it "will not be required to incur any costs to protect such documents, other than the city's routine internal procedures for complying with the Oregon Public Records Law." This limitation, however, is not consistent with the City's charter or Oregon's trade-secret law.

The charter sets forth the scope of information that a franchisee (called a "licensee" in the ROW Code) must provide to the City, and provides that the information is to be produced to the City's auditor or their delegate.[11] The charter mandates that the auditor or delegate "maintain the confidentiality of all confidential and legally privileged information and records except as required by state law or authorized by the City Council." § 2-508(f).[12] There is no exception to this obligation where the City will incur costs in its performance.

[9] Portland Charter, § 2-104: "General Powers: * * * The Council may delegate any of its *nonlegislative functions* or powers to subordinate officers, boards or commissions as it may find appropriate." (Emphasis added.)
[10] *See Brown v. Multnomah Cty. Dist. Ct.*, 280 Or 95, 104-05, 570 P2d 52 (1977).
[11] Section 10-213 (Auditor receives and maintains statements of franchises and other records in a "book to be kept by auditor"); Section 2-507 (Auditor is responsible for auditing City franchises).
[12] Likewise, City Code provides that the "[a]uditor shall not disclose confidential or legally privileged information and records and shall be subject to the same penalties as the legal custodian of records for any unlawful or unauthorized disclosure." PCC 3.05.045 This code also does not provide an exception for avoiding costs.

Allowing the disclosure of confidential information to avoid costs would also violate Oregon's trade-secret law. The law provides that persons and entities, including local governments,[13] may not disclose confidential information that was "acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use[.]" ORS 646.461(2)(d). There are a few limited exceptions for government officials under this law, but those do not include circumstances when the government will need to incur costs. Accordingly, the ROW Code limitation on incurring costs in protecting confidential information is invalid.

F. Conclusion.

In short, the proposed ROW Code amendments are outside the City's authority to adopt, will result in regressive cost increases on Portland families already suffering from sky-high inflation, and will harm the local economy. Accordingly, we respectfully ask that the City pause this ill-conceived proposal.

Thank you for your consideration of WSPA's comments. If you have any questions or comments, please contact me at hjohnson@wspa.org or (360) 239-2248.

Sincerely,

Holli Johnson
Sr. Manager NW Region

cc: Sophie Ellinghouse, WSPA
Jessica Spiegel, WSPA

[13] ORS 646.461(3).

GLOBAL HQ
1821 30th Street, Unit A
Boulder, CO 80301 USA
www.zayo.com
@ZayoGroup

May 25, 2022 VIA EMAIL TO: comtech@portlandoregon.gov

Office of Community Technology
111 SW Columbia Street, Suite 600
Portland, OR 97201

Re: Second Public Comment Period; Zayo Comments to Proposed Changes to City of Portland Right-of-Way Code

To Whom It May Concern:

Please accept the following comments from Zayo Group, LLC in response to the City of Portland's proposed right-of-way ordinance. Prior to addressing its concerns with the proposed ordinance, Zayo sends its condolences on the passing of an OCT staff member.

As noted in its previous comments, Zayo understands it is essential to strike the proper balance in providing essential telecommunications services and broadband infrastructure while also managing access to public rights-of-way ("ROW").

Although Zayo supports the City's efforts to modernize its ROW code, Zayo emphasizes that any fee structure imposed by the City that is at odds with federal law is detrimental to the deployment of fiber optic networks within the City, and to downstream communities, because it takes capital needed for physical network maintenance and expansion. Every dollar paid in fees for access to ROWs is a dollar less that can be spent to build and maintain broadband facilities.

Over the last four quarters, Zayo has paid the City over $1,000,000 dollars in fees to access City ROWs. Although the economics of its business required Zayo to pass through a portion of those fees to its business customers in Portland, Zayo paid much of it directly. The resulting loss of those funds meant less money Zayo could invest in broadband infrastructure deployment and upgrades to its communication facilities in Portland.

Federal Law Regarding ROW Fees

As Zayo explained in its previous comments, to which the City did not respond, the Federal Telecommunications Act of 1996 ("Act") promotes competition in local markets by removing barriers to entry,[1] including removal of barriers to the public ROW necessary to provide service.[2] Section 253(a) of the Act expressly provides: "No State or local statute or regulation, or other State

[1] *See* 47 U.S.C. § 251 et seq.

[2] *See generally* 47 U.S.C. § 253

or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[3]

In September 2018, the Federal Communications Commission ("FCC") issued an Order[4] clarifying that under section 253(a), state and local authorities cannot "materially inhibit" the provisioning of telecommunications services.[5] Notably, the FCC confirmed that local authorities materially inhibit the provisioning of telecommunications services when they charge fees greater than actual cost.[6] Additionally, any fees cannot be higher than fees charged to other providers.[7]

On August 12, 2020, the Ninth Circuit affirmed the Order,[8] holding that the materially inhibit standard set forth in the FCC's *California Payphone*[9] decision was the correct method to determine whether a state or local fee prohibits or effectively prohibits the provisioning of telecommunications services and is therefore preempted by 253(a).[10]

Zayo has explained the impact of the Order and Ninth Circuit's decision to the City, as well as other cities in Oregon that charge Zayo gross revenues to access ROWs. In response, some cities have stated that the Order and *City of Portland* only pertains to small cells. As explained below, this position is incorrect.

In *City of Portland*, the Court held that *California Payphone* was the correct interpretation of 253(a). Section 253(a) is not limited in scope to small cell services, but expressly includes ***all*** telecommunication services.[11] As a result, any statute, rule, ordinance, or directive from a state or local government that materially inhibits the provisioning of telecommunications services – ***any*** telecommunication services – violates 253(a).[12]

In the Order, the FCC determined that state and local government fees for access to ROW violate 253 and materially inhibit the provisioning of telecommunications services "unless these conditions are met:"

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[3] 47 U.S.C. § 253(a).

[4] *See FCC's Declaratory Ruling and Third Report & Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Red. 9088 (rel. September 26, 2018) ("FCC Order").

[5] Para 10, p.4 of the FCC Order.

[6] Para 10, p.4 of the FCC Order.

[7] Para 77, p. 41 of the FCC Order.

[8] Excepting the objective aesthetics standard that is not at issue here.

[9] *California Payphone Association Petition for Preemption of Ordinance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, CCB Pol 96-26, Memorandum Opinion and Order, 12 FCC Rcd 14191 (1997) ("California Payphone").

[10] City of Portland, 969 F3d 1020; 1034, 1035. The Court also affirmed the FCC's actual cost and safe harbor fee provisions as well as the Moratorium Order.

[11] Para 34, p. 14 of the FCC Order.

[12] City of Portland, 969 F3d 1020; 1034, 1035, 1048.

(1) the fees are a reasonable approximation of the state or local government's costs;
(2) only objectively reasonable costs are factored into those fees, and;
(3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.[13]

Any fee assessed against Zayo must meet the requirements set out by the FCC. As the Ninth Circuit noted, "fair and reasonable" does not mean cities should be making a "profit by charging fees above costs.[14]" (emphasis added). The actual cost standard is the methodology for determining whether a fee materially inhibits the provisioning of telecommunications services and is preempted by 253 – whatever the telecommunication service may be.

Portland's Proposed ROW Fees Structure Violates Federal Law

Portland's proposed utility fees structure violates federal law because it does not make it clear that any fee structure must be based on actual cost.

Additionally, the proposed ordinance has a number of other alarming provisions, detailed below, that are sure to stifle deployment of broadband facilities and the provisioning of telecommunications services in Portland.

12.15.030 H – The definition of "Gross Revenue" includes use of a utility facility. Fees should only be charged on entities that are occupying the ROW with their owned utility facilities, not to customers using those utility facilities. Including the word "use" highlights the City's intention to charge multiple times for occupancy of the same ROW, driving a for-profit mechanism rather than a pro-deployment actual cost model. To the extent the City seeks to enforce this double-charge, it should be mindful of the FCC ruling in *Missouri Network Alliance, LLC d/b/a Bluebird Network and Uniti Leasing MW LLC Petition for Preemption and Declaratory Ruling* [15]

12.15.030 V – Utility Service includes communications services to or from customers within the corporate boundaries of the city. See similar comments to Administrative Rule 2 (below); this section should be revised so that it is clear if an end-user has an "A" location in the City and "Z" location is outside the City, the amount of gross revenue can only be assessed for the proportionate share of facilities within the City that make up the overall end-user's utility service.

12.15.050 – In addition to the fees for access to ROWs, utilities pay high taxes. The City's tax structure on telecommunications services also acts as a deterrent for providing broadband services and should not be in addition to fees for access to ROWs, but rather deducted from any fees required by the City.

[13] Para 50, p. 25 of the FCC Order.

[14] City of Portland, 969 F3d 1020; 1039.

[15] 35 FCC Rcd 12811 (2020) ("Bluebird Order"). *See* paras. 2, 12-14, 21, 26, 27, 29 and 34.

12.15.070 – Requires utilities to register upon enactment of the ordinance and every year thereafter. Other than as a mechanism to generate additional revenue, through both fees and penalties for missing registration requirements, it is not clear why annual registration is necessary. Other provisions of the ordinance require utilities to provide updated maps and other information, including cessation of service, so annual registration should not be necessary. If the City is set on requiring a burdensome annual registration, there should be plain limits on what information will be required, not anything the City decides to request. These requirements place real burdens on utilities that operate in hundreds of different cities and unnecessarily drive the cost of services up.

12.15.080 A – There should be an exception for utilities that have already provided up-to-date maps and information to the City. Requiring utilities to provide maps already in possession of the City is pointless and creates unnecessary costs and strain on utility resources.

12.15.080 B – The City is not the Oregon Public Utilities Commission and should not be requesting information that is within the jurisdiction of the Commission. The only information the City should request is a copy of registration, licensing, or other certification from the Commission and a current business license. Requiring utilities to provide unnecessary documentation related to services offered or other information "at the sole discretion of the City" is overreaching and beyond the City's authority.

12.15.080 C – In addition to taxes, access fees, registration fees, and other fees, the City is requiring a license fee of unknown amount. There should be no need for an additional license fee on top of a registration fee. Again, this appears to be an attempt by the City to unlawfully generate revenue, as opposed to simply recouping its direct and actual costs.

12.15.080 D – The City should clearly identify reasons for denial of a license. Stating that capacity of the ROW should not be a basis for denial of a license – it isn't clear how the City can maintain a non-discriminatory approach to ROW access if it can deny licenses based on capacity; that discriminates against new entrants. If there is a capacity issue, that should be addressed on a per permit basis and should not be a wholesale reason for denying a license.

12.15.080 E – If franchise agreements that differ from the ordinance are permitted, it is not clear how the City will meet its goal of ensuring a non-discriminatory, level playing field. It also is not clear when public interest would warrant treating a particular entity differently under a franchise agreement. The public interest is best served by enabling fair competition, which is also required by federal law.

12.15.080 F(2) – The City does not have jurisdiction to determine assignment of utility facilities; that is the jurisdiction of the Commission and the FCC. As long as the party assuming the license is obligated under the ordinance, the City should only require notice of assignment.

12.15.080 I – The City should pay for attachments to utility property. If the City implements an actual cost based access fee, then attachments should be at actual cost. If not, then the City should pay the market rates like any attacher. Additionally, there should be mention that any permitted attachment is subject to the utilities rules for attachment if a tariff does not apply; for example, capacity, engineering, and safety. It is important to note that any attachment or access rights imposed by the City on utilities is yet an additional franchise fee on top of the 5% of Gross Revenue.[16]

12.15.080 J – See comments above relating to fees; users of non-owned utility facilities should not have to pay a fee to the City on top of the fee already paid to the City by the owners of the used facilities. Additionally, see comments related to actual cost requirement under 253(a); actual cost would not require a utility to notify the City of the type of services it provides.

12.15.080 K – See comments above pertaining to assignment; only notice should be required.

12.15.080 L (1) – Requiring a utility to seek written permission prior to leasing any portion or capacity is untenable and unreasonable. Such a requirement would involve Zayo seeking permission for every transaction it entered into that used facilities in the City. The negative repercussions of such a requirement on the City, utilities, and businesses are nearly incomprehensible. Presumably the City would require some form that had to be filled out identifying the potential customer and service, which in turn would require utilities to consume resources and costs that would further increase service fees. City personnel would then have to review each order attempted to be completed between a utility and its customer and determine whether such transaction was approved or rejected. Any orders rejected by the City would lead to host of issues, including potential litigation based on a host of issues, including discrimination. At present, there isn't even language identifying why an order would be rejected. Finally, the City doesn't have the authority to determine what services are provided where and to whom; that is the jurisdiction of the Commission and the FCC.

12.15.080 L (2) – See comments above regarding assignment; the same reasons why the City cannot determine assignments apply to this section.

12.15.080 M – It is not clear why a utility would have to resubmit all the information in Subsection B for a renewal when the City would already have that information via the original registration and updates required under the ordinance. Again, this seems like a thinly veiled mechanism to use ROWs to unlawfully generate revenue for the City coffers at the expense of deployment of broadband facilities.

12.15.100 – Zayo requests the City clarify that third party requested relocations of utility facilities are at the cost of the third party and should be paid in advance with a true-up on completion. Such a

[16] *See; City of Eugene, Oregon v. FCC, 998 F.3d 701 (6th Cir. 2021)*

clarification would ensure that costs associated with relocation are borne by the party requiring the move and preserve a fair, first in time mechanism.

12.15.120 – Utilities should not be required to disclose confidential agreements to the City as part of accessing ROWs. Again, an actual cost based fee for access would not necessitate any disclosure of confidential agreements. A non-actual cost based fee in violation of 253(a) that requires documentation to verify accuracy of fee payment raises additional confidentiality concerns. Additionally, it isn't clear why, or what documents, the City would require or need and for what purpose. The audit rights of the City elsewhere in the ordinance overlap this requirement, adding confusion as to why and what is required.

12.15.130 A – It is unclear why the City cannot look up the FCC reports and why this is a burden imposed on utilities. The City can access such information at its whim either by phone or electronic requests.

12.15.140 – See prior discussion in this letter pertaining to actual cost based fees for access to ROWs.

12.15.140 H – The late penalties set by the City are unduly punitive and are not reflective of any damages sustained by the City for late payment. For example, if Zayo had the same fee payments under this ordinance that it had for the last four quarters, the late payment would be in excess of $100,000. If we had four misses, the fee would be in excess of $400,000. The truth is mistakes are made, and payments are late. Given there is no grace or cure period, or late payment notice required by the City, this can only be viewed as yet another overreaching mechanism to line City coffers. The City should revise the penalty to have a reasonable cap, a notice of late payment, and a cure period. Again, as with many requirements in the ordinance, an actual cost based fee that complied with federal law would eliminate the concern with late penalties because the late penalty would be proportionate and fair under the current language of this subsection.

12.15.150 – The ability of the City to perform an audit should be based on a good faith belief by the City that a utility has not paid in accordance with the ordinance. Further, any audit requirements should be limited to once per year, the margin of error should be 10%, not 5%, and penalties should only incur if the same mistake happens multiple times. Under the current language, the City has complete and unfettered audit and penalty rights which could be used to conduct unnecessary, time-consuming, and costly audits and penalties, further burdening the ability of utilities to provide broadband facilities and communication services to residents and businesses in the City.

12.15.150 B – It isn't clear why the City is requiring every licensee to deliver information to the City that the City will already have in its possession. As noted elsewhere, such unnecessary and repetitive requests harm utilities and their customers by increasing costs.

12.15.150 F – See prior comments pertaining to confidential information; there should be no need for "administrative subpoenas."

12.15.170 A – A penalty of $1000 a day for any violation is excessive; particularly on top of the huge penalties for late payment. The City should limit such penalties for wanton and willful acts or demonstrated disregard for the ordinance. Imposing such penalties for failing to timely register or failing to file an updated map seems, again, like a profit-making mechanism versus reasonable measures to ensure compliance.

12.15.170 C – The City should make the provisions of the ordinance fair and reasonable rather than excessive and waivable as set forth in some future document modifiable at the whim of the City.

12.15.170 F – Should be a mutual right to have remedies at law and equity.

Administrative Rule 2 – Should be revised so that it is clear if an end-user has an "A" location in the City and a "Z" location outside the City, the amount of gross revenue can only be assessed for the proportionate share of facilities within the City that make up the overall end-user's utility service. Failing to do so means the City is assessing a fee taking into account facilities that are not within the City and results in double-charges for revenue that is not derived from within the City.

Example 2 – indirectly sourced – The City is charging fees for revenue that have nothing to do with the occupancy of the City ROW; the example should be revised for clarity.

Admin rule 3 – See comments above on multiple fees for same occupancy of the ROW. Customers of owners of utility facilities should not be required to pay in addition to the owners of utility facilities. Such a fee on lit services, which is very clearly a telecommunication service, is a violation of 253(a). Further, if the City does not adopt an actual cost-based fee, the City's erroneous classification of cost-recovery as "revenue" will require utilities to impose an additional layer of charges on its end-users to recover fees imposed by the City. To avoid excessive fees that may cost a utility business, utilities will likely be forced to absorb such costs, further diminishing profit that could be used for buildout of broadband facilities. Finally, it is important to note that if a utility does try to impose cost-recovery, the outcome is that the City will actually get more than 5% of gross revenue. Cost recovery charges for the Gross Revenue fee and taxes should not be counted in the definition of Gross Revenues.

Admin rule 4 – See comments under 3; administrative fees, call outs, other charges to recover utilities costs to service customers should not be counted as part of Gross Revenues.

Admin rule 7 – There should be a mutual time limitation for City audits and recovery of fees.

Admin rule 8 – A per linear foot fee should not be based on fibers; again, that appears to be nothing short of a money-making mechanism for the City at the cost of deployment of broadband facilities.

Instead, if the City is going to charge a per linear foot (which, again, any lawful fees structure must be based on actual cost), the fee should be imposed on the conduit, not on a per fiber basis. The rules around how to count per linear foot for fiber are confusing and will lead to incorrect assessments – and of course penalties the City can then impose on utilities for getting it wrong.

Conclusion

The need for deployment of broadband facilities is critical. The City's ROW stewardship should promote infrastructure deployment rather than stifling deployment. Many of the impositions in the ordinance are unreasonable, unlawful, and detrimental to the broadband needs of the people and businesses in Portland. Zayo respectfully requests the City modify the ordinance to comply with federal law.

If the City has any questions, please feel free to contact the undersigned at ted.gilliam@zayo.com.

Sincerely,

Ted Gilliam

Ted Gilliam
General Counsel, Strategic and Regional Networks
Zayo Group, LLC

May 25, 2022

VIA EMAIL

Ms. Elisabeth Perez
Director, Office for Community Technology
City of Portland
1120 SW 5th Avenue, Suite 405
Portland, OR 97204

RE: CTIA Opposition to the Office for Community Technology Proposed Amended ROW Code

Dear Ms. Perez:

CTIA®[1], the trade association for the wireless communications industry, submits these comments on the Office of Community Technology's ("OCT") proposed amended Rights-of-Way Code ("Proposed Code"), released April 29, 2022.[2]

CTIA's members seek to work with Portland to bring the benefits of advanced "5G" and broadband wireless services to the City's residents, schools, businesses and institutions. The COVID-19 pandemic has highlighted the importance of reliable wireless communications that meet the public's increasing demand for high-speed connectivity. Our members are investing tens of billions of dollars in wireless networks nationwide to provide that connectivity. They are working with state and local officials to build those networks to deliver the enormous benefits to the public of ubiquitous 5G and broadband services.

CTIA supports OCT's stated mission "to champion public policy and technology investments for communications and utility infrastructure to keep our local communities economically and culturally healthy."[3]

However, CTIA is concerned that the Proposed Code will delay and hinder the availability of 5G and broadband wireless services to Portland's residents. Rather than advance OCT's mission "to champion"

[1] CTIA – The Wireless Association® ("CTIA") (www.ctia.org) represents the U.S. wireless communications industry and the companies throughout the mobile ecosystem that enable Americans to lead a 21st century connected life. The association's members include wireless carriers, device manufacturers, and suppliers as well as apps and content companies. CTIA vigorously advocates at all levels of government for policies that foster continued wireless innovation and investment. The association also coordinates the industry's voluntary best practices, hosts educational events that promote the wireless industry and co-produces the industry's leading wireless tradeshow. CTIA was founded in 1984 and is based in Washington, D.C

[2] OCT plans to present its final proposal for an amended Code to the Portland City Council this summer. OCT, "Portland ROW Code FAQ" (April 2022). The proposal contains a new ordinance, entitled "Utility Access to and Use of the Right-of-Way," which would be codified in Chapter 12.15 of the Portland City Code (Exhibit A), and a schedule of fees that would apply to utilities (Exhibit B).

[3] OCT website, https://www.portlandoregon.gov/oct/57502.

communications infrastructure, the Proposed Code would make wireless investment exceedingly costly and burdensome. We have three broad concerns:

- The proposed fees set forth in Exhibit B are excessive and violate federal law. And Portland's effort to impose fees on entities whose traffic merely traverses rights-of-way (ROW) facilities that are owned by others is unjustified and unlawful, and will result in windfall payments to the City that bear no relationship to the City's costs of managing the ROW.

- Application of a number of the non-fee requirements set forth in the Proposed Code to entities who do not own facilities in the ROW exceed Portland's authority and are unnecessary.

- Certain provisions in the Proposed Code are draconian. Fundamentally, the Proposed Code will not serve the interests of Portland's residents.

CTIA details its concerns below. Given the Proposed Code's serious legal flaws, as well as the numerous provisions that will slow or discourage infrastructure investment to serve the City, we respectfully urge OCT to rework the Proposed Code and reissue a revised draft for further comment. This will enable OCT to ensure that the final Code not only complies with legal requirements but will also promote (rather than impede) the availability of advanced, high-speed wireless services to all Portland residents.

1. Proposed Fees

Federal law limits the fees that localities can charge communications providers for deploying facilities in a ROW, because Congress has recognized that excessive ROW fees can impair the public's access to communications services. Section 253(a) of the Communications Act of 1934, as amended (the "Act") preempts state and local laws that "prohibit or have the effect of prohibiting any entity" from providing service.[4] Courts have concluded that high fees can have that prohibitive effect, and thus held that fees must be based on actual use of the ROW or be proportionate to the costs to maintain the ROW.[5] Additionally, Section 253(c) only permits fees that recover "fair and reasonable compensation" for usage of the public rights-of-way.[6] Section 332(c)(7) of the Act contains similar language prohibiting regulation of the placement, construction and modification of personal wireless facilities that has the effect of prohibiting personal wireless services.[7]

In 2018, the Federal Communications Commission ("FCC") recognized the benefits to the public of speeding the deployment of wireless infrastructure and addressed fee-based and other regulatory barriers to

[4] 47 U.S.C. § 253(a).

[5] *See, e.g., New Jersey Payphone Association, Inc. v. Town of West New York*, 130 F.Supp.2d 631, 638 (D.N.J. 2001); *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006); *AT & T Commc'ns of Sw., Inc. v. City of Dallas*, 8 F. Supp. 2d 582, 593 (N.D. Tex. 1998); *XO Missouri v. City of Maryland Heights,* 256 F. Supp. 2d 987 (E.D. Mo 2003).

[6] 47 U.S.C. § 253(c).

[7] 47 U.S.C. § 332(c)(7).

deployment.[8] It interpreted Section 253 to set guardrails on local regulation. It held that fees for small wireless facilities must be based on the locality's reasonable costs to manage the deployment of those facilities in the ROW, and adopted presumptively lawful fees of $100 for each initial facility application and $270 in annual charges. Localities may charge higher fees but only if they demonstrate that such higher fees are based on an approximation of the locality's reasonable ROW management costs. The City has provided no such justification.

A federal appeals court affirmed the FCC's interpretation of Sections 253 to limit localities' fees.[9] Of particular relevance here, the court rejected localities' argument that Section 253(c) authorized them to set fees that were not cost based: "The statute requires that compensation be 'fair and reasonable"; this does not mean that state and local governments should be permitted to make a profit by charging fees above costs."[10]

The Proposed Code and Exhibit B, however, violate these federal guardrails in at least five ways. First, the proposed recurring fee of $1,408 fee for small wireless facilities is many times the presumptively reasonable amount the FCC identified. Yet OCT does not explain how this fee was determined – let alone demonstrate, as it must, that the fee is based on its direct ROW management costs.[11] Such a high fee could also have the effect of prohibiting infrastructure deployment beyond Portland as well – an impact that both the FCC and the appeals court affirming its fees ruling held was contrary to the Act and its public policy goal to promote the expansion of services to the public.[12]

Second, the even higher recurring fee for wireless macro facilities of $9,004 also violates federal law because, once again, there is no economic study or other demonstration that this amount is necessary to compensate Portland for its costs.[13] As with the fee for small wireless facilities, this exceedingly high fee for macro facilities could also violate federal law by having the effect of prohibiting infrastructure deployment anywhere.

Third, the $300 license fee exceeds by three times the presumptively reasonable one-time fee identified by the FCC, and there is similarly no demonstration that it is based on Portland's direct costs associated with processing license applications. Indeed, the edits to the Proposed Code suggest exactly the opposite: the

[8] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Deployment,* Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9908 (2018) "(Wireless Broadband Order").

[9] *City of Portland v. United States,* 969 F.3d 1020 (9th Cir. 2020).

[10] *Id,* 969 F.3d at 1039.

[11] Schedule B does not explain whether the $1,408 fee is for initial installation and/or is a recurring charge. In addition, Section 12.15.140.C states that fees are to be paid quarterly, leaving unclear whether these quarterly payments would each be in the amount of $1,408 or one-quarter of that amount. While the City should clarify how the fee would operate, its amount is in any event presumptively unlawful.

[12] Both the FCC and the Ninth Circuit held that the unlawfully prohibitive effects of excessive fees can occur not only in the locality that imposes such fees, but can spill over into other localities, because wireless providers have less resources to invest in those other locations. As the court held, "The record supports the FCC's conclusion that high fees in one jurisdiction can prevent deployment in other jurisdictions." 969 F.3d at 1039.

[13] Again, Schedule B does not specify whether this fee is a one-time or annual charge or is to be paid annually or quarterly. Either way, there is no factual showing that it is based on the City's costs.

Proposed Code deletes the requirement in existing Section 12.15.080.C that the fee is to be "an amount sufficient to fully recover all of the City's costs related to processing the application …."[14]

Fourth, the Proposed Code indicates that an *additional* annual fee – five percent of gross revenues – is applicable to wireless providers. Section 12.15.140 states, "Every person subject to this Chapter will pay the fee to access and use the right-of-way for every utility service provided in the amount determined by ordinance of the City Council." Section 12.15.010 defines "utility service" to include "wireless communications services." Exhibit B then states that this fee is five percent of gross revenues.

A number of federal courts have, however, struck down such gross revenues fees, because they are by definition not based on a locality's costs and may have the effect of prohibiting service, contrary to the language and purpose of Section 253. For example, the First Circuit found that because a five percent gross revenues fee "'materially inhibits or limits the ability'" of providers to compete, it violates Section 253.[15] Summarizing the case law in its 2018 Order, the FCC held: "[W]e agree with courts that have recognized that gross revenue fees generally are not based on the costs associated with an entity's use of the ROW, and where that is the case, are preempted under Section 253(a)."[16] Simply put, the proposed gross revenue fee would violate federal law.

Fifth, all of the fixed and gross revenue fees the Proposed Code would impose are particularly exorbitant and unreasonable because they would apply to wireless service providers whose traffic is carried over third parties' ROW facilities but *do not themselves own facilities in the ROW*, but would also charge the third party facilities-based operators. For example, if a non-facilities-based provider leases access to a fiber operator's fiber optic lines to backhaul wireless traffic, *both* would pay the gross revenues fee, because under the Proposed Code, both would be engaged in ROW "use." Portland incurs *zero* costs because the non-facilities-based provider's traffic merely traverses third-party ROW facilities and there is no new fiber installation – the use is effectively invisible. Yet the City would collect multiple fees for a single ROW facility. The fiber owner would pay – but so would every wireless provider whose traffic traverses that fiber. Such multiple charges for the same ROW facilities violate Section 253 because they are clearly not related to the costs of managing facilities in the ROW.

Charging entities that own facilities in the rights-of-way, plus every entity whose traffic is carried on those same facilities, cannot be described as reasonable compensation – it is an attempt to maximize revenues.

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[14] The Proposed Code is ambiguous as to whether a utility must pay the license fee once to provide service anywhere in Portland, or for each ROW facility that the entity deploys. A fee that is site-specific would raise further issues.

[15] *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006). Similarly, in *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003), the court held that fees based on providers' revenues are not permitted by Section 253(c): "The Court adopts the reasoning supporting other courts' decisions that revenue-based fees are impermissible under the [1996 Telecom Act]. Thus, to meet the definition of "fair and reasonable compensation" a fee charged by a municipality must be directly related to the actual costs incurred by the municipality when a telecommunications provider makes use of the rights-of-way. . . [P]lainly a fee that does more than make a municipality whole is not compensatory in the literal sense, and instead risks becoming an economic barrier to entry."

[16] Wireless Broadband Order at ¶ 70.

Section 12.15.030.C of the Proposed Code acknowledges that "the fees and costs provided for in this Chapter are subject to applicable state and federal law." Given the multiple ways that the proposed fees depart from federal law, CTIA urges the City to make the following modifications to Exhibit B of the Proposed Code:

- Clarify that the gross revenues fee does not apply to wireless providers, regardless of whether the provider owns or operates facilities in the ROW or only has traffic that is carried over those facilities.

- Reduce the fees for small cells, macrocells and license applications to amounts that are presumptively reasonable as indicated by the FCC, or are supported and documented by a showing that these fees are necessary to compensate the City for its reasonable, direct costs to manage the ROW.

2. Proposed Non-Fee Provisions that Apply to Entities that Do Not Own ROW Facilities

The Proposed Code would apply a number of additional requirements to entities that do not own or operate facilities in the ROW. Those additional provisions conflict with federal law, impose unreasonable burdens on wireless providers, or at a minimum are ambiguous and will create uncertainty and delay in providing new or expanded high-speed wireless services across Portland. CTIA identifies these provisions below and suggests ways they can be modified to address these problems.

A core flaw of these provisions is that they would regulate wireless service providers that do not deploy any facilities in the ROW. As discussed above, service providers often obtain capacity on equipment that is owned and operated by third parties. They may, for example, lease or purchase fiber capacity from a fiber optic operator for backhauling their traffic, and obtain capacity on a facilities-based provider's antenna structures and resell that capacity to retail customers. But, they build or install no equipment in a locality's ROW. They thus impose no burdens or costs on the locality, which already regulates (and receives compensation from) operators that do construct and operate physical facilities in the ROW.

The Proposed Code, however, is explicit in its intent to regulate entities that merely use other parties' facilities. As OCT states, "The new city code will apply to any current or future entity that provides a utility service and/or uses infrastructure in the right-of-way, whether or not the entity owns the infrastructure in the right-of-way."[17] A wireless service provider that does not build, own or operate equipment in Portland's ROW would thus have to comply with the Proposed Code's numerous requirements, including securing a license and complying with numerous insurance, audit, and other requirements.[18] But there is no legitimate basis to

[17] OCT, "Portland ROW Code FAQ" (April 2022) at 1. See, for example, proposed Section 12.15.080.A.2, which would require companies that merely use other facilities to obtain a license.

[18] *See, e.g.,* Sections 12.15.080.A.2 (requiring that any "person" that "uses" ROW facilities must apply for and be granted a license); 12.15.100 (licensee must purchase insurance and carry minimum amounts of liability coverage); and 12.15.110 (licensee must provide "financial assurance, such as a performance bond or other security, in a form acceptable to the City.").

impose licensing mandates and other regulatory burdens on providers who do not own or operate facilities in the ROW.

OCT's sweeping definition of ROW "use" to include lessees and other providers that do not own or operate any ROW facilities themselves is also inconsistent with the way courts have interpreted that term. Courts have rejected the proposition that a carrier "uses" the ROW simply by obtaining backhaul services from third parties.[19]

CTIA strongly opposes OCT's effort to subject non-facilities-based wireless providers to the Proposed Code as arbitrary and excessive regulation that is contrary to law. OCT should delete all provisions that subject providers without ROW facilities to its mandates.

3. Additional Non-Fee Provisions that Should be Modified.

12.15.030.R. The Proposed Code defines "Small Wireless Facility" more narrowly than federal law and thus deprives certain facilities of the protections federal law affords them. FCC rules define a small wireless facility as a facility where each antennas associated with the deployment (excluding associated antenna equipment) is no more than three feet in volume and the facilities meet one of several alternative height limits.[20] But Section 12.15.030.R does not include the alternative height limits the FCC adopted. Thus some small cells that would qualify for the protections of FCC rules (including guardrails on fees and shorter permit review timelines) would not qualify under the Proposed Code's definition. To rectify this violation of federal law, the Code's definition of small wireless facility should be aligned with the FCC's definition.

12.15.080.G. This provision allows for license terms of only one year in length and for a maximum of five years, at which point the license automatically terminates, but supplies no justification for such a short time period or for automatic termination. Other provisions fully protect the City's interest by empowering it to take enforcement actions (including termination) against licensees that fail to comply with its regulations. Given those protections, the Code should grant license for longer initial terms (e.g., ten years), with the right to seek successive renewal for additional terms.

12.15.080.I. This new provision grants the City an unlimited right to attach streetlights, signs, wireless equipment and other equipment to a licensee's wireless facilities. But it does not compensate the wireless operator for sharing its property, protect the facilities' existing equipment, or condition access on a study determining that the facilities can safely support city equipment. This unilateral right appears to constitute an unlawful taking of private property for government use.[21] The provision should be modified to state that the

[19] See, e.g., AT&T Commc'ns of Sw., Inc. v. City of Austin, 235 F.3d 241 (5th Cir. 2000).

[20] 47 C.F.R. § 1.6002(l).

[21] Article I, Section 18 of the Oregon Constitution states, "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation …."

City and the licensee need to mutually agree on the terms and conditions for such installations of City equipment, including compensation to the licensee.

12.15.080.L. By requiring the City's prior consent before a provider can lease its facilities, this provision, as with others discussed above, would improperly extend Portland's authority over service providers who do not own or operate facilities in the ROW. Again, there is no justification for mandating leasing approval because the City retains authority to ensure the facility owner or operator remains compliant with ROW requirements. Section 12.15.080.L also would violate federal law. Because it extends the prior consent requirement to leasing "capacity" on a facility, it appears to require that before a licensee leases some or all of its *radio spectrum* to another provider, it must obtain such consent. But localities have no jurisdiction over leases of radio spectrum, which are regulated solely by the FCC. For these reasons, Section 1.15.080.L should not be adopted.

12.15.090.A.2. This provision states that a "[l]icensee will allow and encourage providers of wireless communications services to collocate wireless communications facilities on poles and other infrastructure." While CTIA does not object to encouraging collocation, it opposes making the practice mandatory. There are many situations where an existing structure is unable to safely support additional wireless antennas or other equipment, the new equipment would cause harmful interference to existing operations, or the existing structure would not satisfy the service provider's propagation and coverage goals. Section 12.15.090.A.2 should be modified to delete the words "allow and". It should also condition collocation on the existing provider and new provider mutually agreeing that the new equipment can safely be installed.

In sum, the Proposed Code raises serious legal and policy issues both as to its excessive and burdensome fees and its non-fee requirements. CTIA is concerned that the Proposed Code would discourage and delay infrastructure investment in Portland and in other communities – in stark contrast to the recognition of government policymakers at all levels that *now* is the critical time to jump-start such investment. We thus respectfully request that the City restart its process, and work with all communications providers to develop a new Code that will serve the interests of all Portland residents.

Sincerely,

David J. Maloney
Director
Local Affairs