



[Home](#) / [Council Documents](#)

## 501-2023

Ordinance

### Add Utility Operators Code to govern utility access and use of the City right-of-way and adopt fee schedule for utilities operating in the City right-of-way (add Code Title 12)

Referred

Amended by Council

The City of Portland ordains:

Section 1. The Council finds:

1. The Bureau of Planning & Sustainability (BPS) manages the access, fee collection, and agreements pertaining to access to and use of the rights-of-way on behalf of the City; and
2. The City of Portland has constitutional and charter authority to manage its rights-of-way and receive compensation for access to and use of the rights-of-way consistent with applicable federal and state law; and
3. The City has typically granted individually negotiated franchise agreements to each utility using the City's rights-of-way to provide utility services, with each franchise agreement setting forth the terms of use and compensation to be paid for such use; and
4. The City has determined that it can more effectively, efficiently, fairly, and uniformly manage the City's rights-of-way and provide consistent standards for utility access to and use of the rights-of-way through licenses, rather than franchise agreements; and
5. The new Portland City Code Chapter 12.15 will regulate access for utilities operating in the City's rights-of-way and assist the City in exercising its authority to secure compensation to the City and its residents for utility use of the rights-of-way; and
6. The Ordinance adopts a new Portland City Code 12 as shown in Exhibit A into City Code; and
7. The Ordinance adopts the right-of-way fee schedule as show in Exhibit B and adds a new franchise negotiation fee for if a party requests a franchise agreement under special circumstances, if the City deems appropriate. The fee would compensate the City for the costs associated for negotiating the agreement. Per Portland City Code Section 12.15.110, the City Council shall establish a rights-of-way

#### Introduced by

[Commissioner Carmen Rubio](#)

#### Bureau

[Planning and Sustainability \(BPS\)](#)

#### Contact

**Andre Speer**

Cable Utility Franchise Manager

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#### Requested Agenda Type

Regular

#### Date and Time Information

**Requested Council Date**

June 14, 2023

Changes City Code

- access fee for use of utility facilities in the City to provide utility service;  
and
8. The Ordinance delegates authority to the BPS Director to adopt administrative rules related to PCC Chapter 12.15. The Utility Access to and Use of the Right-of-Way (PCC Chapter 12.15) administrative rule document (attached in draft format for reference as Exhibit C) will establish guidelines and examples for calculating gross revenues.
  9. The City Council adopted Resolution No. 37168 on November 12, 2015, which opposes the transportation and storage of fossil fuels in or through Portland or adjacent waterways. The resolution states that, prior to any further Council action related to code changes to advance the policies in the resolution, the Mayor will schedule a work session to review proposed code changes and an executive session to review the legal considerations of any proposed code changes. Although it does not appear that such directive relates to this Ordinance, the purpose of which is to codify existing utility franchise agreements, in an abundance of caution, these requirements have been met as follows: the first reading of the Ordinance fulfills the work session requirements. The City Attorney has met with each of the Commissioners to discuss the legal considerations of the proposed code changes, so no executive session is necessary.

NOW, THEREFORE, the Council directs:

- A. Add Code Title 12, Utility Operators, as shown in Exhibit A.
- B. Adopt Annual Rights-of-Way Fee Schedule as attached in Exhibit B per Portland City Code Section 12.15.110, which will be effective as of October 1, 2023.
- C. Exhibit B, Annual Rights-of-Way Fees is binding City policy.

## Documents and Exhibits

### [Approved Amendments](#)

(<https://www.portland.gov/sites/default/files/council-documents/2023/471-proposed-amendments-to-row-ordinance-6-7-23.pdf>) 129.13 KB

### [Exhibit A - As Amended](#)

([https://www.portland.gov/sites/default/files/council-documents/2023/exhibit-a\\_row-code\\_chapter-12.15\\_final\\_with-amendments\\_efiling.pdf](https://www.portland.gov/sites/default/files/council-documents/2023/exhibit-a_row-code_chapter-12.15_final_with-amendments_efiling.pdf)) 312.49 KB

 [Exhibit A \(https://www.portland.gov/sites/default/files/council-documents/2023/exhibita\\_rowcodechapter12.15\\_final.pdf\)](https://www.portland.gov/sites/default/files/council-documents/2023/exhibita_rowcodechapter12.15_final.pdf) 323.29 KB

 [Exhibit B \(https://www.portland.gov/sites/default/files/council-documents/2023/exhibitb\\_rowcode\\_feeschedule\\_final.pdf\)](https://www.portland.gov/sites/default/files/council-documents/2023/exhibitb_rowcode_feeschedule_final.pdf) 107.42 KB

 [Exhibit C \(https://www.portland.gov/sites/default/files/council-documents/2023/exhibitc\\_rowcodeadminrules\\_final.pdf\)](https://www.portland.gov/sites/default/files/council-documents/2023/exhibitc_rowcodeadminrules_final.pdf) 195.98 KB

## Impact Statement

### Purpose of Proposed Legislation and Background Information

By adopting the Right-of-Way (ROW) code and correlating fee schedule, the City will join roughly one dozen other municipalities in Oregon that have implemented a uniform ROW licensing system via code.

The purpose of this project is to replace the administratively cumbersome, resource-intensive, and outdated system of managing access to the right-of-way through franchise agreements. The proposed new code will apply to all companies that have infrastructure in the right-of-way or maintain a business using that infrastructure, whether or not they own the infrastructure.

The pertinent provisions of the Right-of-Way Ordinance include:

- Providers with existing franchise agreements are exempted until their agreements expire;
- Preserves the City's right to enter into franchise agreements with individual providers in situations where the public interest warrants;
- Wireline cable television providers will continue to operate under franchise agreements due to protections under Federal Communications Commission (FCC) law;
- Each license with utility providers will be for a term of one (1) year with renewal upon annual registration up to five (5) years;
- Licenses are transferrable upon the written consent of the City, provided the transfers are consistent with state and federal law;
- Providers seeking license renewals must submit license applications at least thirty (30) days, but not more than ninety (90) days prior to expiration;
- Includes provides under which the City may terminate licenses; and
- Provides for fees to be established by ordinance.

### Financial and Budgetary Impacts

The purpose of this code is to clarify and codify the terms and corresponding fees for utilities operating in the City's right-of-way. Utilities who operate in the ROW pay fees to the City in two ways. The first are fee-based, and second are a percentage of gross revenue. Fee-based payees pay on a per site or per foot basis, and the fees associated with those categories are based on existing fee structures. Utility providers will experience no material changes to their annual ROW license payments to the City. Overall, the annual collection of fees is expected to not change more than one percent over the first five years of implementation.

There may be small positive budgetary impacts in future years due to more efficient administration of the program by eliminating the need for franchise negotiations and individual agreements, improved oversight of account management, and increased compliance.

## Community Impacts and Community Involvement

There are no direct community impacts as a result of this ordinance. While general community involvement was not conducted, industry stakeholders were consulted and provided multiple opportunities to give comments and suggest edits over the two-year process.

## 100% Renewable Goal

n/a

## Budget Office Financial Impact Analysis

No immediate financial impact. There may be small positive budgetary impacts in future years due to more efficient administration of the program by eliminating the need for franchise negotiations and individual agreements, improved oversight of account management, and increased compliance.

## Agenda Items

471 Time Certain in [June 7-8, 2023 Council Agenda](https://www.portland.gov/council/agenda/2023/6/7)  
(<https://www.portland.gov/council/agenda/2023/6/7>)

Passed to second reading as amended

Motion to amend Ordinance to add Finding 9: Moved by Rubio and seconded by Wheeler. (Y-4)

Motion to amend Exhibit A to revise the definition of small wireless facility or small cell: Moved by Rubio and seconded by Wheeler. (Y-4)

Motion to amend Exhibit A to add a subsection to Utility-Specific Provisions: Moved by Rubio and seconded by Wheeler. (Y-4)

Passed to second reading June 14, 2023 at 9:30 a.m. as amended

501 Regular Agenda in [June 14, 2023 Council Agenda](https://www.portland.gov/council/agenda/2023/6/14)  
(<https://www.portland.gov/council/agenda/2023/6/14>)

Referred to Commissioner of Public Utilities

**TITLE 12 – UTILITY OPERATORS**

**CHAPTER 12.15 – UTILITY ACCESS TO AND  
USE OF THE RIGHT-OF-WAY**

**Sections:**

12.15.010	Short Title.
12.15.020	Purpose and Intent.
12.15.030	Definitions.
12.15.040	Jurisdiction and Management of the Public Right-of-Way.
12.15.050	Regulatory Fees and Compensation Not a Tax.
12.15.060	Administration.
12.15.070	Registration.
12.15.080	Licenses.
12.15.090	Utility-Specific Provisions.
12.15.100	Insurance and Indemnification.
12.15.110	Financial Assurance.
12.15.120	Confidential/Proprietary Information.
12.15.130	Equal Employment Opportunity/Affirmative Action/Minority Business Enterprises.
12.15.140	Fee to Access and Use the Right-of-Way.
12.15.150	Audits, Review and Information Requests.
12.15.160	Compliance.
12.15.170	Violations; Remedies and Civil Penalties.
12.15.180	Enforcement.
12.15.190	Severability and Preemption.
12.15.200	Application to Existing Agreements.

**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 equal and consistent access to and usage of the right-of-way 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 City Code Section 7.02.295 of the City Code.
- B. "Bureau" means the City of Portland, Oregon, Bureau of Planning and Sustainability, along with its employees and agents, or such other bureau as the City Council may designate.
- C. "Cable service" is defined consistent with federal laws and means the one-way transmission to subscribers of video programming or other programming service along with subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- D. "City" means the City of Portland, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.
- E. "City Council" means the elected governing body of the City.
- F. "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, and whether or not the transmission medium is owned by the provider itself. Communications services

includes all forms of telephone services and voice, video, data or information transport, but does not include:

- ~~1.~~ cable service, whether provided over a cable system or an open video system, as defined in 47 C.F.R. Part 76;
  - ~~2.~~ over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor;
  - ~~3.~~ public communications systems; or
  - ~~4.~~ direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996 (47 U.S.C. § 152 note).
- G.** "Director" means the director of the City's Bureau of Planning and Sustainability or any successor City bureau.
- H.** "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 fossil fuel content, biodiesel/renewable diesel with less than five percent 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. For the purposes of this Chapter, hydrogen, renewable natural gas, and other low or lower carbon fuel sources are not considered fossil fuels.
- I.** "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.
- J.** "License" means the authorization granted by the City to a utility operator pursuant to this Chapter.
- K.** "Licensee" means a utility operator subject to the provisions of this Chapter.
- L.** "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.
- M.** "Notice" means any written communication sent to a licensee's address listed on license's application or the address listed on licensee's most recent tax filing with the City. Notice also includes any electronic communication sent to a licensee's

agent when that agent both acknowledges and holds themselves out to be the relevant point-of-contact.

- 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 such use.
- R.** “Small wireless facility” or “small cell” means a ‘small wireless facility’ as defined by the Federal Communications Commission in 47 C.F.R. Section 1.6002(l), as may be amended or superseded. is defined consistent with federal law and means any wireless communications facility in the right-of-way that:
- ~~1.~~ has one or more antennas, each of which is no more than 3 cubic feet in volume, either: mounted on a structure 50 feet or less in height, including the antenna(s); or mounted on a structure no more than 10 percent taller than other adjacent structures; or that does not extend an existing structure on which the antenna(s) is located to a height of more than 50 feet or by more than ten percent, whichever is greater; and
  - ~~2.~~ has a volume of no more than 28 cubic feet for all equipment associated with the structure, including all antenna equipment, wiring, and cabling associated with the antenna(s) and located at the same fixed location as the antenna(s) and any pre-existing equipment. Except as provided in the foregoing, a small wireless facility does not include fiber, coaxial cable, conduit, 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 person provides utility services.
- V. "Utility service" means the provision of electricity, natural gas, communications services, wireless communications services, cable services, water, sewer, 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, wiring and cabling, enclosures, or cabinets housing associated equipment or cable at the same fixed location and may be attached to utility or City-owned structures or poles in the right-of-way. Wireless communications facilities include strand-mounted devices and associated equipment. Except as provided in the foregoing, a wireless communications facility does not include fiber, coaxial cable, conduit, 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, 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.

**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 Bureau.
- 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 a 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 Bureau's website, must be published at least four 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 with the Bureau. Copies of all current rules will be posted on the Bureau'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 facts and circumstances supporting such finding. An interim rule adopted pursuant to this Subsection is effective for a period of not more than 180 calendar days. The Director may extend the interim rule past the 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 be a utility operator 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 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 July 1 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.

#### **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 installing any utility facility or conducting any other work in the right-of-way.
  - 2. Every utility operator as of the effective date of this Chapter will apply for a license from the City within 45 calendar days of the later of:
    - a. the effective date of this Chapter; or
    - b. the expiration of a valid franchise from the City, unless a new franchise is granted by the City pursuant to Subsection E of this Section.
  - 3. Every utility operator 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. Such documentation must allow the City to easily identify the applicant and its legal status, including its authorization to do business in Oregon, and include a description of the type of utility service provided or to be provided by the applicant, 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 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.
- 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 application 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 a written interagency agreement if the utility operator is a City bureau), that includes terms that clarify, enhance, expand, waive, or vary from the provisions of this Chapter, consistent with applicable state and federal law. The franchise agreement may conflict with the terms of this Chapter only with the review and approval of the City Council. The interagency agreement may conflict with the terms of this Chapter only with the review and approval of the Director and the directors of bureaus who are parties to the agreement. In the event of a conflict between the express provisions of such an agreement and provisions of this Chapter incorporated by reference therein, the terms of the agreement will control. A franchise application will be accompanied by a nonrefundable application fee or deposit set by 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 utilize, lease capacity, construct, place, maintain, and operate utility facilities 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 J 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.**

1. Subject to the termination provisions in Subsection M of this Section, the license granted pursuant to this Chapter will be effective as of the date issued by the City or the date utility service began, whichever is first, and will have a term beginning either:
  - a. January 1 of the effective year for those licenses effective between January 1 and June 30; or
  - b. January 1 of the year after the effective year for those licenses effective between July 1 and December 31.
2. The license will have an initial term of one year with four automatic one-year renewals for a total term of 5 years. After its term, the license will terminate on December 31.

**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. Multiple Services.**

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.

- J.** 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, which consent will not be unreasonably withheld, conditioned, or delayed. 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.
- K.** 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:
    - 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 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 and 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 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, and 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.
  
- L. **Renewal.** At least 30 but no more than 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 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 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 or agreed extensions thereof, the City may deny the renewal and terminate the license. The termination process outlined in Subsections M. and N. of this Section to do not apply to such denial and termination.
  
- M. **Revocation or Termination.**
  - 1. **Revocation or Termination of a License.** The Director may revoke or terminate a license granted pursuant to this Chapter for any of the following reasons:
    - a. Violation of any of the provisions of this Chapter;
    - b. Violation of any provision of a license;
    - c. Misrepresentation in a license application;
    - d. Failure to pay taxes, compensation, fees, or costs due the City after final determination of the taxes, compensation, fees, or costs;

- e. Failure to restore the 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.
- N. 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 20 and no more than 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.

1. Violations of Subsection 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.
- O.** Removal of Utility Facilities. If the City has revoked or terminated a license or if a license has expired without being renewed or extended or a license renewal has been denied, 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 existing or replacement 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 that is measurable in accordance with then-existing industry standards to any equipment of the City that is operating within its licensed or unlicensed 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 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 6 months, the utility operator is unable to fully eliminate the interference, the City may require the licensee to relocate the equipment.

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.
6. Gross revenues for wireless communications facilities will be calculated as a fee on a per-facility basis, rather than as a percentage of the licensee's gross revenue.
7. Wireless communications facilities will pay an annual attachment fee on a per-facility basis as set forth in the Right-of-Way Access Fee Schedule.
8. Notwithstanding Section 12.15.140, the fees set forth in Section 12.15.140 will be paid annually for each year during the term of the license.

**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 expand or increase the capacity to transport fossil fuels.
  - a. Resolution 37168 does not restrict:
    - (1) improvements in the safety, or efficiency, seismic resilience, or operations of existing infrastructures;
    - (2) the provision of services directly to the 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.
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 Bureau of Planning and Sustainability a map showing such proposed changes. The Bureau will respond in writing with its approval, modifications, or denial (and its reasoning for any modifications or denial) within 45 calendar days from receiving the proposal.

3. Subject to applicable regulations of the City, licensee may perform all of the construction, repair, and maintenance of its facilities within the City's rights-of-way to consumers' premises and other points as may be required to provide natural gas service, and licensee will apply for and obtain all permits necessary for such construction.
4. Removal of underground facilities used to provide natural gas. With written permission from the City, facilities may be allowed to be abandoned in place at the facility owners' sole expense. However, the owner of the facilities will be financially responsible for the removal of the facilities at any time if:
  - a. there is a risk to public safety or health;
  - b. those facilities interfere with any City projects or other users of the right-of-way; or
  - c. those facilities are exposed due to alteration or work of the subsurface.
5. Cost of Removal or Relocation.
  - a. If the need to remove or relocate a facility is caused directly by development of private property or any project sponsored or funded by a third party (including but not limited to any governmental agency or instrumentality other than the City), and the removal or relocation occurs within the area to be developed, or is made for the benefit or convenience of a third-party, licensee may charge the cost to remove or relocate the facilities to the developer or other third-party. Such costs may include acquiring private rights, permits, and other associated costs that result from the relocation. Licensee will be solely responsible for collecting the costs from the developer or other third-party. For the purpose of this paragraph, the removal or relocation of facilities will be considered "caused directly" by a private development or third-party project if, for example, the removal or relocation is necessary to enable the developer or third party to make any improvements or otherwise satisfy any conditions required under any permit, rule, regulation, or other requirement applicable to the project.
  - b. If the removal or relocation of facilities is requested by the City for a City-funded project that serves a public purpose (e.g., a street widening project undertaken independently of a project described in Subsection B.5.a.), licensee will remove or relocate its facilities

at licensee's sole expense within a reasonable time as determine by the City.

**6. Vacation; Conveyance of Right-of-Way; Condemnation.**

- a.** The City will make a good faith effort to retain public utility easements or otherwise request the petitioner for the vacation to grant an easement to licensee if the City vacates any public right-of-way where licensee has facilities. If the licensee's facilities must be relocated from a vacated public right-of-way, the licensee will bear the expense of moving the facilities and obtaining alternate rights, permits, or easements.
- b.** In the event the City conveys, assigns, or transfers title to any property within any right-of-way in which licensee has facilities, as part of said conveyance, the City will make a good faith effort to secure from such transferee an easement or other rights allowing for such facilities to remain in place in a form acceptable to licensee. In the event such facilities must instead be relocated, licensee will bear the expense of relocating the facilities.
- c.** In the event the licensee has facilities located on any private property that is condemned or otherwise acquired by the City for the purpose of expanding any existing right-of-way or creating any new right-of-way, expenses related to such relocation, including the expense of relocating the facilities and acquiring a new easement or other rights in such form and location as is acceptable to licensee, will be borne by the licensee. In addition, in the event that said facilities remain in place or are relocated within the existing or expanded right-of-way, notwithstanding the terms of Subsection B.5.b., the licensee will be responsible for all related relocation costs, including expense of relocating the facilities and acquiring a new easement or other rights.

**C. Public Telephone 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
  - d. Relocate a specified public telephone on a temporary or permanent basis to discourage unlawful activity.
2. Removal of Public Telephones. The City, upon 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 20 calendar days' written notice to the City. A licensee may otherwise relocate any public telephones with the City's prior written 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 require the licensee to reimburse the City for its full costs.

**D. Electric Utilities.**

**1. Cost of Removal or Relocation.**

- a. If the need to remove or relocate a facility is caused directly by development of private property or any project sponsored or funded by a third party (including but not limited to any governmental agency or instrumentality other than the City), and the removal or relocation occurs within the area to be developed, or is made for the benefit or convenience of a third-party, licensee may charge the cost to remove or relocate the facilities to the developer or other third-party. Such costs may include acquiring private rights, permits, and other associated costs that result from the relocation. Licensee will be solely responsible for collecting the costs from the developer or other third-party. For the purpose of this paragraph, the removal or relocation of facilities will be considered "caused directly" by a private development or third-party project if, for example, the removal or relocation is necessary to enable the developer or third party to make any improvements or otherwise satisfy any conditions required under any permit, rule, regulation, or other requirement applicable to the project.
- b. If the removal or relocation of facilities is requested by City for a City-funded project that serves a public purpose (e.g., a street widening project undertaken independently of a project described in Subsection D.1.a.), licensee will remove or relocate its facilities at licensee's sole expense within the time determine by the City.

**2. Vacation; Conveyance of Right-of-Way; Condemnation.**

- a.** The City will make a good faith effort to retain public utility easements or otherwise request the petitioner for the vacation to grant an easement to licensee if the City vacates any public right-of-way where licensee has facilities. If licensee's facilities must be relocated from a vacated public right-of-way, the licensee will bear the expense of moving the facilities and obtaining alternate rights, permits, or easements.
- b.** In the event the City conveys, assigns, or transfers title to any property within any right-of-way in which licensee has facilities, as part of said conveyance, the City will make a good faith effort to either:

  - (1) secure from such transferee an easement or other rights allowing for such facilities to remain in place in a form acceptable to licensee; or
  - (2) if such facilities are to be relocated, licensee will obtain an easement or other rights, and the expense of relocating the facilities and obtaining such easement or other rights will be borne by licensee.
- c.** In the event licensee has facilities located on any private property that is condemned or otherwise acquired by City for the purpose of expanding any existing right-of-way or creating any new right-of-way, expenses related to relocation, including the expense of relocating the facilities and acquiring a new easement or other rights in such form and location as is acceptable to licensee, will be borne by licensee. In addition, in the event said facilities remain in place or are relocated within the existing or expanded right-of-way, notwithstanding the terms of Subsection D.1.b., licensee will be responsible for all related relocation costs, including expense of relocating the facilities and acquiring a new easement or other rights.
- d.** **Underground Conversion.** Licensee will remove and replace overhead facilities with underground facilities at the request of City. Cost responsibility will be allocated in accordance with all applicable Oregon Administrative Rules and a schedule agreed upon by the City and licensee.

- e. Termination or Abandonment of License. Upon any termination of a license, if the licensee is not engaged in efforts to renew or reapply for a license under this Chapter:
  - (1) all above ground facilities installed or used by licensee will be removed by licensee at licensee's expense or, with the City's approval, de-energized and abandoned in place, and the property on which the facilities were located restored by licensee to the condition it was in before installation; and
  - (2) all underground facilities installed or used by licensee will be de-energized and abandoned in place.

#### **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 Bureau. All required insurance must be issued by companies or financial institutions with an AM Best rating of A- or better that are 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 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 per occurrence, and aggregate limit of \$4,000,000 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 each occurrence, and an umbrella or excess liability coverage of \$2,000,000, 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 Bureau 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 presence of the facilities or 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, and 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. The financial assurance will include any costs, expenses, damages, or loss to the City because of any failure to comply with this Chapter and accompanying ordinances, resolutions, rules, regulations, or policies attributable to the licensee. The licensee will also provide, upon request, written evidence of payment of the required premium.
- B. Amount.
  1. The amount of such financial assurance will be in an amount of \$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:

- a. termination of a franchise or license; or
  - b. removal of all or part of a licensee's utility facilities.
2. 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 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.**

- A. 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 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. 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, 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, the licensee will 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 the payment be less than zero dollars.
- 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 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, 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. The utility service provider may request a refund by filing with the City a written request within 5 years from the date payment is due.
- 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.

- 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. Further, the licensee's payment of any amount hereunder 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 licensee may have for refund of any overpayment.
- H.** Penalties on late remittances. Penalties and interest imposed by this Section are in addition to any fines or penalties that may be assessed under other ordinances or regulations of the City.
- 1.** 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:
    - a.** First occurrence during any one calendar year; ten percent of the amount owed, or \$25, whichever is greater.
    - b.** Second occurrence during any one calendar year; 15% of the amount owed, or \$50, whichever is greater.
    - c.** Third occurrence during any one calendar year; 20% of the amount owed, or \$75, whichever is greater.
    - d.** Fourth occurrence during any one calendar year; 25% of the amount owed, or \$100, 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 25 percent of the amount owed, or \$500, whichever is greater, will be added thereto in addition to other penalties allowed by law.
  - 3.** 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 one and a half percent 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. 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.
- I. 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. The City may audit and review the fees paid by a licensee under this Chapter for a period of no more than 5 years after the period to which such fees relate. Any information requested or required by this Chapter will be delivered to the City, at no cost to the City.
- B. Within 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 and 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 are 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 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 30 calendar days of the City's notice to the licensee of such underpayment.
  - D. Penalties. A penalty of five percent of any underpayment will be due within 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 95 percent or less of the fees owing for the period under review.
  - E. 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 60 calendar 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 Violations; Remedies and Civil Penalties.**

- A. The City will give the licensee written notice of any violations and provide a reasonable time (no less than 20 and no more than 40 calendar days) for the licensee to remedy the violations. If the Director determines the licensee is guilty of violating any 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 may:
  1. issue a hold on any permit applications filed by the licensee for work in the right-of-way; or

2. fine the licensee not less than \$100 nor more than \$1,000 for each offense;  
or
  3. both Subsection 1. and 2. 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 due;
  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; or
  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 Subsection 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. The remedies in this Section are in addition to the revocation and termination provisions outlined in Subsection 12.15.080 M. of this Chapter. 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 Mayor, 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 decisions, 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 agreements, this Chapter will apply to all existing agreements granted to utility operators by the City. To the extent that a term of such an existing agreement

irreconcilably conflicts with a provision of this Chapter, the term of the existing agreement will control for the remainder of the agreement's term.

## Annual Rights-of-Way Fees pursuant to PCC Section 12.15.110

### Annual Rights-of-Way Access Fee

<b>UTILITY SERVICE</b>	<b>ANNUAL RIGHTS-OF-WAY ACCESS FEE</b>
Electricity	5% of Gross Revenues
Natural gas	5% of Gross Revenues
Communications	5% of Gross Revenues
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 does not earn gross revenues within the City	\$4.95/linear foot (2023 rate) of Utility Facilities in the Rights-of-Way (as these terms are defined in Chapter 12.15) or a minimum fee of \$10,000, whichever is greater. The per linear foot fee and the minimum fee shall increase 3% annually on January 1 of each year, beginning January 1, 2024.
Small cells	\$1,408 per attachment (2023 rate) in the Rights-of-Way (as these terms are defined in Chapter 12.15). The attachment fee shall increase 3% annually on January 1 of each year, rounded to the nearest dollar, beginning January 1, 2024.
Macro site	\$9,004 per attachment (2023 rate) in the Rights-of-Way (as these terms are defined in Chapter 12.15). The attachment fee shall increase 3% annually on January 1 of each year, rounded to the nearest dollar, beginning January 1, 2024.
<b>ADMINISTRATION</b>	<b>FEE</b>
Registration	\$50*
Initial license application	\$300*
Renewal license application	\$250*
Franchise agreement negotiation	A \$10,000 initial deposit to reimburse for City staff time is required prior to the start of any franchise negotiation. City staff will account for and record all time spent directly on franchise negotiations. Once

	the initial deposit is spent down, an additional deposit amount of \$5,000 will be paid until such time as the negotiations are complete.
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\*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.

## ADMINISTRATIVE RULE

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

## I. Purpose and Scope

The purpose and intent of this Administrative Rule is to establish the process and examples for what to include in gross revenue calculations under Portland City Code (PCC) Chapter 12.15 for utility license payments. This Administrative Rule applies to all companies who require access to the public right-of-way (ROW) when the activities of the company are regulated as set forth in PCC Chapter 12.15.

## II. Administrative Rules

## A. 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 person’s operation, service, or use of utility facilities within the City. If such revenue would not have been received in the absence of such utility operation, service, or use of utility facilities within the City, then it will be considered part of “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 operator assesses and collects a late fee from the customer. Because the late fee would not have been imposed or collected but-for the utility service consumed, the late fees will be included in gross revenue.

## B. Gross Revenue – “Derived from the Operation or Use of Utility Facilities in the City of Portland”

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

**Example 1:** Directly Sourced – Service Address. Utility operator receives revenue from a utility service provided to an address located in Portland, Oregon, but the customer’s billing address is in Seattle, Washington. 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 provide natural gas or electric services.

**Example 2:** Directly Sourced – Apportionment. Utility operator has a private line, with node A located in Portland, OR, and node Z located in Salt Lake City, UT. The revenues

generated from this private line shall be apportioned 50% to the City of Portland and 50% outside the City of Portland.

**Example 3:** Indirectly Sourced – Apportionment. Utility operator receives advertising revenue from multiple jurisdictions within the State of Oregon, none of which are sourced to a particular jurisdiction. Because there is no specific asset or service address to source the revenues earned, the provider will apportion the revenues to each jurisdiction. 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 and by customer count are examples of reasonable apportionment methodologies.

**C. Gross Revenues – Billing, Collection Fees, and Charges**

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 or disconnect fees, convenience fees, equipment rental fees, and administrative fees will be included in gross revenues.

**D. Fees and Charges that Are Not Gross Revenues**

The following fees and charges will not be included within the definition of 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 operator 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 operator is required or authorized to collect by federal or state statute, or administrative rule, or by a 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 operator’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. Utility License Fees:** Utility license fees payable under Portland City Code (PCC) Chapter 12.15.

3. **Residential Exchange Program (Bonneville Power Administration Credits):** The program created by the Pacific Northwest Electric Power Planning and Conservation Act to provide residential and farm customers of Pacific Northwest regional utilities is a form of access to low-cost federal power. See <https://www.bpa.gov/energy-and-services/power/residential-exchange-program>.
4. **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).
5. **Revenues associated with taxes for emergency communications under ORS Chapter 403.**
6. **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 that brings an E9-1-1 call to the appropriate responding Public Safety Answering Point, regardless of where the E9-1-1 call is originated.
7. **Sales of bonds, mortgages, or other evidence of indebtedness, securities, or stocks.**
8. **Net Uncollectable:** Uncollectable revenues are only those uncollectable amounts that can be directly sourced to service(s) provided within the City.
9. **Wholesale Energy Sales:** Proceeds from the sale of energy to another utility when the purchasing utility is not the ultimate consumer of the energy.
10. **Wheeling:** Revenues for distribution services provided to a third-party for its sale or supply of electricity to its customers.
11. **Transmission Services:** Revenues from the sale of transmission capacity to a third-party supplier of electricity to its customers.

**E. Utility Facility; Leases**

“Utility Facility” as defined in PCC Chapter 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 that a utility operator derives from leases, indefeasible right of use agreements (IRUs), and other similar agreements, for the Portland portion of the utility operator’s system for dark fiber or for lit fiber services.

**Example 1:** Revenues from the lease of dark fiber. Utility operator A leases to utility operator B dark fiber, which utility operator B “lights up” to use in its own system to provide utility services, or leases to another utility operator. The dark fiber that 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.

**F. Refunds by City to Licensee – Statute of Limitations**

The utility operator may request a refund by filing with the City a written request within five (5) 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 operator 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 to the City.

**Example:** Payment Due Date. Licensee’s remittance for the first calendar quarter of 2022 was due on May 14, 2022. The City received the remittance on August 31, 2022. Licensee’s five (5) year statute of limitations to file a written request for a refund is on or before May 14, 2027. 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.

**G. Fees Paid for Leased Facilities**

A utility operator that provides services within the City, by means of leased facilities, will pay fees based on a percentage of gross revenue. Notwithstanding the foregoing, wireless communication facilities will be charged on a per-facility basis.

**H. Fees Paid Per Linear Foot if No Services are Provided within the City**

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

- Any conduit or fiber owned by the utility operator.
- Any fiber owned by the utility operator that passes through a leased conduit.
- For multiple strands of fiber owned by a utility operator through a single conduit length, the utility operator 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 operator 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 operator 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 operator has two lines of business: (1) cable and (2) telecommunications. The utility operator 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 operator 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 there is one conduit with strands of fiber owned by multiple utility operators inside the same conduit, each utility operator will pay a separate linear per foot fee, if applicable.

#### I. Attachment Fee

Attachment fees pursuant to PCC 12.15.090.A. 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 operator 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:** If a utility operator obtains a permit from PBOT on January 20, the utility operator will pay the quarterly fee. If a utility operator obtains a permit on February 15, the utility operator will pay two-thirds (2/3) of the quarterly fee.

#### J. Notice of Intent to Review

If either a payment or return was not received by the date both the payment and return were due, the 5-year term under PCC 12.15.150.A. extends one day for each day, or portion thereof, the payment is outstanding. If no payment was made, the statute of limitation extends indefinitely from the due date for that payment and all other payments due thereafter.

**Example:** Licensee filed a return but failed to remit payment for the 1Q17 period, due May 15, 2017. On May 15, 2022, payment was received for the 1Q17 period. Revenue sends licensee a notice of intent to audit on Oct. 15, 2022.

Normally, if both a return and payment were submitted on the due date, the review period for a notice of intent sent Oct. 15, 2017, would be for all payments due from Oct. 15, 2012, to Oct. 14, 2017.

If the payment was received 5 years after the due date, the eligible review period can start as far back as May 15, 2012. However, because the City did not file the notice of intent to audit until Oct. 15, 2022, 5 months after the payment was received, the review period can start only as far back as Oct. 15, 2012.

**III. Responsibility**

The Bureau of Planning and Sustainability is responsible for managing and implementing this Rule.

**IV. History**

Date Adopted: \_\_\_\_\_

Effective Date: **October 1, 2023**

DRAFT

**Amendments to Item 471, Add Utility Operators Code to govern utility access and use of the City right-of-way and adopt fee schedule for utilities operating in the City right-of-way (add Code Title 12)**

**June 7, 2023**

**Approved amendments to Ordinance**

The City of Portland ordains:

Section 1. The Council finds:

1. The Bureau of Planning & Sustainability (BPS) manages the access, fee collection, and agreements pertaining to access to and use of the rights-of-way on behalf of the City; and
2. The City of Portland has constitutional and charter authority to manage its rights-of-way and receive compensation for access to and use of the rights-of-way consistent with applicable federal and state law; and
3. The City has typically granted individually negotiated franchise agreements to each utility using the City's rights-of-way to provide utility services, with each franchise agreement setting forth the terms of use and compensation to be paid for such use; and
4. The City has determined that it can more effectively, efficiently, fairly, and uniformly manage the City's rights-of-way and provide consistent standards for utility access to and use of the rights-of-way through licenses, rather than franchise agreements; and
5. The new Portland City Code Chapter 12.15 will regulate access for utilities operating in the City's rights-of-way and assist the City in exercising its authority to secure compensation to the City and its residents for utility use of the rights-of-way; and
6. The Ordinance adopts a new Portland City Code 12 as shown in Exhibit A into City Code; and
7. The Ordinance adopts the right-of-way fee schedule as show in Exhibit B and adds a new franchise negotiation fee for if a party requests a franchise agreement under special circumstances, if the City deems appropriate. The fee would compensate the City for the costs associated for negotiating the agreement. Per Portland City Code Section 12.15.110, the City Council shall establish a rights-of-way access fee for use of utility facilities in the City to provide utility service; and
8. The Ordinance delegates authority to the BPS Director to adopt administrative rules related to PCC Chapter 12.15. The Utility Access to and Use of the Right-of-Way (PCC Chapter 12.15) administrative rule document (attached in draft format for reference as Exhibit C) will establish guidelines and examples for calculating gross revenues.
- 8-9. The City Council adopted Resolution No. 37168 on November 12, 2015, which opposes the transportation and storage of fossil fuels in or through Portland or adjacent waterways. The resolution states that, prior to any further Council action related to code changes to advance the policies in the resolution, the Mayor will schedule a work session to review proposed code changes and an executive session to review the legal considerations of any proposed code changes. Although it does not appear that such directive relates to this Ordinance, the purpose

of which is to codify existing utility franchise agreements, in an abundance of caution, these requirements have been met as follows: the first reading of the Ordinance fulfills the work session requirements. The City Attorney has met with each of the Commissioners to discuss the legal considerations of the proposed code changes, so no executive session is necessary.

NOW, THEREFORE, the Council directs:

- A. Add Code Title 12, Utility Operators, as shown in Exhibit A.
- B. Adopt Annual Rights-of-Way Fee Schedule as attached in Exhibit B per Portland City Code Section 12.15.110, which will be effective as of October 1, 2023.
- C. Exhibit B, Annual Rights-of-Way Fees is binding City policy.

**Approved amendments to code language:**

**Section 12.15.030 (Definitions), is amended as follows:**

R. ~~“Small wireless facility” or “small cell” is defined consistent with federal law and means any wireless communications facility in the right-of-way that: 1. has one or more antennas, each of which is no more than 3 cubic feet in volume, either: mounted on a structure 50 feet or less in height, including the antenna(s); or mounted on a structure no more than 10 percent taller than other adjacent structures; or that does not extend an existing structure on which the antenna(s) is located to a height of more than 50 feet or by more than ten percent, whichever is greater; and 2. has a volume of no more than 28 cubic feet for all equipment associated with the structure, including all antenna equipment, wiring, and cabling associated with the antenna(s) and located at the same fixed location as the antenna(s) and any pre-existing equipment. Except as provided in the foregoing, a small wireless facility does not include fiber, coaxial cable, conduit, or similar equipment located within the right-of-way means a ‘small wireless facility’ as defined by the Federal Communications Commission in 47 C.F.R. Section 1.6002(l), as may be amended or superseded.~~

**Section 12.15.090 (Utility-Specific Provisions), A (Wireless Services) is amended to add a new paragraph 8 to read as follows:**

Notwithstanding Section 12.15.140, the fees set forth in Section 12.15.140 will be paid annually for each year during the term of the license.

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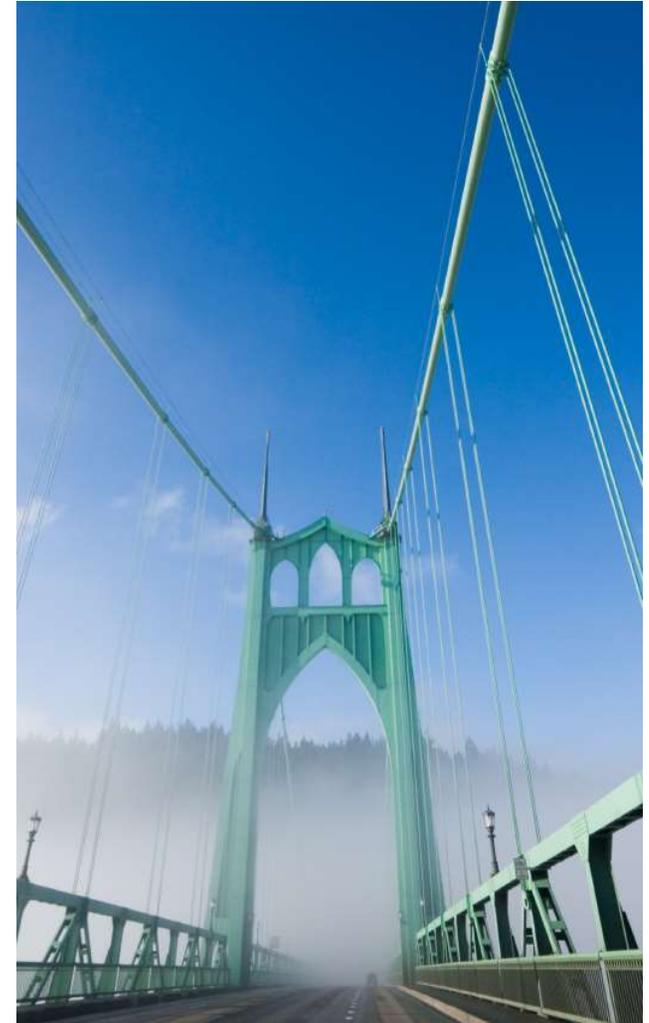
# Right-of-Way (ROW) Code

# ROW, Use, & Access

- Portland's largest physical asset that largely makes up streets and sidewalks - ~**20%** of the City
- Valued at **\$13B**, held in trust by the City on behalf of residents
- The City manages access to the ROW:
  - Limited physical capacity of asset
  - Fair compensation for asset use by utilities in ROW

## How has the City Managed Access to the ROW Historically?

- Negotiated franchise agreements – **50+ franchises**
- Approximately **225** accounts
- Passive management of agreements
- **3rd** largest source of general fund
  - Stable revenue source - **\$85-90M** annually



# What the ROW Code is 'Not'

- Setting new fees or changing fee levels 
- An assessment of fees to work in the ROW 
- Financial compensation for maintenance of the ROW 
- A pathway to create advantages for a single utility 

## **ROW Code & Objective**

*The governing code that grants the legal authority to utilities for the use of the ROW to use or own, maintain, and operate assets in the ROW as part of their business.*

- Ease administrative burden
- Level the playing field for all utilities
- Clarify the "rules of the road"
- Fair compensation for private use of public asset
- Consistency in auditing





## Oregon Cities with like ROW Codes

Gresham 2012  
Oregon City 2013  
Beaverton 2016  
Hillsboro 2016  
Gladstone 2016  
Happy Valley 2016  
Milwaukie 2017  
Tualatin 2017  
Corvallis 2018  
Sherwood 2018  
Tigard 2019  
Lake Oswego 2019  
Woodburn 2021

*Many other cities are considering adopting similar codes in the near future.*

# Stakeholder Engagement

- Two plus year process
  - **Two** formal rounds of stakeholder comments
  - **Multiple** rounds of individual stakeholder engagements
  - Over the past two months staff have met with:
    - Core utilities - PGE, Pacific power, NW Natural
    - Wireless providers – AT&T, T-Mobile, Verizon, and Crown Castle
  - The City has made movement on key policy topics raised by industry

# Business and Policy Changes Adopted

- Adding clarity to the definition of gross revenue
- Wireless providers being subject to fees
- Decommissioned assets in the ROW
- Current franchise agreement holders

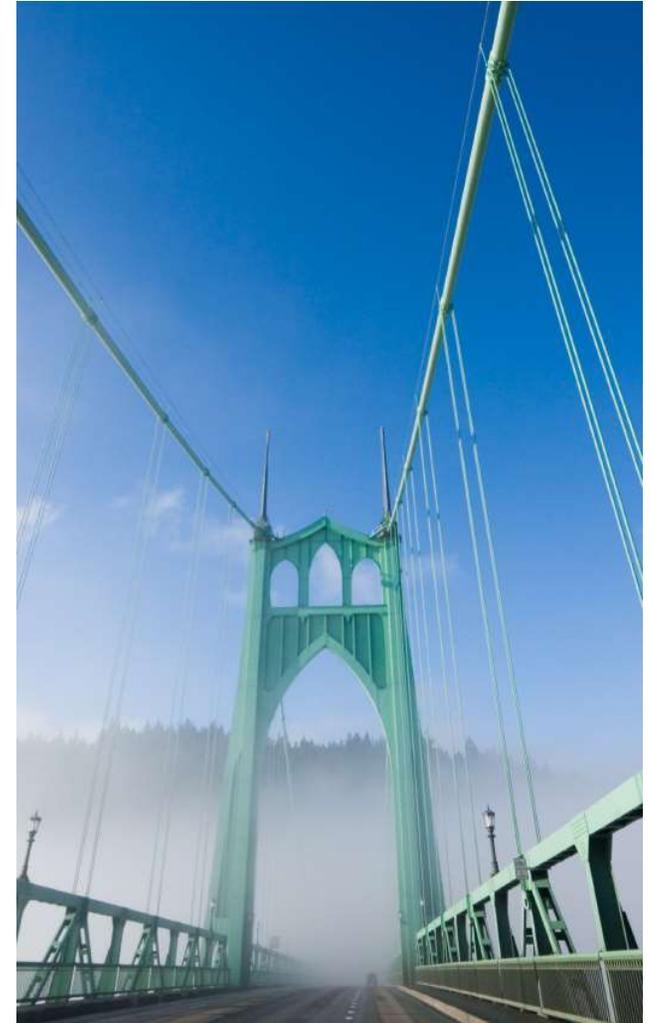
## Other Key Issues Raised by Parties

1. 5-year utility license term is too short
2. Cost study for “small wireless” attachment fee
3. Code is too broad and overreaching to some industries
4. Competitive advantage for those with existing franchise agreements
5. Definition of gross revenues should be in the code



## What is Council Approving?

- Ordinance seeks to approve/adopt:
  - **Exhibit A:** ROW Code (new chapter of City code)
  - **Exhibit B:** Fee schedule (5% of gross revenue, wireless fees, per foot fee, admin fees)



## Written Testimony Submissions - Agenda Item 501/471

Agenda Item	Name	Position	Comments	Attachment	Created
471	Wireless Infrastructure Association	Oppose	Please find the attached letter from the Wireless Infrastructure Association (WIA)	Yes	06/02/23 5:57 PM
471	Western States Petroleum Association	Oppose		Yes	06/05/23 2:56 PM
471	Alan Galloway, Counsel, Davis Wright Tremaine LLP, on behalf of Timothy Halinski, Corporate Counsel, T-Mobile	Oppose		Yes	06/05/23 4:05 PM
471	Olympic Pipe Line Company LLC	Oppose		Yes	06/06/23 6:40 AM
471	Jeremy Crandall, CTIA	Oppose	Please see our attached letter. Thank you!	Yes	06/06/23
471	Jessica Epley/Zipty Fiber	Oppose		Yes	06/06/23
471	Skip Newberry, Technology Association of Oregon	Oppose		Yes	06/06/23 6:17 PM
471	Alex Leupp / Verizon	Oppose		Yes	06/07/23
471	Bob Gravely, on behalf of Pacific Power, Portland General Electric, and NW Natural		I wouldn't characterize as support or opposed. The viewpoint is more we think this is workable but would still like to see changes.	Yes	06/07/23 3:04 PM
471	Bob Gravely on behalf of Pacific Power, Portland General Electric and NW Natural		This is a very slightly amended version of letter submitted earlier. Please use this one if possible.	No	06/07/23 3:18 PM



TECHNOLOGY  
ASSOCIATION  
OF OREGON

Date: June 6, 2023

RE: Proposed ROW Rules

Mayor Wheeler and Members of Portland City Council,

As the President & CEO of the Technology Association of Oregon (TAO), I am writing to express our concerns with the proposed rules governing Portland's Right-of-Way (ROW), specifically with respect to the calculation and setting of fees. In particular, the approach taken by the City in calculating its ROW fees is neither FCC compliant, nor does it comport with a number of stated policy goals expressed by City officials.

TAO's mission is to drive technology enablement to create a world-class and inclusive innovation-based economy in Oregon. Representing over 500 member companies and over 50,000 tech professionals in the region, TAO works with early-stage tech startups to some of the largest companies in the world.

As technology has grown more central to all aspects of our lives, so too has the importance of ensuring access to high-quality, reliable technology infrastructure. The early years of the recent global pandemic underscored how vital technology infrastructure is to healthcare, education and employment. In order to close the digital divide, many communities and the federal government are pursuing initiatives to lower and remove barriers that prevent this kind of investment, and in some cases these same institutions are providing subsidies that are truly historic in size and scope.

In contrast, the City of Portland's proposed ROW pricing continues a trend where the City of Portland is an outlier when it comes to ROW fees relative to other cities on the West Coast. There is a reason why cities like Spokane have 3x the small cell infrastructure, and smaller cities in the region, like Gresham, have nearly as much as Portland. In terms of larger cities on the West Coast, ROW access costs 5x less in Seattle compared to Portland. The City's proposed ROW fees look like a short-term attempt to boost revenue and ignores the fact that a similar approach in recent years has only set Portland back when it comes to attracting necessary investments in critical telecommunications infrastructure.

At a time when Portland is losing residents and businesses and faces a shrinking tax base, throwing up more barriers to investment in infrastructure that will enable more effective and equitable delivery of services and information between, among, and to residents and businesses is counterproductive.



TECHNOLOGY  
ASSOCIATION  
OF OREGON

These proposed changes completely contradict recent statements made by some members of this Council about the importance of halting increased taxes, fees and utility rate increases as a way to start evaluating barriers to doing business in the city. As proposed, Portland's ROW fees are an impediment to ensuring that Portland residents and businesses have access to the latest technology infrastructure that is at least commensurate with that of other West Coast cities.

Telecommunications firms that are looking at possibly investing in Portland are simply asking that the City produce a cost study that is consistent with the FCC's Declaratory Ruling, which requires "a reasonable approximation of the [City's] objectively reasonable costs." This would include a detailed cost study that shows the actual costs of 1) administering initial access to the ROW, and 2) having small cell infrastructure in the ROW on an annual basis.

Like Portland, Los Angeles and San Francisco initially worked to overturn the FCC's Small Wireless infrastructure order. They have since found ways to productively work with wireless providers. We respectfully encourage the City of Portland to do the same. Thank you for your consideration.

Sincerely,

A handwritten signature in black ink that reads "Skip Newberry". The signature is written in a cursive, flowing style.

Skip Newberry  
President & CEO  
Technology Association of Oregon



June 5, 2023

Via the City's Written Testimony Form and email to [councilclerk@portlandoregon.gov](mailto:councilclerk@portlandoregon.gov)

Mayor Ted Wheeler  
Commissioner Rene Gonzalez  
Commissioner Carmen Rubio  
Commissioner Mingus Mapps  
Commissioner Dan Ryan  
1221 SW 4th Ave  
Portland, OR 97204-1900

Re: T-Mobile's Comments on the City of Portland's Proposed ROW Code

To Whom It May Concern:

T-Mobile West, LLC ("T-Mobile") appreciates the opportunity to again provide the City of Portland ("City") with comments on proposed new Chapter 12.15 of the Portland City Code and the related fee schedule (collectively, the "Proposed Code"). As a leading provider of mobile voice and broadband in Portland, T-Mobile has been engaged with the City's planned code update since it was announced. Throughout that time, T-Mobile has repeatedly articulated its concerns about the Proposed Code in the limited opportunities the City provided for discussions with the City staff and its consultant. On November 15, 2021, T-Mobile submitted joint comments with Verizon and AT&T expressing concern about the draft code and the lack of stakeholder engagement. On May 25, 2022, T-Mobile supported CTIA's letter to the City, which raised serious concerns about the fee structure of the Proposed Code, including language that appeared to impose gross-revenue fees on wireless service. On June 1, 2022, T-Mobile submitted additional comments reiterating concerns about gross revenue fees, failure to tie fees to costs, and the application of fees to leases and resale that add no facilities to the right-of-way ("ROW"). In September 2022, when the City responded to carriers' concerns with inaccurate statements in a revised FAQ, T-Mobile again joined with AT&T and Verizon to alert the City Council to those inaccuracies. T-Mobile submitted additional comments on the Proposed Code on December 1, 2022, noting that the City had not addressed previous concerns, and again seeking constructive, substantive engagement from the City.

T-Mobile is pleased to see that the City has now taken some steps towards the substantive engagement with stakeholders that T-Mobile has requested throughout this process. While more is needed, T-Mobile notes certain improvements in the latest draft of the Proposed Code, even as it remains concerned about persistent problems that remain unaddressed. Accordingly, T-Mobile wishes to take this opportunity to highlight both progress made and further progress that is needed to produce a code that effectively manages the ROW, fully complies with federal law, and supports, rather than impedes, the continued deployment of next-generation wireless in Portland.



12920 SE 38<sup>th</sup> Street, Bellevue, WA 98006  
[www.t-mobile.com](http://www.t-mobile.com)

## I. NOTABLE IMPROVEMENTS

T-Mobile is pleased to see some notable improvements in the latest draft of the Proposed Code, even as it remains concerned about persistent problems that remain unaddressed. T-Mobile appreciates several welcome changes in the latest Proposed Code.

First, the City aligned the definition of “Small wireless facility” more closely with the federal definition in 47 C.F.R. § 1.6002. Aligning the definitions is essential, since the federal definition is the basis for obligations under the FCC’s 2018 *Small Cell Order*, with which the City must comply regardless of the definition the City adopts.<sup>1</sup> If the City’s definition doesn’t match the federal definition, that would thwart the City’s ability to apply appropriate fees and processes to small wireless facilities, as defined in the FCC’s rules.

Second, new sections in 12.15.090.A provide welcome clarification on the fees that apply to wireless communications service. Section 12.15.090.A.6 reads:

6. “Gross revenues for wireless communications facilities will be calculated as a fee on a per-facility basis, rather than as a percentage of the licensee’s gross revenue.”

Reading the above together with other provisions, and in light of the definitions in Section 12.15.030, T-Mobile understands this to mean that all revenues collected from wireless communications service providers will be on a *per-facility* basis, namely fees for each wireless communications facility (as defined in Section 12.15.030). New Section 12.15.090.A.7 evinces that same understanding, further clarifying that the only fees on wireless communications facilities (as defined) are annual fees listed in the fee schedule:

7. “Wireless communications facilities will pay an annual attachment fee on a per-facility basis as set forth in the Right-of-Way Access Fee Schedule.”

Third, the fee schedule circulated on May 17, 2023 further clarifies the City’s intent by setting forth two annual per-facility fees: (1) a \$1,408 fee for each small wireless facility, and (2) a \$9,004 fee for each “macro” facility.<sup>2</sup>

Taken together, the revisions to the “small wireless facility” definition, new Sections 12.15.090.A.6 and A.7, and the fee schedule constitute an important step forward. The revised versions better align the Proposed Code with the City’s recently-stated intent to impose fees on a per attachment basis, rather than as a percentage of gross revenues.<sup>3</sup> The changes also help align the Proposed Code with federal law, which restricts the application of gross revenue-based fees.

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<sup>1</sup> *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 relevant part and vacated in part*, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020) (“*Small Cell Order*”).

<sup>2</sup> Although the fee schedule lists these fees as “per attachment,” since the Proposed Code expressly allows only “per-facility” fees, T-Mobile reads “per attachment” to mean “per-facility” here. Otherwise, the fee schedule would not list any fees that could be assessed on wireless communications service providers consistent with § 12.15.090.7.

<sup>3</sup> The City’s intent was evident at the meeting with industry that was held on May 17, 2023.

The *Small Cell Order* unequivocally states that the statutory “requirement that compensation be limited to a reasonable approximation of objectively reasonable costs ... applies to all ... local government fees paid *in connection with* a provider’s use of the ROW to deploy Small Wireless Facilities” and “applies with equal force to any fees *reasonably related to* the placement, construction, maintenance, repair, movement, modification, upgrade, replacement, or removal of Small Wireless Facilities within the ROW.”<sup>4</sup> The FCC “agree[s] 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).”<sup>5</sup> Such fees are also preempted by Section 332(c)(7)(B)(i)(II) of the Communications Act, which has “the same substantive meaning as Section 253(a).”<sup>6</sup>

## II. ADDITIONAL IMPROVEMENTS NEEDED

Although the positive changes noted above are a significant step in the right direction, the City needs to take further steps to ensure strict compliance with applicable federal law. In some cases, addressing the remaining issues will require only minor changes, in line with those already made in the latest draft, to fix remaining ambiguities. In other cases, the City needs to make more significant changes to ensure that key provisions will be unambiguous and consistent with state and federal law.<sup>7</sup>

### A. The definition of “small wireless facility” needs fine-tuning.

The definition of “small wireless facility” should be further revised to have the same scope as the federal definition. Despite recent changes that improve alignment with the federal definition, discrepancies remain. For example, the federal definition expressly includes “antenna equipment” as part of the antenna. *See* 47 C.F.R. § 1.6002. In addition, the City’s definition includes provisions that purport to exclude certain cabling and conduit, which has no equivalent in the federal definition. These discrepancies should be rectified before enactment. Preferably, the Proposed Code could simply incorporate the federal definition by reference. But if not, the City’s definition needs to have identical scope.

### B. Fees must be cost-based and should align with Section 12.15.090.A.

Federal law is unequivocal that fees exceeding \$270 per small wireless facility are unlawful unless the City shows that they are “a reasonable approximation of [City] costs” that are “specifically related to and caused by the deployment” and “themselves objectively reasonable.”<sup>8</sup> To date, the City has provided no cost study or any other showing that the proposed fees comply with this federal requirement. To rectify this deficiency, the City should provide such a cost study for public examination before the City Council considers the Proposed

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<sup>4</sup> *Small Cell Order*, ¶ 69 (emphases added).

<sup>5</sup> *Small Cell Order*, ¶ 70.

<sup>6</sup> *Small Cell Order*, ¶ 46.

<sup>7</sup> This intent is evidenced by § 12.15.190 (“The provisions of this Chapter will be interpreted to be consistent with applicable state and federal law, and ... to cover only matters not preempted by state or federal law.”).

<sup>8</sup> *Small Cell Order*, ¶¶ 50, 55 & n. 131.

Code.<sup>9</sup> In addition, because the Proposed Code expressly allows only “per-facility” fees, which is consistent with the FCC’s approach in the *Small Cell Order*,<sup>10</sup> T-Mobile suggests changing “per attachment” to “per facility” in the fee schedule to avoid ambiguity.

**C. The City should drop the unnecessary and unlawful lease consent requirements.**

T-Mobile has numerous concerns about Section 12.15.080(K) of the Proposed Code. That section requires the City’s consent to lease utility facilities or capacity (e.g., capacity on fiber optic cables or wireless networks). Section 12.15.080(K) states that each “licensee will obtain the written consent of the City prior to leasing any portion of, or capacity on, its utility facilities....” The fundamental problem with this provision is that it positions the City as a regulatory gatekeeper, determining who can (and cannot) provide communications service over networks running through Portland connecting neighboring cities, counties and states. That is beyond the City’s authority (and, indeed, interstate communications are beyond the authority of the Oregon Public Utility Commission). Conditioning leases on City approval—however determined—isn’t necessary if the City simply wants information about facilities in the ROW, which could be obtained by less-burdensome means.

Requiring consent for leases would materially inhibit efficient deployment of wireless facilities by obstructing arrangements to lease wireless facilities, as well as wireline facilities that provide the critical backhaul that connects wireless facilities to high-speed internet backbones. Such obstruction would violate federal law. Section 253(a) of the federal Communications Act provides that “[n]o State or local statute 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.”<sup>11</sup> The FCC interprets Section 253, and related Section 332(c)(7), which applies to wireless facilities, as preempting *any* requirement that “materially inhibits” the provision of service.<sup>12</sup>

**D. The City should revise the burdensome indemnification provision.**

Although T-Mobile could support a reasonable obligation for a service provider to indemnify the City for the provider’s negligence or other culpable conduct, T-Mobile is disappointed that the latest Proposed Code retains unreasonably burdensome indemnification language in Section 12.15.100.B. In October 2022 the City made regrettable revisions to this language, requiring licensees to indemnify the City from all claims “in any way arising out of, resulting from, during, or in connection with, or alleged to arise out of or result from **the presence of the facilities or** the negligent, careless, or wrongful acts, omissions, failure to act, or

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<sup>9</sup> Although the City provided T-Mobile with a document entitled “Small Cell Fee Analysis” on May 31, 2023, that document contained no detailed breakdown of the City’s costs, no details tying those costs to deployments, no details supporting the City’s allocation of costs, and no showing that the City’s costs are objectively reasonable.

<sup>10</sup> The *Small Cell Order* recognizes the presumptive validity of recurring annual fees of \$270 “per Small Wireless Facility,” and describes such fees as “including any possible ROW access fee or fee for attachment include both ROW access.” *Small Cell Order*, ¶ 79.

<sup>11</sup> 47 U.S.C. §253(a).

<sup>12</sup> *Small Cell Order*, ¶ 31.

other misconduct....” That language—essentially unchanged in the current draft—is both unreasonably burdensome and likely unenforceable, as explained below.

First, as drafted, 12.15.100.B purports to require indemnification for claims stemming from the mere presence of facilities in the ROW, even if the facilities comply with the law and are free of defects. That is fundamentally unfair and would discourage providers from deploying facilities in the ROW—including facilities that would enhance and expand wireless service in Portland. Fairness requires that indemnification obligations should only arise where there is fault (*i.e.*, at least negligence) by the indemnifying party. Otherwise, this broad and unilaterally imposed indemnification obligation unreasonably increases risk (and costs) to providers, and itself constitutes a material inhibition on deployment, in violation of Sections 253 and 332 of the Communications Act. Accordingly, T-Mobile requests that the City delete the “presence of the facilities” language.

Second, Section 12.15.100.B is unreasonable because it lacks an exception for liability resulting from the City’s own negligence or failures. Even in a negotiated contract, clauses requiring indemnification for an indemnified party’s own negligence are only enforceable when the “manifest” intention of both parties is both “clear and unequivocal.”<sup>13</sup> That standard cannot be met by the Proposed Code, where the City is unilaterally replacing negotiated franchise agreements with an ordinance drafted by the City. Without an exception for the City’s own negligence the language may be unenforceable.

Finally, the language is simply poorly drafted and ambiguous. Due to apparent drafting issues, it could conceivably be interpreted to require every licensee to indemnify the City for every claim arising “during ... the presence of the facilities,” even where there is no connection to the facilities or licensee *at all*. That would be absurdly overbroad, and T-Mobile trusts that it is not the City’s intent to impose such an unreasonable and unenforceable requirement. Nonetheless, it underscores the need to revise the provision before enacting the Proposed Code.

### III. CONCLUSION

As T-Mobile has stated repeatedly, T-Mobile supports the City’s efforts to modernize the ROW Code. The latest draft of the Proposed Code is a step forward, compared to prior drafts, but should not be enacted in its current form. Before enacting such an important ordinance, the City should address the remaining problems to ensure that the final code is consistent with the City’s intent—and with federal law. The planned October effective date allows ample time for detailed, meaningful engagement with industry that would improve the Proposed Code and better align it with the City’s own goals.

T-Mobile trusts that the City understands the immense value that advanced mobile broadband and voice services provide to Portland businesses, visitors, and residents. Wireless facilities in the City, along with wireline infrastructure necessary for their operation, are essential infrastructure for commerce, tourism, and everyday life in Portland. The latest draft of the code

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<sup>13</sup> *State, ex rel. Dep't of Forestry v. PacifiCorp*, 236 Or. App. 326, 333 (2010) (“[A]n indemnity provision ‘will not be construed to cover losses to the indemnitee caused by the indemnitee’s own negligence unless such *intention is expressed in clear and unequivocal terms*. Nevertheless, *where such intent is manifest*, a court will enforce *the parties’ agreement* to allocate risks *as the parties have agreed*....”) (cleaned up, emphases added).

addresses some, *but not all*, of the issues that must be addressed to ensure that the enacted ordinance facilitates, rather than hinders, needed expansion of that essential infrastructure. Taking additional time to thoughtfully reconsider and revise the Proposed Code, along the lines T-Mobile has proposed, offers the City the opportunity to encourage and accelerate the availability of next-generation wireless services, including 5G, in Portland. T-Mobile hopes that the City will seize that opportunity. T-Mobile is eager to work with the City to help it do so.

Thank you for your consideration, and please contact the undersigned with any questions.

Sincerely,

*Tim Halinski*

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Tim Halinski, Corporate Counsel, T-Mobile

cc: Andrew Speer, Franchise Utility Program Manager ([Andrew.Speer@portlandoregon.gov](mailto:Andrew.Speer@portlandoregon.gov))



June 2, 2023

Sent via electronic mail to the parties below

Portland City Council  
1221 SW Fourth Avenue  
Portland, OR 97204

Re: Proposed Portland City Code Chapter 12.15 Regarding Utility Access to the Right-of-Way

Dear Mayor Wheeler, Commissioners Gonzalez, Rubio, Mapps and Ryan:

The undersigned companies operating in the City of Portland (the “City”) are writing to express concerns with the recent Right-of-Way Proposal (“ROW Proposal”) circulated by the City’s Franchise Utility Program Manager on May 5, 2023, and the related fee schedule and administrative rules (the “ROW Proposal”). The ROW Proposal, if passed as currently written, will create inconsistencies between local, state, and federal law that are contrary to the public policy goal of expanding affordable access to broadband services. It will create impediments to market entry, which will reduce customer choice and increase the cost to serve customers in and around Portland.

The City, through its various departments and agencies, including the Office of Community Technology (“OCT”), now part of the Bureau of Planning and Sustainability, conducted outreach to individual franchise utilities, issuing a draft proposal September 21, 2021. Many stakeholders filed comments citing varied objections to the proposal. The second draft was released April 26, 2022, and the City directed stakeholders to provide their response to the City’s contractor, ROW Consultants, LLC. To date the City has not yet responded substantively to many comments, providing only very brief, conclusory statements in a spreadsheet summarily dismissing the concerns presented by stakeholders. At no time has the City, via OCT or otherwise, held a workshop featuring two-way substantive discussions with communications industry participants with active participation by counsel for the City.

The City has not developed a written record to justify the imposition of the substantial fees and other requirements contained in the ROW Proposal, or to demonstrate how the ROW Proposal can be reconciled with state and federal law. We request that the City delay action on the ROW Proposal at this time, and initiate a workshop or other working group action with the City Council, to allow for meaningful discussion of the potential impact the ROW Proposal would have on the City and its citizens, and permit appropriate modification of the ROW Proposal.

### **Legal Concerns**

Many of the legal concerns with ROW Proposal are detailed in the November 2021 and June 2022 comments filed by the undersigned and others. In brief, some of the major concerns include, but are not limited to:

1. The ROW Proposal gross revenue-based fees on broadband services are contrary to federal law.

As drafted, the ROW Proposal is inconsistent with federal statutes governing telecommunications and cable television services. The ROW Proposal seeks to impose a right of way fee that does not align with Section 253 of the federal Communications Act. Section 253(a) provides that “[n]o State or local statute 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.”<sup>1</sup> The FCC has interpreted this broad preemption language to bar any requirement that “materially inhibits” the provision of service,<sup>2</sup> agreeing with “courts that have recognized that gross revenue fees generally are not based on [such] costs . . . and where that is the case, are preempted under Section 253(a).”<sup>3</sup> Although Section 253(c) allows for “fair and reasonable” fees for use of the ROW on a nondiscriminatory basis, the FCC has interpreted that language to mean fees “that represent a reasonable approximation of actual and direct costs incurred by the government, where the costs being passed on are themselves objectively reasonable.”<sup>4</sup> The FCC’s interpretation of Section 253 is authoritative 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, 133 S. Ct. 1863, 1874 (2013).

2. ROW Proposal franchise fees on broadband services provided by telecommunications carriers is contrary to state law.

The ROW Proposal seeks to impose fees that are not permitted under Oregon Revised Statute 221.515. This state statute permits a limited privilege tax on specific local telephone services for the privilege of using the ROW, but unequivocally prohibits any other ROW fees on “telecommunications carriers” (as defined in the statute), including the fees that the ROW Proposal purports to impose on broadband services. We also note that local authority to assess taxes or fees on broadband services is pre-empted by the federal Internet Tax Freedom Act, which prohibits taxes on Internet access.<sup>5</sup>

3. ROW Proposal franchise fees discriminate among broadband providers.

The ROW Proposal attempts to impose fees on Incumbent Local Exchange Carriers, Competitive Local Exchange Carriers, cable operators and non-facilities-based Internet Service Providers in the same manner. These categories of providers, however, operate under different state and federal regulatory schemes, each of which will have different restrictions on the kind of fee imposed by the City. As a result, the City’s proposed fee will create an unequal playing field for providers seeking to deliver broadband services to the businesses and citizens of Portland. This discriminatory effect is prohibited

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<sup>1</sup> 47 U.S.C. §253(a).

<sup>2</sup> *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) (“Third Report and Order”) ¶ 35, *affirmed in part and vacated in part*, *City of Portland v. United States*, 969 F.3d 1020 (9th Cir. 2020).

<sup>3</sup> Third Report and Order, ¶ 70.

<sup>4</sup> *Id.* ¶ 55.

<sup>5</sup> See 47 U.S.C. § 151 Note (Moratorium on Internet Taxes), § 1101(a)(1) (prohibiting “[t]axes on Internet access”).

under Section 253 of the Communications Act, which allows only “fair and reasonable compensation from telecommunications providers *on a competitively neutral and non-discriminatory basis.*”<sup>6</sup>

4. ROW Proposal creates multiple franchise fee payments for the same occupancy of the right of way.

The ROW Proposal attempts to impose franchise fees on both a facilities-based provider that actually occupies the right of way and on any other party that may lease capacity from the facilities-based provider, regardless of whether the lessee has a physical presence in the right of way or uses the facilities that have already been subject to the fee. This fee regime goes far beyond any kind of reasonable cost-based payment for a right of way privilege and results in a separate business tax for the leasing company – with multiple fees charged to different parties for one physical occupancy. The lessor maintains control and ownership of the physical facility while the lessee is merely paying for services. This kind of tax on the lessee is contrary to both federal and state law, bears no relationship to the actual costs of the City in maintaining the ROW or performing directly related administrative tasks necessary to do so, reflecting an overbroad concept of “use.” Such tax, untethered to physical encroachment on the ROW, was considered *and rejected* by the Oregon Court of Appeals in *Qwest Corp. v. City of Portland*, 275 Or. App. 874, 888 (2015), and by a 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).

5. ROW Proposal provisions for capacity leasing advance notice and approval requires disclosure of confidential customer information and inserts city government into purely commercial transactions.

The ROW Proposal calls for any lease of facilities or of capacity for broadband services in the right of way to be subject to prior notice *and approval* of the City.<sup>7</sup> The requirement for notice of a commercial transaction could result in a carrier providing confidential information to the City about its customers, in violation of federal telecommunications customer privacy law. Further, the requirement for prior approval is completely unnecessary for any legitimate City purpose and inserts the City into the regular business operations of carriers, including those working to use available broadband capacity in the City to serve customers, unnecessarily delaying the deployment of broadband. Discussed below, the deployment of broadband is a well-documented public interest at the state and federal level. The City’s actions would materially inhibit would-be lessors and lessees from leasing facilities and capacity to serve customers, or from growing their networks to expand service in Portland (and also to customers outside of Portland that are served using facilities in Portland). That approval requirement is contrary to Section 253(a), which states unequivocally that “[n]o State or local statute 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,” and is violated if a requirement materially inhibits the provision of service. This requirement also unnecessarily inserts the City into transactions regulated by the Oregon Public Utilities Commission, as well as the Federal Communications Commission, and

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<sup>6</sup> 47 U.S.C. § 253(c) (emphasis added).

<sup>7</sup> ROW Proposal, section 12.15.080(K).

creates an additional regulatory obligation beyond the scope of the City's authority to manage the public rights of way and placing the City in a quasi-judicial authority over otherwise regulated utilities.

### **Public Policy Concerns**

In addition to the legal issues described above, the ROW Proposal is contrary to well-established public policy on the provision of broadband services in the United States. Both the federal and Oregon state governments have established an express public policy for the promotion and expansion of broadband services. This policy has two major prongs: Affordability and Access. The proposed fees negatively impact both.

Federal public policy in favor of increasing broadband affordability and access is clear. In 2022, Congress passed the Infrastructure Investment and Jobs Act (the "IIJA"), including a \$65 billion investment in high-speed Internet access.<sup>8</sup> The IIJA devotes significant federal resources to promote affordability of and access to broadband services. First, Congress authorized \$14.2 billion to fund the Affordable Connectivity Program ("ACP") to subsidize the purchasing of broadband services for the poorest sections of our society. As implemented, many carriers have made plans available at little to no cost, after the subsidy, to qualifying subscribers. As broadband services have been tax-free and free from franchise fees, there have been no additional charges for these customers. Congress has emphasized Affordability of broadband services as a key national public policy.

Second, Congress authorized two separate funding mechanisms to help fund the expansion of broadband services to those areas that do not have access to these services today. The \$25 billion in American Rescue Plan Act ("ARPA") funding through the State and Local Fiscal Recovery Funds ("SLFRF") and Capital Projects Funds ("CPF")<sup>9</sup> preceded the much larger and direct \$42.45 billion investment in high-speed Internet through the IIJA and its Broadband Equity Access and Deployment ("BEAD") program. The various states will receive allocations from this fund and will partner with private industry to build out broadband networks nationally. Congress has strongly emphasized Access to broadband services as a key national public policy, which is reflected in the breadth and scope of the program's funding and directive. Imposing substantial additional regulatory impediments and fees on the deployment of broadband would not only be irrational given the foregoing, but also contrary to the intent of the IIJA and its BEAD program.

The State of Oregon has also acknowledged Affordability and Access to broadband services as a vital state policy. Through Executive Order 2018-31, then Governor Kate Brown established the Oregon Broadband Office citing broadband as critical infrastructure vital for all Oregonians to improve the economy and quality of life. Oregon's legislature affirmed Governor Brown's order in 2019 through House Bill 2173 reciting that the Oregon "Legislative Assembly has declared that it is the policy of the State of Oregon to promote, facilitate and encourage activities, projects and businesses that improve Oregon's Internet Protocol network infrastructure, performance and connectivity to the Internet backbone network and World Wide Web for the benefit of Oregon's commercial, educational, governmental and individual users." Through expansion of the Oregon Telephone Assistance Program, the State subsidizes discounts for broadband services for qualifying subscribers.

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<sup>8</sup> Source: [FACT SHEET: Biden-Harris Administration Announces Over \\$25 Billion in American Rescue Plan Funding to Help Ensure Every American Has Access to High Speed, Affordable Internet | The White House.](#)

<sup>9</sup> Source: [Investing in America - Build.gov | The White House.](#)

The State is expected to be allocated \$707 million under the BEAD program and is preparing to allocate these federal funds through grants to assist in expansion of broadband to the citizens of Oregon. The ROW Proposal contravenes both aspects of federal and state public policy.

1. Affordability

The ROW Proposal will increase the costs to provide broadband services. These costs and fees imposed by the ROW Proposal will only increase the ultimate cost of the services for Portland residents. As many of these residents can afford broadband services only through the ACP, even a slight increase in cost will jeopardize the affordability of broadband for thousands of households in Portland.

2. Access

The ROW Proposal, regulatory burdens, and franchise fee increases the cost of providing services to end users in Portland. These increased costs make additional expansion more expensive. These costs will also deter new entry into the City by carriers who may be willing to broaden service availability. Such barriers to entry will not assist in expansion of service availability in the City.

Further, the ROW Proposal franchise fee increases the cost of doing business in the City of Portland. Portland currently is a vital hub for data centers and connectivity among internet providers. By increasing costs, the City is providing incentives for telecommunications carriers to seek data center connectivity in other suitable facilities outside the City.

**Conclusion**

The legal and policy issues with the ROW Proposal outlined in this letter warrant deliberate and full consideration by the City Council. The undersigned urge the City to remove the ROW Proposal from the current agenda and convene a workshop where all stakeholders can present these concerns, engage in meaningful discourse with the City, craft mutually agreeable solutions to the issues, and allow the City to develop a substantial record that might support any decision it makes.

Sincerely,

David von Moritz  
Corporate Counsel & VP Government Relations  
Astound Broadband

Gillian Leytham, Esq  
VP – Underlying Rights & Government Relations  
Zayo

Trent Fellers  
VP Regulatory and Government Affairs  
Windstream

Jessica Epley  
VP – Regulatory & External Affairs  
Ziplay Fiber



Olympic Pipe Line Company LLC  
600 SW 39<sup>th</sup> Street, Suite 275  
Renton, WA 98057

Phone: (425) 235-7736  
Fax: (425) 981-2525

June 6, 2023

**VIA EMAIL AND CITY TESTIMONY PORTAL**  
**ANDREW.SPEER@PORTLANDOREGON.GOV**  
**<https://www.portland.gov/council-clerk/writtentestimony>**

Mayor Ted Wheeler and  
Portland City Council  
1221 SW Fourth Ave  
Portland, OR 97204

Mayor Wheeler and Members of the City Council:

Olympic Pipe Line Company LLC (“OPLC”) appreciates the opportunity to provide comments on the proposed utility access/right-of-way code amendments (the “ROW Code”) to the City of Portland (the “City”).

OPLC operates the Olympic Pipeline system, which supplies Portland and Oregon with fuel from refineries in Washington. Oregon receives more than 80 percent of its transportation fuel through the Olympic Pipeline,<sup>1</sup> including most of the jet fuel used at Portland International Airport.<sup>2</sup> These fuel products are critical to every aspect of the City’s economy, as well as the daily lives of its citizens.

Although the City has stated that the changes introduced by the ROW Code are mostly administrative in nature, that is not the case as applied to OPLC. The code amendments will have significant impacts on our operations, our customers, and ultimately, consumers of fuel in Portland and beyond.

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<sup>1</sup> Oregon Department of Energy, *Oregon Fuel Action Plan* (2017), at 9-10; see also Oregon Department of Energy, *2022 Biennial Energy Report*, for the Oregon Legislative Assembly.

<sup>2</sup> *Id.*

For example, City staff has stated that the amendments will not increase the fees the City charges for the use of its right-of-way.<sup>3</sup> This is not accurate when it comes to OPLC's right-of-way. Under either the broad "gross revenue" taxation or per-linear-foot fee measure, the fees imposed on OPLC will be significantly higher. They would also be three to four times higher than the right-of-way fees charged by other cities and counties throughout the Northwest.

The short-term licensing period, broad termination powers, and vague prohibition on new fuel transportation facilities would also interfere with OPLC's facility planning. Changing market forces, such as the demand for cleaner fuel products and increasing regulations on fuel content, require OPLC to adapt its operations and facilities to ensure there is sufficient capacity to transport an increasing number of fuel types. The short licensing period and risk/ambiguity introduced by the nonspecific enforcement and termination provisions,<sup>4</sup> however, create significant uncertainty that discourages such investments in pipeline infrastructure.

Many of these problems exist because the ROW Code is crafted for utility companies and communication service providers, which are entirely unlike pipeline operators. OPLC is an interstate transportation company, a common carrier that transports fuel produced and purchased by third parties. It does not provide services to residences/consumers or sell the fuel delivered to Portland. Rather, its operations are highly regulated by the Federal Energy Regulatory Commission and it must provide pipeline transportation services to all qualified companies upon reasonable request.<sup>5</sup>

The ROW Code's inclusion of OPLC along with utilities and communication service providers is inconsistent with the City's charter, state law, and other local code governing licenses for use of right-of-way. For example, the City's charter contains an entire article providing additional regulatory authority over "public utilities," which does not include pipeline operators such as

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<sup>3</sup> *E.g.*, "Right-of-Way Code: Frequently Asked Questions," <https://www.portland.gov/sites/default/files/2022/right-of-way-code-faq.pdf>.

<sup>4</sup> For example, the proposed code states that it will terminate the license of a pipeline operator if a City employee determines that the licensee made an alteration to facilities that violated the ROW Code's prohibition on "additions or alterations to facilities that expand or increase the capacity to transport fossil fuels."<sup>4</sup> This prohibition is not limited to alterations or facilities within the ROW or even within the City. Moreover, the operator is not entitled to notice, an opportunity to cure, or a local appeal following a staff determination that a violation exists.

<sup>5</sup> 49 USC § 15701.

Mayor Ted Wheeler and  
Portland City Council  
June 6, 2023  
Page 3

OPLC. Similarly, state law authorizes local governments to impose privilege taxes on utilities (ORS 221.450) and telecommunication carriers (ORS 221.515), but no similar statutory authority exists for local taxation of pipeline operators. Finally, the City states in the ROW Code Frequently Asked Questions article published online that the code is based on right-of-way licensing programs adopted by surrounding jurisdictions, as well as the model ordinance created by the League of Oregon Cities. All these other ordinances, however, do not include pipeline operators such as OPLC within their scope.

Pursuant to the City's charter and the Commerce Clause of the United States Constitution, the City must negotiate a franchise agreement with OPLC for placement of its pipelines within the City's right-of-way; the use fee set out in that agreement must be based on the value of the right-of-way at issue.

For the reasons above, we ask that the City remove pipeline operators from the scope of the ROW Code and delete all provisions specific to those entities.

Thank you for consideration of our comments and request.

Sincerely,

A handwritten signature in black ink, appearing to read 'Terry Zimmerman', with a long horizontal flourish extending to the right.

Terry Zimmerman  
President



Portland City Council  
1221 SW 4<sup>th</sup> Ave.  
Portland, OR 97204

June 7, 2023

Honorable Mayor Wheeler and Commissioners Rubio, Mapps, Gonzalez, and Ryan,

As the main energy utilities in Portland and long-time users of the public right-of-way (ROW), we appreciate the opportunity to jointly communicate our views on the proposed ROW licensing ordinance.

We do not oppose the ordinance in its current form but have remaining concerns about the new ROW licensing structure that the City is proposing, as detailed below. We believe, at least as applied to our three companies, that the ordinance can be successfully implemented, if City and utility staff work together in good faith and in open communication to avoid future surprises in application and interpretation of the rules. We remain committed to a collaborative relationship with City of Portland staff and elected leaders in the execution of this new standard and look forward to participating in a good faith effort to implement it equitably.

We submitted extensive comments on previous versions of the proposed ordinance and want to acknowledge the engagement by staff and recent modifications to the ROW licensing proposal that alleviate major concerns we expressed in prior correspondence.

Our remaining concerns as energy utilities center on the broadening of what counts as revenue from utility activity that would be used to calculate the five percent ROW usage fee in unclear ways that could increase customer bills, plus create unnecessary compliance confusion for ROW users. The proposed language defining revenue from utility activity deviates in material respects from both the historic course and statewide norms. We are concerned that the vagueness around what is and is not subject to the ROW usage fee has the potential to result in a tax increase for customers.

We encourage council to clarify in the ROW ordinance or administrative rules that the ROW usage fee only applies to revenue directly associated with utility facilities located in the ROW. Without these clarifications, utilities will not have the guidance needed to be certain of compliance with the ordinance, and disputes between the City and utilities may occur. We also encourage incorporation of these clarifications into the ordinance itself.

We look forward to working with staff to address our remaining concerns in the finalization of administrative rules.

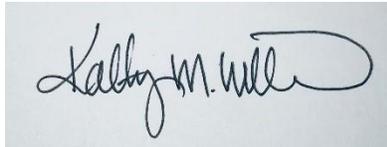
Sincerely,



Nik Blosser, Vice President, Public Affairs  
Portland General Electric



Annette Price, Vice President, Government Affairs  
Pacific Power



Kathryn Williams, Vice President, Public Affairs and Sustainability  
NW Natural



Portland City Council  
1221 SW 4<sup>th</sup> Ave.  
Portland, OR 97204

June 7, 2023

Honorable Mayor Wheeler and Commissioners Rubio, Mapps, Gonzalez, and Ryan,

As the main energy utilities in Portland and long-time users of the public right-of-way (ROW), we appreciate the opportunity to jointly communicate our views on the proposed ROW licensing ordinance.

We do not oppose the ordinance in its current form but have remaining concerns about the new ROW licensing structure that the City is proposing, as detailed below. We believe, at least as applied to our three companies, that the ordinance can be successfully implemented, if City and utility staff work together in good faith and in open communication to avoid future surprises in application and interpretation of the rules. We remain committed to a collaborative relationship with City of Portland staff and elected leaders in the execution of this new standard and look forward to participating in a good faith effort to implement it equitably.

We submitted extensive comments on previous versions of the proposed ordinance and want to acknowledge the engagement by staff and recent modifications to the ROW licensing proposal that alleviate major concerns we expressed in prior correspondence. We recognize at the same time that other major users of the ROW have remaining strong concerns with the proposed ordinance and believe that long-term success of a uniform licensing structure depends on it being workable for all ROW users.

Our remaining concerns as energy utilities center on the broadening of what counts as revenue from utility activity that would be used to calculate the five percent ROW usage fee in unclear ways that could increase customer bills, plus create unnecessary compliance confusion for ROW users. The proposed language defining revenue from utility activity deviates in material respects from both the historic course and statewide norms. We are concerned that the vagueness around what is and is not subject to the ROW usage fee has the potential to result in a tax increase for customers.

We encourage council to clarify in the ROW ordinance or administrative rules that the ROW usage fee only applies to revenue directly associated with utility facilities located in the ROW. Without these clarifications, utilities will not have the guidance needed to be certain of compliance with the ordinance, and disputes between the City and utilities may occur. We also encourage incorporation of these clarifications into the ordinance itself.

We look forward to working with staff to address our remaining concerns in the finalization of administrative rules.

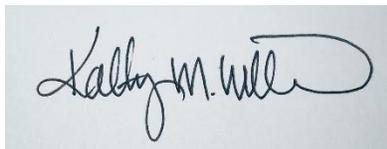
Sincerely,

A handwritten signature in black ink, appearing to be 'Nik Blosser', with a stylized, cursive script.

Nik Blosser, Vice President, Public Affairs  
Portland General Electric

A handwritten signature in black ink, appearing to be 'Annette Price', with a cursive script.

Annette Price, Vice President, Government Affairs  
Pacific Power

A handwritten signature in black ink, appearing to be 'Kathryn Williams', with a cursive script.

Kathryn Williams, Vice President, Public Affairs and Sustainability  
NW Natural



Wireless  
Infrastructure  
Association

June 2, 2023

*Via Electronic Mail*

Carmen Rubio  
Commissioner  
Portland City Council 1221 SW 4<sup>th</sup> Avenue  
Portland, OR 97204

RE: Opposition to Administrative Rule, Utility Access to and Use of the Right-of-Way

Dear Commissioner Rubio:

The Wireless Infrastructure Association<sup>1</sup> (“WIA”) writes today to voice serious concerns with the proposed Right-of-Way (“ROW”) Code currently being considered by the Council.<sup>2</sup> WIA and its members believe that if the ROW Code is adopted in its current form, critical telecommunications deployments will be jeopardized. Additionally, several ambiguities and requirements in the proposal may run afoul of current federal law. Given the current historic efforts to bring connectivity to all Americans and the national trend in removing barriers to the deployment of the needed infrastructure, WIA encourages the Council to pause this proceeding and amend the proposal with feedback from relevant stakeholders.

Generally, rules for access to the ROW for telecommunications infrastructure must comply with rules adopted by the Federal Communications Commission (“FCC”); relevant to this proceeding, the 2018 *Declaratory Ruling and Third Report and Order* (“Small Cell Order”).<sup>3</sup> This rule, as upheld by the Ninth Circuit in *City of Portland v. United States*,<sup>4</sup> generally prohibits excessive fees and regulations that can be viewed as an effective moratorium on telecommunications infrastructure. The proposed ROW Code proposes an excessive fee structure without demonstrating the proposal is related to the “actual and direct costs” of managing the ROW as required by federal rules. Further, WIA’s members point to several ambiguities in the proposal which could be read to charge multiple annual fees for access to the ROW for facilities that are used by multiple providers or provide multiple services.

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<sup>1</sup> The Wireless Infrastructure Association (“WIA”) is the principal organization representing companies that build, design, own, and manage wireless telecommunications facilities throughout the world. WIA’s members include infrastructure providers such as the Applicants, carriers, and professional services firms.

<sup>2</sup> *Add Utility Operators Code to govern utility access and use of the City right-of-way and adopt fee schedule for utilities operating in the City right-of-way (add Code Title 12)*, Ordinance (hearing scheduled June 7, 2023), <https://www.portland.gov/council/documents/ordinance/utility-access-fees-and-use-city-right-way-code>.

<sup>3</sup> *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, FCC 18-133 (Sep. 2018) [Small Cell Order].

<sup>4</sup> 969 F.3d 1020 (9th Cir. 2020).

Beyond compliance with federal law the proposal represents unsound policy which will negatively impact Portland residents. Connectivity underpins services millions of Americans use every day from connecting voice and text to accessing broadband on the go. Mobile traffic has been continually increasing over the past decade. Indeed, from 2015 to 2021 average monthly traffic per smartphone increased nearly threefold, from 5GB per month to nearly 15GB per month.<sup>5</sup> This number is expected to reach over 50GB per month by 2027.<sup>6</sup> To support these applications, networks need to be continually improved to add needed capacity.

As service providers across the country continue to make 5G networks available, new, innovative services will be available to cities ranging from enhanced monitoring of traffic and emissions to increased public safety. States and cities that adopt smart policies which incentivize investment will see the most benefits from these new services. However, the proposal before the Council will make deployment more difficult which could delay the rollout of these technologies.

To ensure that next generation services are generally available to residents of Portland, WIA encourages the Council to pause this proceeding until further feedback can be given by interested stakeholders. The current proposal will likely delay telecommunications infrastructure deployment in Portland and may conflict with federal rules. WIA appreciates your consideration of this important issue and stands ready to collaborate with the Council to improve its rules to ensure connectivity is deployed efficiently and effectively in your city.

Respectfully Submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

Stephen Keegan  
Sr. Counsel, Government and Legal Affairs

**WIA - The Wireless Infrastructure Association**  
2111 Wilson Blvd., Suite 210  
Arlington, VA 22201  
(703) 621-0525

cc: Honorable Ted Wheeler, Mayor  
Portland City Council

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<sup>5</sup> ERICSSON MOBILITY REPORT at 16 (Nov. 2022), <https://www.ericsson.com/en/reports-and-papers/mobility-report>.

<sup>6</sup> *Id.*

**Council Item 471 — Requested Amendments and Background Info**

*Add Utility Operators Code to govern utility access and use of the City right-of-way and adopt fee schedule for utilities operating in the City right-of-way (add Code Title 12) (Ordinance)*

Attached, please find a compilation of the most recent Right-of-Way Code feedback and requested amendments from Verizon, as well as key background documents:

- Verizon’s Requested Amendments** ..... 3
- Verizon Comments on Portland ROW Code**..... 7
- Wireless Industry Response to Portland Office of Community Technology Right-of-Way FAQ updated July 13, 2022**..... 11
- Cost Studies** ..... 23
  - City of Los Angeles independent analysis of fees ..... 25
  - City of San Francisco MLA Fee Breakdown..... 33
- City of Portland’s Small Cell Fee Analysis**..... 41
- Wireless Right-of-Way Fee Survey** ..... 45

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## Verizon's Requested Amendments

- These requested amendments reflect our top concerns, which for the most part have been the same concerns we have been expressing since the beginning of this ROW code process in September 2021—with the exception of rates, where we have registered objections and made requests for independent cost studies since 2018.
- We appreciate that Requested Amendments #2 and #6 were accepted by Commissioner Rubio's office and BPS on June 6, 2023.
- However, major issues remain unaddressed, including:
  - **City rates and fees.** We continue to request the City conduct a thorough, independent analysis of the actual and reasonable costs to the city directly attributable to the presence of a small cell facility in the right-of-way, and use that study to set rates; until such a study is complete, the City should utilize the safe harbor rate of \$270. As demonstrated in later documents in this packet, the "fee analysis" finally shared by the City of Portland on May 31 is wholly inadequate; examples from Los Angeles and San Francisco—where rates are higher than the safe harbor \$270—demonstrate what such a study might look like.
  - **Code language that continues to refer to gross revenue fees for wireless providers.** We propose edits (Amendment 3) that align the code with verbal clarifications shared by staff, to make it clear that per-facility charges would be imposed on wireless providers in lieu of gross revenue fees.
  - **Limited length of ROW licenses (one year with four renewals, for a total of five years), which doesn't provide the certainty required to plan and build out a network.** We propose (Amendment 4) shifting to an initial five year license with automatic one year renewals for a total term of ten years.
  - **Indemnity.** We have recently learned that the overly broad indemnity provision language – which includes the mere presence of wireless facilities in the ROW – may have been intended to indemnify the City should actual damages occur without negligence or carelessness, such as an electrical fire. The code should be amended to reflect this specific concern. As currently written, this broad "presence of facilities" language validates and encourages litigation based on pseudoscience (i.e., "RF" or radiofrequency's alleged effects on health).
  - **Level playing field.** None of the provisions of the proposed ROW Ordinance will apply to any entity with an existing franchise until its expiration, which is contrary to one of the main policy goals of this ordinance, which is to treat every right-of-way operator equally (Amendment 7).

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## Requested Amendments to Proposed Section 12.15

1. The fee schedule is not compliant with federal law because the city is required to either: a) conduct a thorough cost analysis of what the actual and reasonable cost to the city are attributable to the presence of a small wireless facility (“SWF”) in the ROW, or b) charge the FCC Order’s safe harbor rate of \$270 per SWF per year. It is important to note that the proposed SWF rate of \$1408/year is many times higher than the rates charged by more than a dozen of Portland’s peer cities, including Seattle, Bellevue, Spokane, San Francisco, Los Angeles, Oakland, Sacramento, Denver, Salt Lake City, Boise, and many others. These jurisdictions—many of whom were co-litigants in the City of Portland’s legal efforts to overturn the 2018 FCC Order have largely reverted to the FCC safe harbor rate of \$270/yr. Verizon is requesting that the proposed fee schedule be amended as follows:

*Small Cells-Wireless Facilities:*

~~*\$1,408 per attachment (2023 rate) in the Rights-of-Way (as these terms are defined in Chapter 12.15). The attachment fee shall increase 3% annually on January 1 of each year, rounded to the nearest dollar, beginning January 1, 2024.*~~

*\$270 per SWF per year until such time as the City, using methodologies similar to those used by other Western jurisdictions with more than 500,000 residents, conducts a thorough, independent analysis of the actual and reasonable costs to the city directly attributable to the presence of a SWF in the ROW.*

2. The definition of a SWF proposed in the code is not consistent with the FCC definition in the 2018 SWF Order. Verizon is requesting the following amendment to Section **12.15.030 Definitions**:

~~*R. “Small wireless facility” or “small cell” means any wireless communications facility that (i). Has antennae no more than 3 (three) cubic feet in volume that is mounted on a structure 50 (fifty) feet or less in height, including the antennae; (ii). Mounted on structures no more than ten percent (10%) taller than other adjacent structures; (iii). Do not extend existing structures on which they are located to a height of more than fifty (50) feet or by more than ten percent (10%), whichever is greater; (iv). All equipment including all antennae and any pre-existing*~~

*R. “Small wireless facility” means a “small wireless facility” as defined by the FCC in 47 C.F.R. § 1.6002(l), as may be amended or superseded.*

3. The most recent ROW code draft added a section stating that gross revenue fees for wireless providers would be charged on a per facility basis. This language makes no sense, as gross revenue-based fees are by definition, based on the revenues earned in the city, not the number of facilities. Verizon is proposing a clarifying edit to **12.15.090 A, Utility-Specific Provisions** that would make it clear that per facility charges would be imposed on wireless providers *in lieu of* gross revenue:

~~*6. Gross revenues*~~ *Wireless access fees for wireless communications facilities utility operators will be calculated as a fee on a per-facility basis, based on the number and type of wireless communications facilities in the ROW, rather than as a percentage of the licensee’s gross revenue.*

*7. Wireless communications facilities utility operators will pay an annual attachment fee on a per-facility basis as set forth in the Right-of-Way Access Fee Schedule.*

4. The proposed ROW Ordinance severely limits the term of the ROW license to one year with four renewals. Five years is simply too short a time to provide the certainty needed to plan and build out the network for the long-term needs of the city. Verizon requests the following edit to **Section 12.15.080**

**Licenses:**

*G. Term... The license will have an initial term of ~~one (1)~~ five (5) years with five (5) automatic one (1)-year renewals for a total term of ~~five (5)~~ ten (10) years. After its term, the license will terminate on December 31.*

5. The indemnity provision is unlike any found in other Oregon jurisdictions in that it would require the wireless carriers to indemnify the city without regard to fault or negligence for any suit brought against the city and its leaders based on anyone's objection to the mere presence of wireless facilities in the ROW. Verizon requests the following edit to **Section 12.15.100(B)(1) Insurance and Indemnification:**

*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 presence of the facilities or~~ 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. Licensee's indemnification obligation shall not extend to liability to the extent caused by the negligence or willful misconduct of the city or its officers, agents, boards or employees or any other third party.*

6. The City is proposing to move from an annual payment system to a quarterly system that will increase the administrative burden on the city and the carriers needlessly, and that would not apply equally to all carriers until 2029. Verizon is requesting an amendment to **Section 12.15.140 Fee to Access and Use the Right-of-Way:**

*C. Unless otherwise agreed to in writing by the City, the fees set forth in this Section will be paid ~~quarterly, in arrears,~~ annually for each ~~quarter~~ year during the term of the license...*

7. None of the provisions of the proposed ROW Ordinance will apply to any entity with an existing franchise until its expiration. In the case of AT&T, which was granted a franchise in 2019, this would allow them and their customers to enjoy up to a fifteen-year advantage over its competitors. Selectively applying this code is in direct contradiction to one of the supposed 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. It also exposes the city to the risk of claims of unreasonable discrimination among carriers under the Telecommunications Act. The effective date of the wireless provisions of this code should be postponed until all of the active wireless franchises have expired.

## **Verizon Comments on Portland ROW Code**

- Two page summary of Verizon's concerns as of May 25, 2023.
- Verizon also shared detailed redlines of the draft code on May 18, 2023, reflecting a discussion with Andrew Speer and Nancy Thorington on May 17, 2023. This lengthy document has been shared with council offices via email. It is our understanding that none of the requested changes were included in the code.

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## Verizon Comments on Portland ROW Code

May 25, 2023

Verizon submitted detailed redlines to the City on 5/18/23 reflecting our discussion with Andrew Speer and Nancy Thorington on 5/17/23. The substance of these updated redlines are very similar to redlines that Verizon submitted in November of 2022, and redlines submitted in concert with AT&T, T-Mobile, and TC America in April of this year. Staff requested our most recent comments in advance of them finalizing the Code packet for Council by the end of 5/19/23.

It is our understanding that none of the requested changes were included in the code. Below is a list of our top concerns, which for the most part have been the same concerns we have been expressing since the beginning of this ROW code process in September 2021.

### Issue: Overly Broad Language that Would Permit Future Councils and Department Directors Wide Latitude for Alternate Interpretations of Key Policy Provisions

For example: City staff confirmed that they do not intend to charge lessees a percentage of gross revenue, but--notably-- also *did not* express a willingness, when asked, to make that distinction clear in the proposed code.

That unwillingness to clarify provisions and definitions was a common theme of the discussion: Whenever a request was made by Verizon to be more specific on a particular provision, so as to eliminate ambiguity and/or the potential for future staff and program administrators to adopt different interpretations, staff kept- referring to "the universe of the possible" to justify the need for that ambiguity (they would say flexibility) because "we [the City] don't know what we don't know." The argument was made by staff that there could be "new technologies" that could be covered by this code in the future

Verizon's position is that this ambiguous language could be--regardless of the stance of *current* staff and the Council on these issues--be interpreted in a different way by *future* City Councils or ROW program/Department administrators. This deliberate policy ambiguity further increases business uncertainty, which will result in continued underinvestment by network providers. **The City of Portland's ROW Code should be specific and be responsive to technology and society as it exists today, instead of being purposefully broad to account for some imagined or hypothetical future.**

### Issue: Non-compliant Wireless ROW Fees

City staff continue to try and separate the ROW code and the ROW fees as issues. They intend to bring the Fee Schedule-- which charges \$1,408/pole annually for wireless facilities-- to council in the Fall, months after their ROW code is presumably adopted. Staff reiterated that the fees simply represent a percentage of staff time, and are in-line with other Oregon jurisdictions. He said he is working on a cost analysis justifying the fees, but will not have them before the code goes to Council on June 7.

Verizon's position is: (1) the code and the fees are inextricably linked, (2) that we've been asking for a cost justification from the City for *years*, and (3) the fees are way out of line when compared to any other peer jurisdiction in the Western US.

**Language must be added that sets standards/guidelines that wireless fees in Portland be set based on actual, proportional annual cost of having attachments on vertical infrastructure in the right-of-way, using cost study methodology employed by other cities to calculate their attachment/ROW costs (e.g. San Francisco, LA, others).** Portland went all the way to the Supreme Court in an effort to allow them to charge the exact same rates they are trying to continue charging—and lost. Nearly two years after the Supreme Court ended the case, it's long past time for the City to comply with the law.

**Issue: Indemnification against City liability for even "the presence of facilities" in the ROW**

City staff did not express any willingness to remove this provision and limit indemnification to traditional reasons (malfeasance, negligence, etc). The justification appears to be that RF conspiracists and pseudoscience adherents are going to sue them anyway, and we (the carriers) should bear that cost.

**The City's indemnity language validates and encourages litigation based on pseudoscience and conspiracy theories. It will make costly and frivolous lawsuits more likely. Indemnity should be limited to malfeasance, negligence, and actual wrongdoing.**

**Issue: Limiting the ROW License to a total of five years, with a renewal required annually for the duration**

City staff also did not give on this issue. Staff claimed that this is in line with other OR jurisdictions.

**As with other issues such as fees, the City must realize it is not competing with other Oregon jurisdictions for businesses, talent, investment, and tax revenue; it is competing with Seattle. With Salt Lake City. Boise. Sacramento. A myopic focus on Oregon suburbs and small towns does Portland and its residents and businesses a disservice.**

**Issue: Equal Treatment of Carriers (those with and without existing franchises)**

One significant change from the previous version of the proposed code is that its provisions wouldn't apply to any entity with an existing franchise, until the expiration of that franchise. In the case of AT&T, who was granted a franchise in 2019, this would allow them and their customers to enjoy more than 5 years—longer than the entire length of Verizon's first license, per this code-- of financial advantage over its competitors. **Selectively applying this code is in direct contradiction to one of the supposed 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.**

## **Wireless Industry Response to Portland Office of Community Technology Right-of-Way FAQ updated July 13, 2022**

- While City staff have continued to share this FAQ as recently as this week, it has not been corrected or updated to reflect the detailed feedback shared with then-OCT Director Elisabeth Perez and all council offices in September 2022.
- As noted in the cover letter jointly signed by representatives of AT&T, Verizon, and T-Mobile, “many of the statements in the most recent FAQ are demonstrably inaccurate, including statements about what activities will be subject to fees, statements about the codes in nearby cities, and statements about the fees the City can charge under federal law.”

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September 20, 2022

Ms. Elisabeth Perez, Director  
Office for Community Technology  
City of Portland

Mayor Ted Wheeler  
Portland City Council

Re: **Joint Wireless Industry Response to Right-of-Way Code FAQ (updated July 13, 2022)**  
Draft Right-of-Way Code and Administrative Rules

Dear Ms. Perez, Mayor Wheeler, and Commissioners:

Enclosed is a joint response from AT&T, T-Mobile, and Verizon (the “Wireless Carriers”) to the FAQ that the City of Portland’s Office for Community Technology (“OCT”) sent out to stakeholders on August 4, 2022.<sup>1</sup>

Since the City announced its intention to change the right-of-way (“ROW”) code in 2021, the Wireless Carriers have emphasized the importance of informing stakeholders about what is (and is not) changing, as well as providing meaningful opportunities for engagement. Providing timely and accurate information about the changes is critical to allow stakeholders a fair opportunity to provide informed comments. In particular, it is essential for the City to provide accurate information to the public on how the proposed fee structure compares to the City’s prior model and the codes adopted in other Oregon cities.

OCT’s decision to release FAQs about the ROW code and fee changes reflects a recognition of the need for transparency, which the Wireless Carriers strongly support. However, many of the statements in the most recent FAQ are demonstrably inaccurate, including statements about what activities will be subject to fees, statements about the codes in nearby cities, and statements about the fees the City can charge under federal law. To ensure that the City Council has accurate information on these important aspects of the proposed code changes, the Wireless Carriers have prepared the attached response to the FAQ.

It is the Wireless Carriers’ hope that correcting the FAQ’s misstatements will allow for more constructive engagement between the City and stakeholders, and further allow for future

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<sup>1</sup> The FAQ may be found here: <https://www.portland.gov/sites/default/files/2022/right-of-way-code-faq.pdf>

September 20, 2022

Page 2

comments on the proposed changes to be based on an accurate and common understanding of the facts and the law.

Thank you for your consideration of the enclosed.

Sincerely,

*Tim Halinski*

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Tim Halinski  
Corporate Counsel for T-Mobile



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



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Amir Johnson, Director – Oregon  
External & Legislative Affairs for AT&T

Enclosure: Wireless Industry Response to Portland OCT Right-of Way FAQ

## Wireless Industry Response to Portland OCT Right-of Way FAQ

The following responds to portions of the Portland OCT Right-of-Way FAQ updated July 13, 2022,<sup>1</sup> with excerpts from the FAQ (and a prior version of the FAQ) appearing in blue text and responses following in black text.

### Why now?

In recent years, many neighboring cities have adopted similar regulations, and Portland is behind:

- 2012: Gresham
- 2013: Oregon City
- 2016: Beaverton, Gladstone, Happy Valley, Hillsboro
- 2017: Milwaukie, Tualatin
- 2018: Corvallis, Sherwood
- 2019: Tigard, Lake Oswego
- 2021: Woodburn

The City's proposal builds on this regional work:

- Proposal is based on the codes adopted by several of these cities and the model ordinance published by the League of Oregon Cities
- Maja Haium, Deputy City Attorney, helped to write the 2016 Beaverton code
- Reba Crocker, right-of-way consultant to the City, currently assists Tigard, Woodburn, and Lake Oswego, and previously drafted and managed right-of-way codes for the cities of Milwaukie and Gladstone

### **Wireless Industry Response:**

Wireless industry representatives agree that many Oregon cities have moved away from negotiating franchises and instead use a license process that simplifies regulating the occupation of the right-of-way ("ROW"). The wireless industry can support such a simplification of the process; however, wireless providers disagree that many Oregon cities impose fees for ROW "use" in the manner proposed in Portland.

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<sup>1</sup> The FAQ may be found here: <https://www.portland.gov/sites/default/files/2022/right-of-way-code-faq.pdf>

## Wireless Industry Response to Portland OCT Right-of Way FAQ

Wireless providers are not typically assessed fees based on a percentage of their gross revenues for merely being a customer of an entity that owns or operates utility facilities installed in the right of way, such as fiber and power providers, as is proposed for Portland with the ROW code change.

In fact, a majority of the cities that OCT references in the most recent FAQ issued by the City of Portland, dated July 13, 2022 (“FAQ”), **do not charge** a percentage of revenue fee for ROW “use” where wireless entities’ only facilities in the ROW are attached to existing structures. Overwhelmingly in Oregon, wireless providers are charged only a flat, annual fee per pole for their wireless attachments.

**Beaverton** – The FAQ references the Beaverton code and notes that Portland's current City Attorney worked on that code in her prior role with Beaverton. The Beaverton code’s Right-of-Way Fee section provides in relevant part that “[a] utility operator whose only facilities in the ROW are facilities mounted on structures within the ROW, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the ROW, shall pay the attachment fee set by city council resolution for each attachment.”

Beaverton’s annual attachment fees in 2022 are:

- 1) Annual Attachment Fee to City facility in ROW: \$303.88 under the city's “FCC Compliant MLA fee schedule” or \$750 (for first 2 years) and \$281 for the third year under an accelerated MLA, with relevant annual increases to follow.
- 2) Annual Attachment Fee to non-city facility in ROW: \$500.

These attachment fees are charged **in lieu of** the 5% of gross revenue fee imposed on other owners and users of utility facilities in the ROW.

**Under the draft ordinance proposed by Portland, both attachment fees and a gross revenue fee would be imposed on wireless carriers for each service they provide. The Beaverton ordinance operates very differently than the proposed Portland ordinance.**

**Other cities** – Many of the other cities cited in the FAQ also depart from the application and structure of the proposed Portland ordinance as follows:

- **Gresham** – Current fee schedule exempts wireless facilities from gross revenue payments and instead charges \$270 annually for Small Wireless Facilities (“SWF”) in the ROW and \$5,000 annually for macros in the ROW. This is consistent with Gresham’s ROW code, under which ROW fees for wireless facilities are to be set by resolution and charged

## Wireless Industry Response to Portland OCT Right-of Way FAQ

annually, in contrast with the percentage of revenue fees otherwise charged quarterly for ROW use.<sup>2</sup> Compare GRC 6.30.110(3)(d) with -(3)(a) and -(7).

- Happy Valley – Like Beaverton, Happy Valley’s code has a ROW Use Fee section with an exception for utility operators whose only facilities are attached to third-party structures in the ROW.<sup>3</sup> According to Happy Valley’s 2022 fee schedule, the annual fees for such installations are \$5,000 for each macro attachment and \$270 for each SWF.
- Hillsboro – The city has a similar code format but excludes commercial mobile radio service (wireless phone service) from application of its ROW use fee,<sup>4</sup> and lists no gross revenue fee in its fee schedule. Hillsboro has per-attachment fees of \$1,700 per year for each SWF. (No SWF have been installed in Hillsboro.).
- Tualatin – Like Beaverton, the city code has a separate provision on attachment fees applicable to utility operators whose only facilities are attached to third party structures in the ROW,<sup>5</sup> and it has not historically collected a gross revenue fee from wireless providers with no facilities in the ROW who lease or purchase power and fiber from third parties in the ROW. For attachments to structures in the ROW, there are annual attachment fees of \$655 per attachment.
- Sherwood – Like Beaverton, there is no recurring gross revenue fee for operators whose only facilities are attached to third party structures in the ROW.<sup>6</sup> There is an annual flat fee of \$5,000 for macros and \$675 for SWFs in the ROW on third-party structures.

**Reversals** – In response to the Telecom Act and ORS 221.515, the League of Oregon Cities (the “League”) contracted with the law firm Beery, Elsner & Hammond LLP (then known as Beery & Elsner), to draft a Master Telecommunications Infrastructure Ordinance (2000 MTIO) which moved regulation of right-of-way use from a franchise model to a licensing model. In 2010, after several court challenges to the model code, the League again commissioned Beery Elsner to revise and update the model code. In connection with the new model code, Beery Elsner provided a guidance document that advised in 2010 (prior to the 2018 Small Cell Order and other relevant changes in the law) that:

While cities have the authority to charge wireless service providers a fee based on gross revenues earned within the City, a City may choose to exclude from the revenue-based privilege tax wireless providers with antennas on existing poles in

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<sup>2</sup> Compare GRC 6.30.110(3)(d) with -(3)(a) and -(7).

<sup>3</sup> HVMC 12.05.130(B).

<sup>4</sup> See HMC 9.48.020 (definitions, including of definition “communications service”)

<sup>5</sup> TMC 3-6-120

<sup>6</sup> SCO 12.16.120.A.3.

## Wireless Industry Response to Portland OCT Right-of Way FAQ

the right of way, but who do not otherwise occupy the rights of way. These providers could instead be subject to a flat fee per pole as an alternative to the gross revenue-based fee that would otherwise apply to wireless companies with antennas in the right of way. The following language is recommended for such an approach: *"For utility operators with no facilities in the rights of way other than facilities mounted on structures within the rights of way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the rights of way, the privilege tax shall be a flat fee per structure or such other fee determined by resolution of the City Council."*<sup>7</sup>

As noted above, many of the city codes listed above do contain the Beery Elsner exception language and they assess flat fees in lieu of gross revenue fees on wireless providers. While advertised as emulating those cities, in fact **Portland's proposed code is taking a risky and untested approach (e.g., in the manner in which it defines a small wireless facility) that departs from the language and practice of the City of Beaverton and many Oregon cities by double charging wireless providers for purported use of the right-of-way.**

## Gross Revenue

**Concern: The rate is changing.**

**Response:** The rate is not changing. If the City ever wanted to adjust the rate, that would require a vote by the Council. Under the proposal, the City will continue to impose a fee of 5% of gross revenue on utilities.

### Wireless Industry Response:

The City's FAQ has reframed this issue in a way that avoids addressing the substantial change in the fees it will now charge wireless providers for ROW "use."

Wireless providers have not suggested that the 5% rate is changing to another percentage.

The real issue is that the City will impose a percentage of revenue fee based on an alleged "use" of the ROW (by wireless providers contracting for backhaul services) **in addition to site-specific fees** for small and macro wireless facilities physically occupying the right-of-way.

The City's September 2021 FAQ said this about ROW fee payments:

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<sup>7</sup> Emphasis is added.

## Wireless Industry Response to Portland OCT Right-of Way FAQ

### 3. What will NOT be different?

The charge for the use of the right-of-way – 5% of gross revenues – will remain the same whether you are currently subject to a franchise agreement or utility license fee. Payments will still be made quarterly. (How the 5% is calculated will be clearly spelled out in the administrative rules – not in the new code.)

**If you pay by foot or attachment, your cost will still be calculated in this way – and you will still be able to make payments annually.**<sup>8</sup>

The December 2021 and April 2022 revisions of the FAQ include that same assertion. Wireless providers pay the City by attachment for their ROW use/franchise fees. According to the above description, and in the fall 2021 stakeholders meeting with City of Portland staff, wireless industry representatives were advised that their ROW fees **would not increase**.

It is not a rate change that is of concern; it is the City's plan to now charge for activity that the City has not charged in the past, activity that is not directly related to the City's costs of maintaining the ROW.

## Legal Framework

**Concern: The City violates the 2018 FCC Order, “Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment,” by imposing fees above and beyond “costs-based fees” on services other than small wireless facilities.**

**Response:** First, the 2018 FCC order does not apply to services other than small wireless facilities; it only applies to small wireless facilities. Companies who attach small wireless facilities in the right-of-way are subject to the 2018 FCC order, and these include New Cingular LLC (ATT), Verizon, T-Mobile/Sprint, and Crown Castle.

Furthermore, fees over \$270 are allowed if one of these criteria is met:

- Reasonable approximation of costs
- Costs are reasonable
- Costs are non-discriminatory

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<sup>8</sup> Emphasis here is added.

## Wireless Industry Response to Portland OCT Right-of Way FAQ

The City is confident that the small wireless facility rates are in full compliance with the 2018 FCC order.

### Wireless Industry Response:

As explained below, the City’s FAQ is incorrect as the source, scope, and application of the federal fee limitation.

The September 2018 Declaratory Ruling and Third Report and Order (the “*Small Cell Order*”)<sup>9</sup> left no doubt that the limitation on fees applies to small wireless facilities, as defined by the FCC. In the *Small Cell Order* the FCC concluded that “ROW access fees . . . 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.”<sup>10</sup> 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.”<sup>11</sup>

The FCC’s limitation of small wireless fees was expressly rooted in broader “principles” established by the FCC’s interpretation of federal statutes—namely 47 U.S.C. §§ 253(a), 253(c) and 337(c)(7)—that apply to other wireless deployments, and also to wireline facilities in the ROW.<sup>12</sup> Under those principles, any gross revenues-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 in the ROW, 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. Reflecting the statutory principles, the *Small Cell Order* expressly recognized that gross revenues-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).”<sup>13</sup>

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<sup>9</sup> *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), *cert. denied*, 594 U.S. \_\_\_, 141 S.Ct. 2855 (June 28, 2021)(No. 20-1354) (“*Small Cell Order*”).

<sup>10</sup> *Small Cell Order*, para. 50.

<sup>11</sup> *Small Cell Order*, para. 70.

<sup>12</sup> See *Small Cell Order*, para. 55 (expressly noting that the principles are derived from its statutory analysis).

<sup>13</sup> *Small Cell Order*, para. 70 (emphasis added).

## Wireless Industry Response to Portland OCT Right-of Way FAQ

Furthermore, the City asserted above that fees exceeding the FCC safe harbor rate of \$270 per facility annually are permitted if **one of** the three criteria listed above is met. That is incorrect. All three criteria must be met. In the 2018 FCC Order, the FCC made plain that “there should be only very limited circumstances in which localities can charge higher fees consistent with the requirements of Section 253.” The FCC clearly stated that a locality may exceed the presumptively reasonable fee level only when that locality shows that those fees are “(1) a reasonable approximation of costs, (2) those costs themselves are reasonable, **and** (3) are non-discriminatory.”<sup>14</sup> It is evident that the FCC intended to require a locality to show each criterion was met, not just one.

Moreover, the *Small Cell Order* requires that a locality **show** that it has satisfied all three of the criteria. The wireless industry has repeatedly requested a cost study from the City that supports the conclusion that the proposed fees are cost-based, reasonable and non-discriminatory. City staff has not been forthcoming with such support for its plan to increase fees; indeed, the only cost study document the industry has received to-date was secured through a public records request. That document, a 2018 Right-of-Way cost study conducted by Ashpaugh & Sculco CPAs, PLC and Sawvel and Associates, Inc., simply does not support the City’s assertion that its fee schedule is a reasonable estimate of reasonable and non-discriminatory fees.

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<sup>14</sup> *Small Cell Order*, para. 50 (emphasis added).

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## **Cost Studies**

- **City of Los Angeles independent analysis of fees**
  - Consultant SCI “worked closely with Bureau staff to identify the pertinent tasks and staff positions performing those tasks, and to determine the appropriate number of hours and the full-loaded costs for each” on a per-pole basis.
  - The analysis details the City’s justifiable costs with a narrative description (for example, “an average day’s scope” for annual inspections by a staff engineer is 25 poles, and the City calculates a “17% chance that a streetlight will require a system repair” each year based on the number of repairs citywide over the past three years). The analysis also includes detailed worksheets breaking down costs for administration, inspection, maintenance, life and system loss (depreciation/replacement), and community impact.
  - Total annual fees per pole are \$953 or \$519 depending on pole type.
  
- **City of San Francisco MLA Fee Breakdown**
  - SFMTA and San Francisco Water Power Sewer detailed replacement costs, lifespan, maintenance budget, and other pole specifics, and arrived at a total per-pole cost.
  - Pole space utilized by carriers was factored in as 35%, and the total cost per pole apportioned accordingly.
  - Total annual fees per pole are \$270, \$361.77, or \$813.73 depending on pole type.

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Date: April 26, 2019  
To: Norma Isahakian, Bureau Director, LA Bureau of Street Lighting  
From: Jerry Bradshaw, Senior Engineer  
Subject: **City of Los Angeles Street Lighting – Co-Location Fee & Analysis**

In conjunction with SCI’s work for the Bureau of Street Lighting with planning for a ballot proceeding and other financial analyses, we have been engaged to perform an independent analysis of the co-location fees the Bureau charges cell phone carriers for placing their equipment on street light poles. SCI’s task was to review the current fee structure and provide a method to update those fees. The goal was to ensure that the Bureau has the most appropriate fee structure in place in anticipation of a heavy volume of co-location applications in the coming years. SCI was also asked to review what other municipalities charged for similar services.

SCI met with Bureau staff on November 29, 2018 to begin the review process and to receive initial co-location information. SCI and Bureau staff continued to exchange information and ideas over the following months to develop a reasonable method to develop a co-location fee structure based on actual costs for the Bureau to oversee and manage the co-location program.

**BACKGROUND**

The City of Los Angeles’ street lighting system is funded through annual assessments paid by benefiting property owners. These assessments pay for the operation and maintenance of the street lighting system. The City’s system is not funded from the City’s general fund. In accordance with Proposition 218 it is illegal to use assessment funding for any purpose other than the operation and maintenance of the system. The funds cannot be used to pay for the impact of the attachment of communication equipment to these poles. The attachment of communication equipment to streetlights impact the pole’s life, the maintenance of these poles and requires that the City inspect these poles on a regular basis to decrease any liability issues that these attachments may pose.

The Bureau provided SCI with the current fee structure. This was reported to have been based on costs and was broken into four cost elements: Administration, Inspection, Maintenance and Life and System Loss. These elements are shown in the summary below. The Bureau had no substantial back up documentation for these fees, which had been in place for several years.

<b>Existing Annual Co-Location Fee</b>	
Admin	\$ 170
Inspection	180
Maintenance	30
Life & System Loss	430
<b>Total Annual Fee</b>	<b>\$ 810</b>

One additional element the Bureau was interested in considering was that of community impact. As the co-location equipment has been getting installed in neighborhoods, there has been concern about the visual impact to the community. By adding a community impact element to the fee structure, some funding could be channeled into mitigation efforts.

SCI also reviewed two standard documents pertaining to this topic:

- Policy, Specifications, and Procedures for Communications Installations on Street Lighting Poles; and
- Master Permit for Attachment of Communications Equipment to the City of Los Angeles Street Lighting Poles (template)

### APPROACH

A recent ruling from the Federal Communications Commission (FCC) limits co-location fees to \$270 per pole per year unless supported with justifiable costs. SCI recommends a zero-based approach to such justification, which is the approach taken for this analysis. SCI worked closely with Bureau staff to identify the pertinent tasks and staff positions performing those tasks, and to determine the appropriate number of hours and the full-loaded costs for each. Other non-personnel costs were also provided by the Bureau.

SCI concurred with the four original elements and the addition of the community impact element as the basic structure for the fee analysis. From there, an Excel worksheet/matrix was built to track costs and make the necessary calculations. The first three elements are primarily made up of labor costs. Each task was arranged across various staffing positions and assigned appropriate man-hours. A description of those tasks is summarized below:

- Administration – The administrative function is centered around the quarterly invoice process and associated maintenance of support data. Administrative functions include invoice processing, budget coordination and preparation, coordination with Bureau of Accounting, Controller, and Office of Finance. Additional duties include; community outreach; resolution of calls and complaints; IT maintenance and development of the database. Seven staff positions were assigned hours for each quarterly cycle over six tasks. By applying fully-loaded personnel costs, this resulted in a quarterly cost. That was expanded to an annual amount which was spread over an assumed 500 poles to arrive at a cost per-pole per-year.
- Inspection – The annual inspection function is centered around an average day's scope of 25 poles inspected. A staff engineer is the primary staff position for these inspections with some oversight and support by other positions including an occasional field crew. The resultant costs were spread over the assumed 25 poles to arrive at a cost per-pole per-year. The City has allowed the attachment of communication equipment to the street lighting system. Any equipment within the public-right-of-way increases the City's liability in the case of equipment failure or other claims filed against the City for the permission of the attachment. It is for this reason the City will inspect these attachments at a rate of every two years. This inspection will include a visual inspection of the pole's structural

integrity looking for any deterioration, the inspection of anchor bolts. luminaire arm and fixture will be evaluated.

- Maintenance – The maintenance function is centered around the chance that field crews may need to respond to a trouble call such as power interruption or a pole knock-down. Most such trouble calls do not involve the presence of co-location equipment, but when it does it can increase the level of response needed or amount of work required (e.g. removing co-location equipment and storing it for the carrier due to a knock down; de-energize the co-location equipment to complete proper safety procedures during a system repair). Currently the Bureau averages 37,621 streetlights repaired over the last 3 years. This equates to 17% chance that a streetlight will require a system repair. Also, according to the last 3-year trend there is a 5% chance that a streetlight will suffer a knockdown.

The presence of the colocation equipment on an existing streetlight or within an Integrated Pole presents additional challenges when in need of service. During a service repair the field crew will be required to de-energize the communication equipment through phone coordination with the carrier. Also, the field crew will be required to use specialized safety equipment as they go up to the unit to ensure of complete de-energization of the communication equipment.

The colocation attachments can range from 60W to 600W. This additional load consumes electrical capacity otherwise reserved for the City's street lighting circuits, and at times additional services will be required to alleviate the load and chronic circuit repair issues. It is estimated that 5% of the circuits used will require a new service annually. This cost is factored into the calculations.

The final three elements (of Life & System Loss and Community Impacts) were calculated on different bases.

- Life & System Loss – The cost of Life & System Loss was calculated based on an accelerated depreciation and the current capital cost of a new streetlight pole of \$12,000. It was assumed that the typical 75-year life would be reduced to 20 years due to additional structural loading under dynamic (e.g. wind) conditions. The City's existing street lighting poles were designed in the mid 1900's and have not been updated to account for additional equipment added to the pole. The additional equipment will impact the galvanization of the poles allowing rust and eventual deterioration to reduce the expected life of 75 years to an estimated 20 years. The communication equipment weight ranges from 20 to 90 pounds. This will also impact the survivability of the poles during a seismic event. The failure of the pole during a seismic event may result in knockdowns or other failures of the pole and increase the liability of the City. The replacement of the pole at 20 years has been calculated into the annual fees. The resulting differential in annual depreciation was used as the cost of this fee element.

The life and system loss value will be adjusted for those locations that have Integrated poles. Integrated poles will be installed to provide an enclosure for the communication

equipment to be placed inside the pole. These poles will be manufactured specifically to withstand the weight of the communication equipment and meet all seismic codes and regulations. These poles require additional labor to install and or remove during a knockdown event. The Life and System Loss element will be removed for those sites with an Integrated pole. An additional cost of two hours of labor per knockdown for Field crews will be added to the knockdown cost for Integrated poles.

- Community Impact –Two factors were used to try to calculate the impact to communities from the colocation program.
  - Revenue Loss - The poles that are used for the attachment of this equipment will not be available for the attachment of banners. The attachment of these banners generates revenue for communities to be used to improve their neighborhoods. It is currently estimated that the loss of revenue for one pole is \$36 annually (\$3 per month).
  - Aesthetic - A cost of \$5 will be added per pole per year to account for any negative aesthetic impact. It is recommended that these funds be added and sent to Council Offices as the City does with the banner program.
- Digital Inclusion Fund – As the City and its communication partners proceed to provide a robust communication network for visitors, residents and businesses it should be recognized that this improvement may exacerbate the current existing digital divide of disadvantaged communities. Some may argue that the increase of the network throughout the City would increase the opportunity for disadvantaged communities to have increased access. Nevertheless, if many Angelenos now find it unaffordable to have high speed broadband at home, the roll out of 4G and 5G would not improve their access. In addition, communication carriers may have a tendency to buildout in more affluent areas while providing minimal infrastructure support in disadvantaged communities.

The City of Los Angeles is unable to mandate that the deployment of small cells would be done equally in all areas of the City. It seems apparent that in return for the use of City space in the public right of way, the imposition of a fee component, to be placed in a digital inclusion fund, would be an appropriate measure toward providing all Angelenos the tools to access broadband in their home. It is known that the lack of internet access limits opportunities for these residents in disadvantaged areas and also deters businesses from starting up or moving to underserved areas of the City. By establishing a Digital Inclusion Fund with proceeds from the co-location fee, the digital divide will be narrowed further incentivizing communication carriers to buildout in the City equally by increasing clients in these areas.

While the fee component for this is difficult to calculate, a nominal fee of \$50 per pole per year would be conservatively deemed a reasonable amount to provide support through either financial, education or other means.

### RECOMMENDED ANNUAL CO-LOCATION FEE

Based on the approach detailed above and the fully-loaded personnel costs provided by the Bureau, SCI calculated the estimated cost to the Bureau for permitting communication facilities to be co-located on City street light standards. The final estimated costs are used to support the recommended annual co-location fee of ~~\$903~~ as shown below. Detailed worksheets are included in the attached pages.

Recommended Annual Co-Location Fee		
	Existing Poles	Integrated Poles
Admin	\$ 104	\$ 104
Inspection	128	128
Maintenance *	190	196
Life & System Loss *	440	-
Community Impacts	41	41
Digital Inclusion Fund	50	50
<b>Total Annual Fee</b>	<b>\$ 953</b>	<b>\$ 519</b>

\* For Integrated Pole installations:

- Life & System Loss element is not applied
- Two hours of Field Crew labor is added to Maintenance

It is also recommended that the Bureau increase the fee annually to keep pace with inflation. One of two indexes are recommended: Consumer Price Index (US Bureau of Labor and Statistics) or the Construction Cost Index (Engineering News Report).

Finally, as the Bureau meets the challenge of an increased number of co-location applications and installations, it would be prudent for them to track these hours and costs on an ongoing basis and revisit the assumptions made at regular intervals.

### WHAT OTHER CITIES CHARGE FOR CO-LOCATION FEES

SCI researched a sampling of co-location fees charged by other municipalities. As is customary in this industry, the fee amounts tend to be kept somewhat confidential. That is to say that we could not find fee levels published on municipal websites or other publicly available documents.

Several other articles and communications carriers' websites provided a general idea of what the industry is experiencing in general. These annual co-location fees ranged from \$750 to \$1,500 per site. The fees charge by the Los Angeles Bureau of Street Lighting falls well within that range.

#### Attachments

- Tables 1 – 4; Computation Worksheets for first four elements
- Table 5; Summary of Fees charged by various jurisdictions

**Table 1 - Administration Worksheet**

		Notes / Assumptions	Staff Hours										TOTALS
Task	Staffing Level	Mgr / Sr Engr	Program Engr	Constr Engr	Staff Engr	Field Crew	Field Crew OT-only	Admin Supervisor	Admin Staff	GIS Specialist	GIS Supervisor	Other Costs	
	Hourly Rate	\$ 150.37	\$ 136.41	\$ 121.21	\$ 100.03	\$ 310.79	\$ 228.84	\$ 118.20	\$ 72.26	\$ 98.70	\$ 113.33		
<b>Administration</b>		<i>quarterly basis</i>											
Annual Invoicing Process		lease, construction, energy											
	Invoice Prep & Mail							9	24				
	Receivable Tracking							9	18				
	Issue penalties								6				
	Review Agreements	4	8	4				4	8				
	Maintain Data Base		15						15				
	IT Support									7	3		
	TOTAL Admin Hours	4	23	4	0	0	0	22	71	7	3		134
	TOTAL Admin Costs	\$ 601.48	\$ 3,137.43	\$ 484.84	\$ -	\$ -	\$ -	\$ 2,600.40	\$ 5,130.46	\$ 690.90	\$ 339.99	\$ -	\$ 12,985.50
	Frequency per year												4
	Spread over poles served												500
	<b>Admin Cost Per Pole</b>												<b>\$ 103.88</b>

**Table 2 - Inspection Worksheet**

		Notes / Assumptions	Staff Hours										TOTALS
Task	Staffing Level	Mgr / Sr Engr	Program Engr	Constr Engr	Staff Engr	Field Crew	Field Crew OT-only	Admin Supervisor	Admin Staff	GIS Specialist	GIS Supervisor	Other Costs	
	Hourly Rate	\$ 150.37	\$ 136.41	\$ 121.21	\$ 100.03	\$ 310.79	\$ 228.84	\$ 118.20	\$ 72.26	\$ 98.70	\$ 113.33		
<b>Inspection</b>		<i>Daily Batch of 25</i>											
Pre-Inps Office Activity													
	Review & Set Sched	0.1	0.25	0.5	0.5								
	Pull Data				1								
Field Activity		2 man-days											
					16	3							
Post-Inps Office Activity													
	Post data and file				1.5								
	Follow up with Actions			0.5	1								
	Review Carrier Response				1								
	TOTAL Inspection Hours	0.1	0.25	1	21	3	0	0	0	0	0		25.35
	TOTAL Inspection Costs	\$ 15.04	\$ 34.10	\$ 121.21	\$ 2,100.63	\$ 932.37	\$ -	\$ -	\$ -	\$ -	\$ -	\$ -	\$ 3,203.35
	<b>Inspection Cost Per Pole</b>	25											<b>\$ 128.13</b>

**Table 3 - Maintenance Worksheet**

Task	Notes / Assumptions	Staff Hours											TOTALS
		Mgr / Sr	Program				Field Crew	Admin	GIS		GIS	Other Costs	
		Engr	Engr	Constr Engr	Staff Engr	Field Crew	OT-only	Supervisor	Admin Staff	Specialist	Supervisor		
Hourly Rate		\$ 150.37	\$ 136.41	\$ 121.21	\$ 100.03	\$ 310.79	\$ 228.84	\$ 118.20	\$ 72.26	\$ 98.70	\$ 113.33		
<b>Maintenance &amp; Trouble Calls</b>													
<i>Based on a 500-pole batch</i>													
Trouble Calls:priority given	500 units have a 17% chance of a call = 85 calls per year. Hours are aggregated for 85 calls.		2	3		212	10	1	20	1			
Service Calls						42.5							
Training/Safety Courses			4	4	4	4			1				
Safety Equipment Purchase										1			\$250.00
Circuit Impact	500 units have a 5% chance of requiring a new service (~\$1,500) = 25 new services. Costs are aggregated for 25 new services and amortized over 20 years.											\$1,875.00	
Knock-Downs	500 units have a 1% chance of a knockdown = 5 knockdowns per year. Hours and costs are aggregated for 5 knockdowns.			1		14			2			\$1,750.00	
TOTAL Mtce Hours		0	6	8	4	272.5	10	1	24	1	0	326.5	
TOTAL Mtce Costs		\$ -	\$ 818.46	\$ 969.68	\$ 400.12	\$ 84,690.28	\$ 2,288.40	\$ 118.20	\$ 1,734.24	\$ 98.70	\$ -	\$ 3,875.00	
Mtce Cost Per Pole	500											\$ 189.99	
Adjustment for Integrated Poles	Two hours per pole = 10 hours per five poles					10						\$ 3,107.90	
						\$ 3,107.90						\$ 3,107.90	
												\$ 6.22	
												\$ 196.20	

**Table 4 - Life & System Loss Worksheet**

Street Light Pole Depreciation	
New Pole	\$ 3,500.00
New Foundation	7,100.00
Labor	1,000.00
Eq	400.00
<b>Total Cost</b>	<b>\$ 12,000.00</b>
Annual Cost (75 yr)	\$ 160.00
Annual Cost (20 yr)	\$ 600.00
<b>Differential Annual Cost</b>	<b>\$ 440.00</b>

**Table 5 - Survey of Other Municipalities' Fees**

Location	State	Population	Utility Provider	Carrier Provider	Smart Poles or Cells	Annual Lease to Carrier's Cost	Source of Information	
Los Angeles	CA	4,000,000	1.LA Department of Water & Power 2.Southern California Edison 3.Southern California Gas Company	1.Verizon 2.AT&T 3.Sprint 4.Tmobile	Smart Poles	\$1,000/annually per pole	<a href="https://www.techrepublic.com/article/how-la-is-now-saving-9m-a-year-with-led-streetlights-and-converting-them-into-ev-charging-stations/">https://www.techrepublic.com/article/how-la-is-now-saving-9m-a-year-with-led-streetlights-and-converting-them-into-ev-charging-stations/</a>	
					Smart Node		<a href="http://ene-hub.com/site/los-angeles/">http://ene-hub.com/site/los-angeles/</a>	
San Diego		1,420,000	1. San Diego Gas & Electric	1.Verizon 2.AT&T 3.Sprint 4.Tmobile	Small Cells		<a href="https://www.crowncastle.com/communities/san-diego-ca">https://www.crowncastle.com/communities/san-diego-ca</a>	
San Jose		1,035,000	1.Pacific Gas & Electric	1.Verizon	Small Cells	\$800/annual average per site + \$175 attachment fee/ each	<a href="file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(6).pdf">file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(6).pdf</a>	
						2. AT&T	\$750/annually per site	<a href="file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(2).pdf">file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(2).pdf</a>
						3. Mobilite (Sprint)	\$1,500/annually per site for 5 years + 3.0% inflation escalator beginning year 6	<a href="file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(3).pdf">file:///C:/Users/Aaron.Williams/Downloads/Memorandum%20(3).pdf</a>
San Francisco		884,363	1.Pacific Gas & Electric 2.San Fracisco WATER/POWER/SEWER	1.Verizon 2.AT&T 3.Sprint 4.Tmobile				
Fresno	527,438	1.Pacific Gas & Electric	1.Verizon 2.AT&T 3.Sprint 4.Tmobile	Small Cells	City shall be entitled to 75% of recurring gross payments (minus attachment fees)			



# Cost-based Application Fees, Rent for Poles, One-Time Construction Fees, and MLA Fee

For New MLA discussions

# Application Fee \$2,000

Reasons for fee changes:

1. Due to FCC, shift in review process to MTA/PUC
  1. Very low Planning fee (\$5K for 9 apps v. \$7K for 150 apps)
  2. No DPW permit fee
2. Includes City Atty and PUC Engineering in fee
3. Correct overhead rate applied
4. Higher labor rates

MTA POLE LICENSE APPLICATION FEES				PUC POLE LICENSE APPLICATION FEES			
Original MTA		2021 MTA		Original PUC		2021 PUC	
Department	Cost Per App	Department	Cost Per App	Department	Cost Per App	Department	Cost Per App
Engineering	\$250.02	Engineering	\$439.30	Engineering	\$699.36	Engineering	\$909.10
Signal	\$90.32	Signal	\$158.70	Prog Mgmt	\$207.00	Sched + Maint	\$113.11
R/E	\$265.81	R/E	\$549.88			Prog Mgmt	\$379.31
Planner	\$195.60	Planner	\$337.50			Streetlights	\$68.59
		City Atty	\$70.00			City Atty	\$70.00
		Power (PUC Eng.)	\$533.46			Power (PUC Eng.)	\$533.46
	\$801.75		\$2,088.84		\$906.36		\$2,073.57

# Modification Fee \$1,375

Reasons for fee changes:

1. No PUC Eng. fee (sites are already powered)
2. Due to FCC, shift in review process to MTA/PUC
  1. Very low Planning fee (\$5K for 9 apps v. \$7K for 150 apps)
  2. No DPW permit fee
3. Includes City Atty
4. Correct overhead rate applied
5. Higher labor rates

Fee is the average cost between MTA and PUC

MTA MODIFICATION APPLICATION FEES				PUC MODIFICATION APPLICATION FEES			
Original MTA		2021 MTA		Original PUC		2021 PUC	
Department	Cost Per App	Department	Cost Per App	Department	Cost Per App	Department	Cost Per App
Engineering	\$250.02	Engineering	\$439.30	Engineering	\$699.36	Engineering	\$752.57
Signal	\$90.32	Signal	\$158.70	Prog Mgmt	\$207.00	Sched + Maint	\$113.11
R/E	\$265.81	R/E	\$404.66			Prog Mgmt	\$336.80
Planner	\$195.60	Planner	\$337.50			Streetlights	\$68.59
		City Atty	\$70.00			City Atty	\$70.00
	<b>\$801.75</b>		<b>\$1,410.16</b>		<b>\$906.36</b>		<b>\$1,341.07</b>

# Annual Rent

Upon evaluation of the updated costs of poles and maintenance costs, Rent will be \$270 - \$813 per year per pole based on type of pole.

	PUC Steel Pole		PUC Concrete Pole		MTA All Pole	
Avg. Replacement Cost per Pole	15,211.00	USD/Pole	22,211.00	USD/Pole	36,500.00	USD/Pole
Inventory of Poles	15,000	Poles	10,000	Poles	9,800	Poles
Capital Cost All Poles			222,110,000.00	USD	357,700,000.00	USD
Lifespan			30	Years	30	Years
Amortized Annual Capital Costs			7,403,666.67	USD/Yr	11,923,333.33	USD/Yr
Annual Maint. Budget			2,932,500.00	USD/Yr	10,861,000.00	USD/Yr
Total Annual Ownership and Capital Costs			10,336,166.67	USD/Yr	22,784,333.33	USD/Yr
Avg. Annual Cost per Pole			1,033.62	USD/Yr/Pole	2,324.93	USD/Yr/Pole
Pole Space utilized by Carriers			35%		35%	
<b>Avg. Annual Cost per Attachment</b>	<b>\$ 270.00</b>	<b>USD/Yr/Pole</b>	<b>\$ 361.77</b>	<b>USD/Yr/Pole</b>	<b>\$ 813.73</b>	<b>USD/Yr/Pole</b>

# PUC's One-Time Construction Fees

Reasons for the changes:

1. Original one-time fees did not capture all materials and inspection fees
2. Cost-based fees under 2021 MLA will capture fees for power outages, site visits, and materials based upon proper overhead labor costs, which have increased since original assessment

PUC One-time fees - Original			PUC One-time fees - 2021		
Fee Type	Class	Cost	Class	Cost	Fee
Service Connection Fee	Electrical Line	\$440	Electrical Line	\$ 516.05	
Service Connection Material Fee	Electrical Line	\$350	Electrical Line	\$ 400.00	
Service Connection and Material Fee		<b>N/A</b>		<b>\$ 916.05</b>	<b>\$900.00</b>
Foundation Inspection Fee	Electrical Line	<b>\$420</b>	Electrical Line	<b>\$ 516.05</b>	<b>\$500.00</b>
Power outage inspections <b>NEW</b>		<b>N/A</b>	Electrical Line	<b>\$ 516.05</b>	<b>\$500.00</b>
Site visit requests <b>NEW</b>		<b>N/A</b>	Electrical Line	<b>\$ 516.05</b>	<b>\$500.00</b>

# MTA's One-Time Construction Fees

SFMTA Overhead Lines group will continue to separately invoice their costs for DAS services

MTA One-time fees - Original		MTA One-time fees - 2021	
Fee Type	Cost	Fee Type	Cost
SFMTA Overhead Lines Invoice	<b>Variable</b>	SFMTA Overhead Lines Invoice	<b>Variable</b>

# MLA Fee \$7,500

- Note that under prior MLAs, Carriers would pay \$4,500 to MTA and \$7,500 to PUC.
- The 2021 MLA will be a single combined \$7,500.

Original MTA MLA \$4,500		Original PUC MLA \$7,500		2021 New MLA \$7,500	
<u>Department</u>	<u>Costs</u>	<u>Department</u>	<u>Costs</u>	<u>Department</u>	<u>Costs</u>
City Attorney	\$3,444.00	City Attorney	\$6,888.00	City Attorney	\$5,166.00
MTA Staff	<u>\$1,021.80</u>	PUC Staff	<u>\$1,111.01</u>	MTA Staff	\$1,203.04
				PUC Staff	<u>\$1,308.08</u>
<b>Total</b>	<b>\$4,465.80</b>	<b>Total</b>	<b>\$7,999.01</b>	<b>Total</b>	<b>\$7,677.12</b>

# Batch Reservation Fee \$300

- Concept stage
- These figures are contingent upon a mapping system/platform that inventories pole assets
- Additional funding investment needed to kickstart mapping system/platform

MTA Batch Reservation Fee		PUC Batch Reservation Fee	
Engineering	\$70.15	Prog Mgmt	<u>\$336.80</u>
Signal	\$70.15		
Planner	\$84.38		
R/E	<u>\$119.30</u>		
<b>Total</b>	<b>\$343.98</b>	<b>Total</b>	<b>\$336.80</b>

## **City of Portland’s Small Cell Fee Analysis, shared publicly on May 31, 2023**

- This inadequate spreadsheet calculates the percentage of each of several FTE — the BPS director and deputy director, utility program group staff, a city attorney, and a PBOT engineering manager — “allocated to small cells” without specifying what tasks these staff perform related to attachments.
- The total FTE costs based on the above undocumented assumptions (\$660,854) are divided by a count of small cells (the figure noted for Verizon is inaccurate) to arrive at a \$1,456 per cell.
- This does not reflect a reasonable approximation of “direct and actual costs in connection with Small Wireless Facilities, such as the cost for staff to review the provider’s siting application, costs associated with a provider’s **use of the ROW**, and costs associated with **maintaining the ROW itself or structures within the ROW** to which Small Wireless Facilities are attached”—emphasis ours, on examples specified in FCC-18-133. BPS’ June 6, 2023 memo to council seems to acknowledge this, describing the “fee analysis” as capturing “costs associated with administering the franchise and utility license program.”

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## Small Cell Cost Study

Last updated: Apr-23

**Total Annual Small Cell Costs**     \$    660,854

**Annual Costs per Cell**             **\$    1,456**

## Small Cell Count

AT&T                                    179

Verizon                                182

Other                                    93

**Total**                                 **454**

**Bureaus and FTEs who Work on Small Wireless ROW Access and Licensing**

Organization and Position	Notes
<b>BPS</b>	
Director	Percentage of time allocated
Deputy Director	Percentage of time allocated
Franchise Utility License Workgroup	Total cost of the group's cost center is allocated to franchise work, and portion is dedicated to small cells
<b>City Attorney's Office</b>	
City Attorney	Percentage of time allocated
<b>PBOT</b>	
Engineering Manager	Percentage of time allocated

Office/Bureau and FTE Position	Annual Salary	Percentage Allocated to Small Cells	Annual Salary for Small Cell
<b>City Staff</b>			
<b>BPS</b>			
		<a href="http://portlandoregon.gov">798519 (portlandoregon.gov)</a>	
Director	\$ 213,140	5%	\$ 10,657
Deputy Director	\$ 150,698	7%	\$ 10,549
<b>Utility Program (Salary plus loading)</b>			
		<a href="http://portlandoregon.gov">798513 (portlandoregon.gov)</a>	
Utility Program Group	\$ 1,839,692	32%	\$ 588,701
<b>City Attorney's Office</b>			
		<a href="http://portlandoregon.gov">798514 (portlandoregon.gov)</a>	
City Attorney	\$ 208,224	20%	\$ 41,645
<b>PBOT</b>			
		<a href="http://portlandoregon.gov">798504 (portlandoregon.gov)</a>	
Engineering Manager	\$ 186,045	5%	\$ 9,302
		<b>Total cost allocated to small cells</b>	<b>\$ 660,854</b>

Fully Loaded Cost per FTE

## **Wireless Right-of-Way Fee Survey**

- This October 2022 chart outlines ROW use fees, attachment rates, and whether cost studies have been provided, across Portland and 12 other peer West Coast cities.
- Portland has become a national outlier in the way it prices access to its Right-of-Way (R.O.W.) for wireless services. No other major city in the Western US has such high rates. Portland's combined R.O.W. access and Pole Attachment rates are more than 165% higher than those of San Francisco, more than 125% than those of Los Angeles, and at least 700% higher than rates in Seattle, Spokane, Boise, Denver, Salt Lake City, Fresno, and Oakland.

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# WIRELESS RIGHT-OF-WAY FEE SURVEY

OCTOBER 2022

**PORTLAND +  
PEER CITIES IN WESTERN U.S.**

Portland has become a national outlier in the way it prices access to its Right-of-Way (R.O.W.) for wireless services. No other major city in the Western US has such high rates. Portland's combined R.O.W. access and Pole Attachment rates are more than 165% higher than those of San Francisco, more than 125% than those of Los Angeles, and at least 700% higher than rates in Seattle, Spokane, Boise, Denver, Salt Lake City, Fresno, and Oakland.

<b>CITY</b> <i>Population estimate</i>	<b>R.O.W. USE FEE</b>	<b>POLE ATTACHMENT RATE, PER POLE, PER YEAR</b>	<b>COST STUDY PROVIDED?</b>
<b>Portland, OR</b> (proposed) 650,000	\$1,408	\$750	<b>NO</b>
<b>Seattle, WA*</b> 741,000	\$0	\$270	<i>NA: Safe Harbor rate</i>
<b>Bellevue, WA*</b> 150,000	\$0	\$270	<i>NA: Safe Harbor Rate</i>
<b>Spokane, WA</b> 220,000	\$0	\$270	<i>NA: Safe Harbor Rate</i>
<b>Boise, ID</b> 230,000	\$135 (for non-city assets)	\$270 (for city-owned assets, this includes R.O.W. fee)	<i>NA: Safe Harbor Rate</i>
<b>Denver, CO</b> 716,000	\$0	\$200	<i>NA: Safe Harbor Rate</i>
<b>Salt Lake City, UT</b> 210,000	\$0	\$50	<i>NA: Safe Harbor Rate</i>
<b>San Francisco, CA*</b> 875,000	\$0	\$270-\$813, depending on pole type.	<b>YES</b>
<b>Los Angeles, CA*</b> 3,975,000	\$0	\$519-\$953, depending on pole type	<b>YES</b>
<b>Oakland, CA</b> 425,000	\$0	\$270	<i>NA: Safe Harbor Rate</i>
<b>Santa Monica, CA*</b> 95,000	\$0	\$816.84	<b>YES</b>
<b>Fresno, CA*</b> 530,000	\$0	\$270	<i>NA: Safe Harbor Rate</i>
<b>Honolulu, HI</b> 350,000	\$0	\$275	<i>NA: Safe Harbor Rate</i>

(\* = Participants in Portland v. FCC)

**Sophia Steele**

Senior Manager, Government Affairs, Northwest Region

June 2, 2023

Via Email [Andrew.Speer@portlandoregon.gov](mailto:Andrew.Speer@portlandoregon.gov)

Via Online Written Testimony Portal

Mayor Ted Wheeler and  
Portland City Council  
1221 SW Fourth Ave  
Portland, OR 97204

Re: Proposed Updates to Right of Way Code 12.15.090

Mayor Wheeler and Members of the City Council:

The Western States Petroleum Association (WSPA) appreciates this opportunity to provide feedback on the proposed Right of Way (ROW) Code 12.15.090 updates. WSPA is a non-profit trade association that represents companies that produce and refine the fuels and creates the energy we all need now and for the future, including renewables, biofuels, innovative solar and sustainable energy projects, and biofuels. WSPA and our members companies operate in the City of Portland and supply much of the fuel used throughout the State.

We have specific concerns with the provisions addressing the fuel pipelines which are explained in Appendix A. The City of Portland's elected officials and residents have expressed their desire to prioritize clean and safe energy. WSPA and our members share this desire and want to ensure changes in the ROW Code do not prevent or delay our efforts in this shared goal.

The changes currently proposed appear to be duplicative of already established processes and laws. Further, we are concerned there are many unanswered questions and missing details to ensure these changes are beneficial. We would respectfully request these pipeline specific provisions are removed from the proposed ROW Code updates.

We appreciate the opportunity to provide feedback on the ROW Code updates. If you have any questions about the information presented in this letter or Appendix A, please contact me at (360) 352-4507 or via email at [ssteele@wspa.org](mailto:ssteele@wspa.org). I would be happy to discuss our comments with you.

Sincerely,



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Sophia Steele  
Sr. Manager, Government Affairs, NW Region

Cc: Jessica Spiegel, Sr. Director, Northwest Region

## **Appendix A: Concerns with Proposed Updates to Right of Way Code 12.15.090**

As you may know, pipelines provide the safest, cleanest, and most efficient means of transportation of liquid fuels. Proposed Section 12.15.090 in the Right-of-Way Code (the “ROW Code”), however, interferes with the operation and maintenance of existing fuel pipelines, as well as discourages the construction of new pipeline infrastructure. This will not only force more fuel to be transported by truck and train, but also obstruct the terminals’ transition to cleaner fuels and construction of modern, earthquake-resilient pipelines and related facilities.

The ROW Code framework appears to have several deficiencies and could use additional refinement. The licensing and privilege tax approach of the ROW Code contradicts the City Charter’s requirement for individual franchise agreements. The City also impermissibly attempts to implement land use regulations through the ROW Code—regulations that have been overturned twice and are again on appeal to the Land Use Board of Appeals (LUBA).

Given its defects, City Council should not approve the ROW Code at this time. At a minimum, City Council should delete the provisions specific to fuel pipelines and remove pipeline operators from its scope. Below is an outline of a few of the deficiencies in the current proposal.

### **1. The ROW Code appears to contradict City Charter direction that use of public right-of-way be managed through individual franchise agreements.**

Section 10, Article 2, of the City Charter sets out a detailed process for the granting of rights to use the City’s right-of-way through franchise agreements. This method is exclusive. Section 10-201 states, “[e]very franchise hereafter granted shall be expressly subject to all the provisions” in this article. The ROW Code, however, ignores these charter requirements and attempts to establish a general licensing program for use of City right-of-way. The City cannot, however, ignore the detailed requirements in the charter for the granting of franchises by simply calling them “licenses.”

The authorization to place utility or pipeline infrastructure within a right-of-way is a “franchise” right. 12 McQuillin Mun Corp § 34:3 (3d ed); Black’s Law Dictionary (11th ed 2019), “Franchise.” The language in the City Charter reflects this well-known distinction. For example, the two are treated separately in the charter’s enumeration of city powers. Charter Section 2-105(17) provides that licenses may be issued for regulatory or revenue-raising purposes, but can only be valid for up to one year. Conversely, Section 2-105(24) states that the City can authorize the construction and use of “conduits under the streets, lanes, alleys and public places of the City” by private

persons or corporations, but only if they first obtain “as provided in this Charter, a franchise for such business, purpose or use.”

Because the ROW Code conflicts with the City Charter, it is void.<sup>1</sup>

## **2. The fee provisions in the ROW Code violate the City Charter.**

The City Charter states that the compensation for use of right-of-way by private parties—which must be set out in a franchise agreement—must be based on an estimate of the “cash value” and “fair compensation” to the City “for the right” provided. Charter, § 10-209(b).

The ROW Code violates the City Charter by tying the fee for most users of the right-of-way to 5 percent of the business’s revenue, without regard to the extent, location, or nature of the use of the right-of-way. This in no way approximates the fair value of the use of the right-of-way at issue. For covered entities that do not generate revenue in the City, the ROW Code applies in equally invalid fee measure. The charge of \$4.95 per linear foot is not tied to the location or nature of the entity’s use of right-of-way, and is far above fair value in any location, except for perhaps the most extensive utilization of a right-of-way.

## **3. The fee provisions in the ROW Code violate the Dormant Commerce Clause of the United States Constitution.**

The Dormant Commerce Clause of 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.<sup>2</sup>

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 \$4.95-per-linear-foot fee on entities that do not generate revenue in the City is

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<sup>1</sup> *Portland Police Ass’n v. Civil Serv. Bd. of Portland*, 292 Or 433, 440, 639 P2d 619 (1982) (“A city’s charter is, in effect, the city constitution. Any city ordinance, rule, or regulation in conflict with its provisions is void.”) (internal citations omitted).

<sup>2</sup> 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. County of Kent, Mich.*, 510 US 355, 373, 114 S Ct 855, 127 L Ed 2d 183 (1994).

not tied to the value of the right-of-way at issue and is far above a reasonable estimate of the fair compensation that the United States Constitution allows the City to charge.<sup>3</sup>

#### **4. 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,<sup>4</sup> which means an opportunity to be heard “at a meaningful time and in a meaningful manner”<sup>5</sup> prior to termination.<sup>6</sup> 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. The enforcement of the ROW Code specific to fuel pipeline operators is an even more dramatic violation of due-process requirements, subjecting the license to immediate revocation without notice or opportunity to cure. § 12.15.080(N)(1).

#### **5. 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).

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<sup>3</sup> *Western Oil & Gas Ass’n v. Cory*, 726 F2d 1340 (9th Cir 1984), *aff’d per curiam by an equally divided Court*, 471 US 81, 105 S Ct 1859, 85 L Ed 2d 61 (1985); *Shell Oil Co. v. City of Santa Monica*, 830 F2d 1052, 1059 (9th Cir 1987).

<sup>4</sup> 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).

<sup>5</sup> See *Armstrong v. Manzo*, 380 US 545, 552, 85 S Ct 1187, 14 L Ed 2d 62 (1965).

<sup>6</sup> 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.”).

These provisions are clearly land use regulations because they implement standards<sup>7</sup> in the City's comprehensive plan<sup>8</sup> and impact the application of existing zoning code.<sup>9</sup> 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. PCC Ch 33.740.

Moreover, LUBA has already determined twice<sup>10</sup> that this prohibition does not appear to comply with the City's comprehensive plan. The City cannot avoid these LUBA decisions by adopting the prohibition within a new right-of-way code.

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

Finally, ambiguous provisions throughout the ROW Code render it unduly vague. First, due process under the 14th Amendment of the United States Constitution requires law imposing penalties to set out what conduct will result in liability and be sufficiently clear to be understood by persons of common intelligence.<sup>11</sup> Further, city code cannot be so broad that it allows unelected city staff to essentially set policy—an impermissible delegation of the legislative authority granted to City Council in the City Charter.<sup>12</sup>

The ROW Code violates these principles. It is replete with ambiguous terms and unbounded delegations of authority to the director of the City's Bureau of Planning and

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<sup>7</sup> *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.

<sup>8</sup> ORS 197.015(11) ("Land use regulation" means any local government zoning ordinance \* \* \* or similar general ordinance establishing standards for implementing a comprehensive plan.").

<sup>9</sup> See *Port of Hood River v. City of Hood River*, 47 Or LUBA 62, 68 (2004).

<sup>10</sup> See *Columbia Pac. Bldg. Trades Council v. City of Portland*, 76 Or LUBA 15 (2017); *Columbia Pac. Bldg. Trades Council v. City of Portland*, LUBA No. 2020-009, 2020 WL 6544130 (Or LUBA Oct. 30, 2020).

<sup>11</sup> 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).

<sup>12</sup> See *Anderson v. Peden*, 284 Or 313, 325, 587 P2d 59 (1978); *Pre-Hospital Med. Servs., Inc. v. Malheur Cty.*, 134 Or App 481, 492, 896 P2d 585 (1995); *Warren v. Marion Cty.*, 222 Or 307, 314, 353 P2d 257 (1960).

Sustainability,<sup>13</sup> including determining what gross revenue will be taxed.<sup>14</sup> Staff actions under this broad delegation of power are not subject to City Council review. § 12.15.170(E).

## 6. Conclusion.

For the reasons outlined above, City Council should not approve the ROW Code as drafted. At a minimum, City Council should delete the provisions applicable to pipelines and remove pipeline operators from its scope. The ROW Code is based on state law and regulations adopted by other local jurisdictions that relate only to utilities and communication service providers, not transportation fuel pipelines. There are only a handful of fuel pipelines within the City's right-of-way, which should continue to be governed by franchise agreements specific to their unique circumstances—as mandated by the City Charter.

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<sup>13</sup> For example, multiple definitions that are unlimited in scope. ROW Code, § 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 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)).

<sup>14</sup> Row Code, § 12.15.030(I): “Gross revenue’ means any and all revenue, of any kind, nature or form \* \* \*. Examples of gross revenue may be identified in administrative rules.”



June 6, 2023

The Honorable Ted Wheeler, Mayor  
The Honorable Rene Gonzalez, Commissioner  
The Honorable Mingus Mapps, Commissioner  
The Honorable Dan Ryan, Commissioner  
The Honorable Carmen Rubio, Commissioner  
City of Portland  
1221 SW Fourth Avenue  
Portland, OR 97204

**Re: Proposed Adoption of Right-of-Way Code and Fee Schedule**

Dear Mayor Wheeler and Commissioners:

CTIA<sup>①</sup>, the trade association for the wireless communications industry, is committed to working with the Office of Community Technology (“OCT”) to revise the City’s Right-of-Way Code and related Fee Schedule governing wireless and other communications infrastructure that is installed along Portland’s right-of-way (“ROW”).<sup>②</sup> We are writing in that cooperative spirit to ask that the Council defer adopting the revised Code and fee schedule that OCT is scheduled to present at the upcoming June 7 public hearing,<sup>③</sup> and instead direct OCT to address the serious concerns we and our members have raised about the Proposed Code and Fees so that we and OCT can work to resolve these concerns. We believe this process will yield an improved Code and fee schedule that will advance the City’s interests and promote broadband investment that will benefit Portland’s residents.

CTIA’s members are eager to work with Portland to bring the benefits of advanced “5G” and broadband wireless services to the City’s residents, schools, businesses and institutions. Our members are investing tens of billions of dollars in wireless networks nationwide to provide that connectivity. In 2021 alone, wireless carriers invested nearly \$35 billion in private funds to grow and improve the nation’s networks.<sup>④</sup> This investment also fuels economic growth, including in Oregon, where the wireless industry supports more than 50,000 jobs and

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<sup>①</sup> CTIA – The Wireless Association® (“CTIA”) ([www.ctia.org](http://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.

<sup>②</sup> We understand that OCT has recently become a part of the Bureau of Planning and Sustainability, and that the Bureau will present at the June 7 meeting. Given that the previous communications this letter references were with OCT, to avoid confusion this letter refers to OCT, but we commit to working with the Bureau toward a final Code.

<sup>③</sup> The proposal that OCT will present to you on June 7 (the “Proposed Code and Fees”) contains both a new ordinance, entitled “Utility Access to and Use of the Right-of-Way,” which would be codified as amended Chapter 12.15 of the Portland City Code, and a proposed Annual Rights-of-Way Access Fee schedule.

<sup>④</sup> <https://www.ctia.org/news/u-s-wireless-investment-hits-record-high>



generates \$17.3 billion in GDP growth. We 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.

We have made numerous recommendations to OCT on how its initial draft of the Code and fee schedule could be improved to advance broadband services while preserving the City's objective to ensure safe and productive ROW occupancy that fully compensates the City for its costs to manage the ROW. We also raised multiple legal and practical problems with OCT's drafts of the Code and fee schedule. However, the Proposed Code and Fees documents do not resolve most of those problems.

CTIA supports OCT's stated mission, which is "to champion[ ] investments and public policy in a rapidly changing communications technology, utility, and broadband landscape to keep our local communities economically and culturally healthy."<sup>5</sup> However, CTIA is concerned that the Proposed Code and Fees will delay and hinder the availability of 5G and broadband wireless services to Portland's residents. Rather than advance OCT's mission, the Proposed Code and Fees would deter investments in upgraded infrastructure and would also impede expanded competition that would benefit all wireless consumers.

The following issues illustrate our concerns. We respectfully believe that they demonstrate that the right path forward is to direct OCT to address them and then return to the Council with a revised proposal.

### **1. The Proposed Code and Fees Would Improperly Regulate Providers That Do Not Own ROW Facilities.**

The Proposed Code and Fees would apply numerous obligations on service providers that do not own or operate facilities in the ROW. Those obligations impose unjustified costs and burdens and will discourage and delay the provision of new or expanded high-speed wireless services across Portland.

Service providers often obtain capacity on equipment that is owned and operated by third parties. They may lease or purchase fiber capacity from a fiber optic operator for backhauling traffic and obtain capacity on a facilities-based provider's antenna structures and resell capacity to retail customers. But they build or install no equipment in a locality's ROW. They thus impose no burdens or costs on Portland, which already regulates (and receives compensation from) operators that do construct and operate physical facilities in the ROW.

The Proposed Code and Fees, however, explicitly 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."<sup>6</sup> A wireless service provider that does not build, own or operate equipment in Portland's ROW would thus have

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<sup>5</sup> OCT website, <https://www.portlandoregon.gov/oct/57502>.

<sup>6</sup> OCT, "Right-of-Way (ROW) Code Project Overview, <https://www.portland.gov/bps/com-tech/franchise-utility/row-code/about-row-code>. See, for example, Section 12.15.080.A, which would require all "utility operators" to obtain a license, and that term is defined in Section 12.15.030 to mean "any person who uses, owns, places, operates or maintains a utility facility within the City ...." (emphasis added).



to comply with the Proposed Code and Fees’ numerous requirements, including securing a license and complying with numerous insurance, audit, and other requirements.<sup>7</sup> A service provider with no facilities in the ROW also could be subject to substantial fees, as discussed in Section 2 below. But there is no legitimate basis to impose fees, licensing mandates and other regulatory burdens on providers that do not own or operate facilities in the ROW.

OCT and the Proposed Code’s sweeping references to 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 communications service provider “uses” the ROW simply by obtaining services from facilities-based providers.<sup>8</sup>

CTIA thus opposes any effort to subject wireless providers that do not own or operate facilities in the ROW to the Proposed Code as arbitrary and excessive regulation. We have repeatedly raised this concern with OCT, and the latest draft includes some revisions that we understand are intended to provide that the City will not charge wireless providers a percentage of revenue fee on the basis that they use third-party owned backhaul (fiber) facilities in the ROW. However, OCT has still declined to clarify that wireless providers will not be charged percentage of revenue fees on *some other basis*, asserting that the City needs flexibility in the Proposed Code to charge wireless providers additional types of fees in the future, apparently under Section 12.15.080.K.1, through which we understand the City will attempt to charge both the lessor (owner/operator) of ROW facilities and all lessees of those same facilities. OCT has declined to clarify that wireless providers will only be charged on a per-facility basis, based on the number and type of wireless communications facilities each owns and operates in the right-of-way.

OCT has not explained why the City should extend rules aimed at regulating entities that install infrastructure along ROW to entities that do not install such infrastructure. OCT should delete all provisions that subject providers that do not own or operate ROW facilities to the Proposed Code’s requirements.

## **2. The Proposed Fees are Unreasonable and Unlawful.**

A critical issue that all communications providers face is the fees that localities may charge for ROW occupancy. High up-front fees, and particularly annual recurring fees, can deter investment in upgraded or expanded service to customers by making that investment economically infeasible.

Federal law thus limits the fees that localities can charge, because Congress recognized that excessive ROW fees can impair the provision of communications services. Section 253(a) of the Communications Act (the “Act”)

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<sup>7</sup> See, e.g., Sections 12.15.080.A.2 (requiring that any “utility operator,” which is defined as any person that “uses” a utility facility in the ROW 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.”).

<sup>8</sup> See, e.g., *AT&T Communications of the Southwest, Inc. v. City of Austin*, 40 F.Supp.2d 852 (W.D. Tex. 1998).



preempts state and local laws that “prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.”<sup>9</sup> Courts have also 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.<sup>10</sup> Additionally, Section 253(c) only permits fees that recover “fair and reasonable compensation” for ROW use.<sup>11</sup>

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 deployment.<sup>12</sup> 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 it 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. OCT has provided no such justification.

A federal appeals court affirmed the FCC’s interpretation of Sections 253 to limit localities’ fees.<sup>13</sup> 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.”<sup>14</sup>

The Proposed Code and Fee Schedule contained at Exhibit B, however, violate these federal guardrails in multiple ways. First, the proposed recurring fee of \$1,408 fee for small wireless facilities is many times the presumptively reasonable amount the FCC identified. CTIA and its members have asked OCT to explain how this fee was determined and demonstrate, as it must, that the fee is based on its direct ROW management costs.<sup>15</sup> While OCT has continually asserted that it will eventually justify these high fees, in the two years it has been developing revisions to the Code, it has not provided any details until a Wednesday, May 31, 2023, email transmitted to our members a “Small Cell Fee Analysis.” This fee analysis raises more questions, such as why so much upper-level management (Director and Deputy Director of BPS) and attorney time is allocated to

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<sup>9</sup> 47 U.S.C. § 253(a).

<sup>10</sup> *City of Portland v. United States*, 969 F.3d 1020 (9<sup>th</sup> Cir. 2020), *cert. denied*, 141 S.Ct. 2855 (2021). See also, *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).

<sup>11</sup> 47 U.S.C. § 253(c). 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.

<sup>12</sup> *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”).

<sup>13</sup> *City of Portland v. United States*, 969 F.3d 1020 (9<sup>th</sup> Cir. 2020).

<sup>14</sup> *Id.*, 969 F.3d at 1039.

<sup>15</sup> 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 OCT should clarify how the fee would operate, its amount is in any event presumptively unlawful.



annual ROW maintenance, as it relates specifically to the presence of small wireless facilities in City streets. The City's costs of franchise negotiation are paid by the applicant, but still, the fee analysis assumes a city attorney will spend a separate 2.4 months a year on work related to small wireless facilities in the ROW.

Such a high small wireless 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.<sup>16</sup>

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.<sup>17</sup> 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 Proposed Code and Fee Schedule suggests that OCT intends to charge providers that merely use other providers' ROW facilities – but deploy no facilities themselves – an annual usage fee of 5% of gross revenues.<sup>18</sup> This approach clearly is not based on actual ROW use or Portland's ROW maintenance costs, and thus has been repeatedly invalidated by the courts.<sup>19</sup>

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 for "Communications" 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.<sup>20</sup> Summarizing the

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<sup>16</sup> 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.

<sup>17</sup> 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 Portland's costs.

<sup>18</sup> OCT initially planned to charge annual fees based on gross revenues for all communications service providers. Following industry comments explaining why that approach was unlawful, OCT has apparently abandoned that approach – at least with respect to wireless facilities owned and operated in the ROW but has left unclear whether it will seek to charge revenues-based fees for wireless providers that lease capacity from fiber optic providers – an action that we believe would be unlawful.

<sup>19</sup> See e.g., *Puerto Rico Telephone Co. Inc. v. Municipality of Guayanilla*, 450 F.3d 9, 22 (1st Cir. 2006); *XO Missouri, Inc. v. City of Maryland Heights*, 256 F. Supp. 2d 987, 994 (E.D. Mo. 2003).

<sup>20</sup> *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



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).”<sup>21</sup> Simply put, the proposed gross revenue fee would violate federal law.

We thus ask that the Council direct OCT to (i) revise its proposed Fee Schedule to make it consistent with federal law, and (ii) include in a further revised Code the following language: “All recurring fees for wireless facilities (including small wireless facilities), and all one-time license application fees for such facilities, must be no higher than the fee amounts that the FCC determined were presumptively reasonable, or be supported and documented by a showing that these fees are necessary to compensate the City for its reasonable, actual, direct costs to manage the ROW.”

### **3. Other Provisions in the Proposed Code are Unreasonable and Unjustified.**

CTIA and its members have submitted multiple letters and comments to OCT objecting to other provisions that OCT drafted, to no avail. We have proposed alternative language that fully protects the City’s interests in managing ROW occupancy. However, for the most part, OCT has not accepted our proposals, nor explained why it has ignored our concerns. Again, we believe the right course is for the Council to direct OCT to work with industry to seek to address those concerns. For example:

12.15.080.K.1. 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. (While the provision states that “consent will not be unreasonably withheld, conditioned, or delayed,” it does not identify any situations where denial of consent would be reasonable, leaving impermissible discretion with OCT.) 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.K.1 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.

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 with existing wireless communications facilities.” While CTIA does not object to

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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.”

<sup>21</sup> Wireless Broadband Order at ¶ 70.



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," and to provide that facilities can be collocated "if feasible." It should also condition collocation on the existing provider and new provider mutually agreeing that the new equipment can safely be installed.

12.15.100.B.1. This provision imposes an unfair indemnification obligation on all service providers that obtain a license to occupy the ROW. It states that the licensee must indemnify the City for any claims "arising out of, resulting from, during, or in connection with, or alleged to arise out of or result from the presence of the facilities or the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the licensee ... ." Indemnification provisions typically protect against wrongful or negligent acts. In contrast, OCT's provision would compel providers to indemnify the City even for claims that are based merely on providers' "presence" in the ROW. That is, even though Portland has licensed the provider and approved its "presence," if the city is sued based on that presence, the licensee would bear all of the City's costs. This is unfair and unreasonable because indemnification should not apply to lawful conduct. The language should be deleted.

In sum, the Proposed Code and Fees raise serious legal and policy issues. CTIA is concerned that the Proposed Code and Fees would discourage and delay broadband infrastructure deployment in Portland – in stark contrast to the recognition of government policymakers nationwide that deployment should be accelerated to meet the public's rapidly increasing need for access to high-speed broadband. We thus respectfully request that the Council not adopt the Proposed Code and Fees, and instead direct OCT to resume working with communications service providers to revise its proposal.

Sincerely,

Jeremy Crandall  
Assistant Vice President  
State Legislative Affairs

cc: Donnie Oliveira  
Andrew Speer

**Portland City Council Meeting - Wednesday, June 7, 2023 2:00 p.m.**

<b>Agenda Item</b>	<b>First Name</b>	<b>Last Name</b>
471-01	Alex	Leupp
471-02	Jon	Isaacs
471-03	TRE	Hendricks
471-04	Alan	Galloway
471-05	Jeremy	Crandall (CTIA)
471-06	Christine	Crowe (CTIA)
471-07	Daniel	Schweizer
471-08	Sophia	Steele
471-09	Skip	Newberry
471-10	Bridgecrane	Simcha