November 15, 2021

VIA EMAIL TO: comtech@portlandoregon.gov

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

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

Dear Ms. Perez:

Thank you for taking the time to talk to my colleague, Gayle Doty, and Mitch Cohen about the RIght-of-Way Draft your office is developing. This letter provides our comments on it.

Background

Alaska Communications System Holdings, Inc. (Alaska Communications), is a provider of broadband and managed IT service to business and residential customers in Alaska, and is the parent company of WCI Cable, Inc. (WCI), Hillsboro, Oregon. WCI operates the Oregon part of a fiber optic cable system that connects Alaska Communication's Alaska broadband system to the continental United States. The system's route crosses the City of Portland. In 1998 WCI was granted a franchise (Ordinance No. 172750) by the City of Portland to construct, operate and maintain telecommunications facilities (fiber optic cable and associated wires, cables, ducts, conduits, vaults, etc.) of up to 60,000 linear feet under and over the City's streets, along a route through the City beginning on the westside at NW Springville Rd and Skyline Blvd and ending in downtown Portland, as depicted on a diagram (Exhibit A to the franchise agreement). The WCI franchise was renewed by the City in July 2013 (as Ordinance No. 186165) for a ten-year period set to expire in September 2023.

Under WCI's franchise agreement WCI pays the City an annual linear per-foot fee based on the length of its' "system," a term that is defined in the agreement (WCI Franchise §2.2(O)). As built, the system measures 51,431 linear feet. The route and length of the system is depicted on "as-built" maps WCI filed with the City after construction of the system was complete and which WCI is required to update, as necessary (WCI Franchise §§6.1. and 6.4). The route and length of the system within the City was confirmed by a recent audit conducted by the City.

Although the total length of the WCI system is 51,431 linear feet, under a "lease" exclusion (§2.2(O)) contained in all of the City's franchise agreements with telecommunications companies that pay the per-foot linear fee, WCI does not report or pay fees to the City on the part of its' system that is housed in 29,019 lf of conduit rented from another franchisee, Zayo Group, LLC (Zayo Group operates under Ordinance No. 186501). Instead, Zayo Group, on a gross revenue basis, compensates the City for use of the right-of-way occupied by the conduit.

WCI also has lease agreements involving other fiber located in the City. Under one such agreement WCI leases fiber it owns to TATA Communications (America), Inc.;[1] part of the fiber leased by WCI to TATA runs through the Zayo Group conduit. As in the case of WCI, the conduit owner, not TATA, is responsible for payment of compensation to the City.

In addition, WCI leases dark fiber from TATA and has a dark fiber lease with Zayo Group involving fiber that is separate from the WCI fiber that is the subject of the WCI franchise agreement. WCI is not required to pay fees to the City on the fiber it leases from TATA or from Zayo Group, instead the fiber/conduit owners pay those fees.

Comments

Our comments on the draft code are as follows:

1. The new code should retain the lease exclusion or provide another, comparable rule for multiple users of the same section of right-of-way. As described above, part of the WCI-operated cable system in Portland runs through conduit owned by another telecommunications company and that is used by at least three companies, the owner, Zayo Group, and two lessees, WCI and TATA. Under the current rules, only Zayo Group (the owner) is liable for payment of franchise fees to the City—leaseholders are excluded from the fees. The City thus "collects only once," from the company that secured use of the right-of-way and installed and owns the facilities, and not from others who, under agreement with the owner, merely use (lease) the facilities.[2]

This system for charging telecommunications companies for shared use of the public right-of-way has existed since at least the late-1990s, the time at which WCI (and many other) telecoms first contracted with the City to lay cable in the Portland streets. It reflects the unique way (in contrast to other utility companies) in which telecoms are able to approach use of the public right-of-way, in which shared use among competitors is both feasible and common and benefits both the companies and municipalities, minimizing construction and its' attendant costs and disruption to the public.

[1] TATA operates in Portland pursuant to Ordinance No. 185905.

[2] In a sense, telecommunications companies that lease facilities in the public right-of-way are treated no different than the other end-users of the facilities, *i.e.,* the retail customers the companies serve, all of whom effectively make use of the facilities and benefit therefrom, but none of whom are required to directly compensate the City for such use.

Unfortunately, it appears the proposed code would, perhaps unintentionally, eliminate this established compensation arrangement. Thus, unlike the City's current franchise agreements with telecommunications companies, the proposed code does not provide an explicit lease exclusion (or other rule) for shared use of facilities. Rather, it states more generally that the right-of-way access fee (measured by linear feet or gross revenues) applies to every person that *owns* utility facilities or that *uses* facilities in the City, whether or not the person owns the facilities. (Draft code, §§12.15.100.A, 12.15.030.P and 12.15.030.E) Taken at face value, this would seem to mean that both owners and lessees of facilities in the right-of-way will be required to pay fees with respect to the same facilities. And if so, the City no longer will collect only once, but will be in a position to collect multiple times, from both the owner and each user of the facilities placed in the right-of-way.

When we met you indicated that it was not OCT's intention to increase fees by means of adoption of the new code, but rather merely to standardize and streamline OCT's rules and procedures for collecting right-of-way fees This seems consistent with OCT's FY 2021-22 budget request,[3] which states (at page 4) that while the proposed change from the current fee structure to a licensing code may cause some payers to see differences, OCT expects that the large institutional payers that comprise the majority of current utility license fee revenues received for use of the public right-of-way will not see "significant differences," and that OCT is still evaluating whether the change would have a material impact on total revenues collected by the City. However, you also indicated that you were not certain of exactly how the fee provisions would apply in the case of multiple users of the same section of right-of-way.

If the new code, in fact, eliminates the current lease exclusion, and no other exclusion or accommodation is made for those, such as WCI, who are affected by the change, the impact on WCI and others thereby affected will be very "significant." To start with, in the case of WCI, the absence of the exclusion apparently would require WCI to include in its rate calculation the section of its system that runs through the Zayo Group conduit. If so, WCI would expect to see a more than doubling of its fees. Moreover, elimination of the lease exclusion presumably would require that WCI also pay fees on the fiber within the City that WCI leases from Zayo Group and TATA. Doing so would result in an even more significant increase in the fees paid by WCI, to a level three or four (or more) times the present amount. And other telecommunications companies, such as TATA, would be similarly impacted.

One of the stated the purposes (§12.15.020) of the proposed code is to ensure that the City is "fully compensated" for its' costs in granting and managing access to and use of the right-of-way by those seeking such access and causing the costs, and to secure "reasonable compensation" from those who generate revenue from facilities placed or used in the right-of-way. We see no reason why the current system, whereby the City contracts for and receives compensation from one party – the party who places and owns facilities in the right-of-way – does not "fully" and "reasonably" compensate the City and otherwise achieve the stated goals of the new code. Nor do we see how charging multiple times for use of the same facility in the right-of-way is in any way consistent with these goals, as opposed to providing a windfall to the City.

[3] https://www.portland.gov/sites/default/files/2021/oct-fy21-22-requested-budget-review.pdf

We find the absence of a lease exclusion in the proposed code difficult to comprehend, not only because the exclusion serves such an important purpose, but also because the information (FAQs) OCT provided with the draft code language does not even note its absence or, as might be expected when such an important change is proposed, provide an explanation or justification for making the change and an estimate of the additional revenues for the City, and thus cost to operators, the change is expected to produce.[4] And, it would be ironic – and may put WCI and others similarly situated at a competitive disadvantage – if, as OCT expects, the proposed switch to a licensing code has virtually no impact on large institutional users of the public right-of-way who currently pay the majority of fees, while at the same time impacting smaller users, such as WCI, so significantly.

For these reasons we believe the new code should retain the lease exclusion and that there is no good reason to eliminate it, other than the purpose to increase revenues collected by the City to an unreasonable level.

When we met, we discussed, as an alternative to the lease exclusion, a "pro ration" rule, whereby multiple users of the same facilities located in the public right-of-way would end up paying only a fraction of a single per-foot linear fee, for example, if there are three users with similar usage, each would pay only 33% of the standard fee. However, while a pro ration rule would be of some benefit to WCI, it occurs to us that such a rule would not fully shield WCI (and others similarly situated) from experiencing a significant increase in fees if, for example, it resulted in WCI being required to pay fees (even at a reduced level) with respect to the Zayo Group conduit and the dark fiber it leases from Zayo Group and TATA, none of which currently is subject to fees. Additionally, a pro-ration rule would be extremely difficult to apply given differing fiber counts, electronics, and usage by each participant.

2. Amplify provisions on how length of facilities will be determined. As drafted, the code does not address how the length of an operator's facilities will be determined; instead, the draft code (in §12.15.100.B.) merely states that an operator who does not serve customers in the City "will pay the linear per-foot fee" set by the City Council. We believe the proposed code would be much improved by providing more detail, similar to WCI's current franchise agreement, on the linear per-foot fee, such as an indication that the length of the system will be based on a map, and some explanatory language, such as:

> "The linear per-foot fee will be based on the length of the operator's utility facility in the right-of-way."

We also suggest that a current franchisee, such as WCI, who already has provided the City with the required documentation on the length of its facilities in the public right-of-way should, in a sense, be "grandfathered," so that upon transitioning to the new licensing code the franchisee

[4] As noted already, the OCT FY 2021-22 budget requests states that OCT was at the time still evaluating the revenue impact of adoption of the proposed code. If, as proposed, the code does not retain the lease exclusion, we think it only fair that at a minimum the City consider delaying its implementation until after OCT has put together and made public a reasonable estimate of the combined financial impact on operators such as WCI of eliminating the exclusion.

would not be required to again submit the same information to the City. (This last point perhaps could be handled by administrative rule adopted after the code is enacted by the City Council.)

3. Streamline definition of "right-of-way". The proposed definition in code §12.15.030.N of the term "right-of-way" could be improved. As drafted, it does not really define the term, not only because it contains the qualifier "includes, but is not limited to" (words that should be deleted), but also because it merely defines the term by cross-reference, first to the definition of the term "street" in City Code section 17.04.010, which in turn cross-references to the City Charter, apparently to the definition of "street" in Charter §9-101. Rather than defining a right-of-way in this convoluted manner, it would be better to simply set forth a straightforward definition, such as the one that the City of Beaverton adopted in its' ordinance on Utility Facilities in Public Rights of Way (§4.15.050.K.).[5]

4. Specify amount of linear per-foot fee and mechanism for adjusting the fee. WCI's current franchise agreement (in §3.1) states an initial dollar amount ($3.63 in calendar year 2013) for the linear per-foot fee and provides thereafter for an annual inflation (CPI) adjustment. The proposed ordinance (§12.15.100.B.) merely states that the linear per-foot fee will be set by City Council ordinance. We believe the proposed code would be improved by specifying in the code itself (and not by separate ordinance) both the amount of the linear per-foot fee that will apply upon adoption of the code and the mechanism that will be used for making subsequent adjustments to the fee.

* * * *

Thank you for the opportunity to comment on the proposed licensing code. We understand that in response to the feedback OCT has received from others and now from us, you intend to produce a revised draft code that will be available early next year for additional comment. We look forward to working with you further on this matter.

Very truly yours,

Lars Danner

Lars Danner
Deputy General Counsel

[5] https://beaverton.municipal.codes/BC/4.15). The definition in the Beaverton ordinance apparently was taken without change from §5 of the "Master Utility Right of Way Ordinance" (2010) developed by the League of Oregon Cities, which appears as Appendix C to the League's "Telecommunications Tool Kit" (available at: https://www.orcities.org/application/files/5815/7421/0547/Telecom_Tool_Kit.pdf).

November 15, 2021

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

Via Email

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

Dear Elisabeth and Jillian,

We write to you on behalf of AT&T, T-Mobile, and Verizon (hereinafter, the "Telecommunications Providers") as stakeholders in the draft Utility Access to the Right-of-Way code (Chapter 12.15) currently under consideration by the City of Portland ("City").

The Telecommunications Providers share serious concerns about the draft ordinance. At our meeting with the City on October 26th, the Telecommunications Providers posed many questions regarding process and requested reasonable foundational information regarding the draft ordinance, including the proposed method to calculate the right-of-way access fee, how pole attachment fees would be integrated in the new right-of-way access assessments, and how the City plans to avoid double charging operators that do not own or control facilities in the right-of-way.

From the City's response, it is clear that the requested information necessary for understanding and meaningfully assessing the proposed ordinance will not be forthcoming prior to the current comment period's November 15th deadline. The draft ordinance, as currently proposed, is confusing, internally inconsistent, and at times contradictory to what we have understood from City staff. Additionally, it lacks critical provisions required for implementation; not everything can or should be left to regulations. Moreover, some elements of the ordinance appear contrary to federal law. Without the threshold information requested by the Telecommunications Providers at the meeting, it is not possible to prepare meaningful comments on this draft.

The Telecommunications Providers are also very concerned about the lack of an iterative and transparent process for development of the draft ordinance given the significant impact that it will have on users of the public right-of-way. To remedy the flaws in both the proposal and the process, we request that the drafters restart the process entirely, beginning with comprehensive stakeholder and community engagement prior to penning any new ordinance. Recently, as part of the wireless process improvement efforts initiated by the Bureau of Development Services, the City offered a series of stakeholder meetings and iterative drafts based on redlines and other feedback gleaned from the stakeholders. The process was thorough and transparent and led to a mutual understanding of the challenges on both sides and a plan for improvement. The

Telecommunications Providers request that the City utilize a similar collaborative approach for this ordinance.

Finally, the Telecommunications Providers request a more detailed timeline for the ordinance review process and responses to the collective questions previously posed to the City so the stakeholders may provide comprehensive feedback based on all the necessary information.[1] The Telecommunications Providers would very much appreciate the opportunity to work with the City to build an unambiguous right-of-way access methodology that meets the City's objectives and is equitable to all users of the right-of-way.

Thank you for your consideration of these preliminary comments.

Sincerely,

DocuSigned by:
Timothy Halinski
D19989B8E4E2405...

Tim Halinski, Siting Advocacy Manager
For T Mobile

DocuSigned by:
Alex Leupp
B2E025DDB8D141B...

Alex Leupp, Executive Director
External Affairs, For Verizon

DocuSigned by:
Amir Johnson
3394D04F2BF64A5...

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

[1] A list of the questions posed by the Telecommunications Providers at the October 26th meeting is attached.

T-Mobile verizon AT&T

OCT/Wireless Provider Meeting Questions – 10-26-2021

1. **Code/Policy Change Process**
    - Concern: ROW users are asked to provide comments prior to understanding the proposed fees and other details for the new right-of-way license program. The wireless industry just had a positive, collaborative experience with BDS's preparation of a new Program Guide for reviewing and approving wireless facilities, with the opportunity to comment on multiple drafts. In comparison, it appears that the comment period ending November 15, 2021, will be the only comment period for this significant program change.
    - Questions:
        - Will the City set another comment period once it discloses proposed fees and the fee ordinance and resolution referenced in the draft ROW code?
        - What other opportunities for input will industry have prior to the ordinance being set for Council?
2. **Changes to Fee Structure**
    - Concern: The FAQ says the ROW charges imposed under licenses will be the same as are currently charged (using attachment fees as an example), but there is no reference to attachments in the ROW Usage fee section of the draft ordinance (in contrast, the fee calculated by linear feet is called out expressly).
    - Questions:

- Will ROW Usage fees for wireless still be calculated and imposed on a per-attachment basis?
- Will the separate fee ordinance referenced in the ROW Usage fee section have other details about the calculation of fees?
- Please explain proposed Subsection 12.15.080(J) regarding fees for multiple services.
- How will the City avoid duplicate charges under the new structure?

3. **Fee Ordinance and Resolution**
   - Concern: A referenced future fee ordinance and resolution will apparently provide the fee amounts and presumably more details about the City's intent for how the new program will work.
   - Question: What is the status of these documents being available for review?

4. **Cost study**
   - Concern: ROW fees for small wireless facilities must be cost-based, under the 2018 FCC Order.
   - Question: Does the City have a cost study to support the proposed fees and when/how will it be available for review?

5. **Applicability of Ordinance**
   - Concern: Some of the FAQ/ordinance language is ambiguous regarding applicability.
   - Question: Does the City intend any portion of the ordinance to be applicable immediately, regardless of when relevant franchises expire?

6. **Director Rule-Making Authority, etc.**
   - Concern: Section 12.15.060 describes broad rule-making authority, etc.
   - Question: What is the intended scope of rule-making authority vs. what matters will need to go to Council for approval.
7. **Reservation of Rights**
   - Concern: Section 12.15.080(I) appears to reserve to the City broad rights to attach its facilities, including wireless facilities, to poles owned by utility providers, without charge.
   - Question: What is the scope of facilities the City intends to attach to others' poles? What is the process for a pole owner to demonstrate that such attachment is not feasible, etc.?

Delete Chapter 7.12 (Franchises and Utility Privilege Tax Law)
Delete Chapter 7.14 (Utility License Law)

Exhibit A – Chapter 12.15

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12.15.010 Short Title.
The ordinance codified in this Chapter will be known and may be referenced as the "Utility Access to 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 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 and charging residents for services delivered via those facilities;

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.

12.15.030 Definitions.

For the purposes of this Chapter the following terms, phrases, words and their derivations will have the meaning given below. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The word "will" is mandatory and "may" is permissive.

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

B. "Cable service" is defined consistent with federal laws and means the one-way transmission to subscribers of: (i) video programming; or (ii) other programming service; and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

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

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

E. "Communications services" means any service provided for the purpose of transmission of information including but not limited to voice, video or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications services includes all forms of telephone services and voice, video, data or information transport, but does not include: (i) cable service; (ii) open video system service, as defined in 47 C.F.R. 76; (iii) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor; (iv) public communications systems; and (v)

direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

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

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

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

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

J. "Office" means the Office for Community Technology or any successor City bureau, along with its employees and agents.

K. "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.

L. "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.

M. "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.

N. "Right-of-way" means and includes, but is not limited to, the surface of and the space above and below any street as defined in City Code Section 17.04.010,

road, alley or highway within the City, used or intended to be used by the general public, to the extent the City has the right to allow for their use.

O. "State" means the State of Oregon.

P. "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.

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

R. "Utility service" means the provision, by means of utility facilities permanently located within, under or above the right-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, wireless communications services, cable services, water, sewer or storm sewer, pipeline, public pay phones or other services to or from customers within the corporate boundaries of the City, or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.

S. “Wireless communications facilities” means the equipment, and associated structures, needed to transmit or receive electromagnetic signals. A wireless communications facility typically includes antennas, supporting structures, enclosures or cabinets housing associated equipment or cable and may be attached to utility or City-owned structures or poles in the right-of-way. Wireless communications facilities also include strand-mounted devices and associated equipment.

T. “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).

U. "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 agents of the Office.

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

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

F. The Director may adopt rules relating to matters within the scope of this Chapter.

1. Before adopting a new rule, the Director must notify interested parties and hold a public comment period. Such notice, which may be provided by mail or electronic means, such as posting on the Office's website, must be distributed at least two (2) weeks before the close of the public comment period. The notice must include instructions on how an interested party may comment on the proposed rule, a brief description of the subjects covered by the proposed rule and how to access the full text of the proposed rule.

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

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

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

12.15.070 Registration.

A. Registration Required. Every person who desires to provide utility services to customers within the City will register with the City prior to providing any utility services to any customer in the City. Every person providing utility services to

customers within the City as of the effective date of this Chapter will register within forty-five (45) calendar days of the effective date of this Chapter.

B. Annual Registration. After registering with the City pursuant to Subsection A of this Section, the registrant will, by December 31 of each year, file with the City a new registration form if it intends to provide utility service at any time in the following calendar year. Registrants that file an initial registration pursuant to Subsection A of this Section on or after September 30 will not be required to file an annual registration until December 31 of the following year.

C. Registration Application. The registration will be on a form provided by the City, and will be accompanied by any additional documents required by the City 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 resolution of the City Council sufficient to fully recover all of the City's costs of administering the registration program.

12.15.080 Licenses.

A. License Required.

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

2. Every person that owns or controls utility facilities in the right-of-way as of the effective date of this Chapter will apply for a license from the City within forty-five (45) calendar days of the later of: (i) the effective date of this Chapter, or (ii) the expiration of a valid franchise from the City, unless a new franchise is granted by the City pursuant to Subsection E of this Section.

B. License Application. The license application will be on a form provided by the City, and will be accompanied by any additional documents required by the City to identify the applicant and its legal status, including its authorization to do business in Oregon, a description of the type of utility service provided or to be provided by the applicant, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this Chapter.

C. License Application Fee. The application will be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council in an amount sufficient to fully recover all of the City's costs related to processing the application for the license.

D. Determination by City. The City will issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is denied, the written determination will include the reasons for denial. The license will be evaluated based upon the provisions of this Chapter, the continuing capacity of the right-of-way to accommodate the applicant's proposed utility facilities and the applicable local, state and federal laws, rules, regulations and policies.

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

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 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 K of this Section.

3. Neither the issuance of the license nor any provisions contained in the license will constitute a waiver or bar to the exercise of any governmental right or power, including without limitation the police power or regulatory power of the City, as it may exist at the time the license is issued or thereafter obtained.

G. Term. Subject to the termination provisions in Subsection N of this Section, the license granted pursuant to this Chapter will remain in effect for a term of five (5) years.

H. License Nonexclusive. No license granted pursuant to this Section will confer any exclusive right, privilege, license or franchise to occupy or use the right-of-way for delivery of utility services or any other purpose. The City expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the City's right to use the right-of-way, for similar or different purposes. The license is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record that may affect the right-of-way. Nothing in the license will be deemed to grant, convey, create or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.

I. Reservation of City Rights. The City may, without charge, install and maintain City-owned streetlights, signs and equipment, including but not limited to government-owned wireless communications systems operated by the City and used for governmental infrastructure management, fire or police communications or internal government communications, to be attached to any utility operator's utility facilities. If applicable, these attachments will be subject to the requirements of the utility operator's tariffs on file with the Oregon Public Utility Commission. Whenever required by state or federal occupational safety and health laws or rules, the City will use qualified workers for all such work.

J. Multiple Services.

1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and right-of-way access fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this paragraph requires a utility operator to pay the registration, license or right-of-way access fee requirements owed to the City by a third party using the utility operator's facilities.

2. A utility operator that provides or transmits more than one utility service over its facilities is not required to obtain a separate license or franchise for each utility service, provided that it gives notice to the City of each utility service provided or transmitted and pays the applicable right-of-way access fee for each utility service.

K. Transfer or Assignment. Unless exempted by applicable state and federal laws, the licensee will obtain the written consent of the City, which shall not be unreasonably withheld, conditioned or delayed, prior to the transfer or assignment of the license. The license will not be transferred or assigned unless

the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under state or federal laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee will become responsible for fulfilling all the obligations under the license with respect to all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license. 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 12.15.120. However, the assignment, transfer or delegation of the rights and obligations of the licensee to the licensee's financially viable parent, subsidiary, successor, or affiliate under common control shall not require consent and shall be effective upon written notice to the City.

L. Leases and Sales of Utility Facilities.

1. Leases. The licensee will obtain the written consent of the City prior to leasing any portion of its utility facilities, which consent will not be unreasonably withheld, conditioned or delayed. However, the licensee may lease any portion of its utility facilities in the ordinary course of its business without otherwise obtaining the City's written consent, so long as the licensee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its 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 or a valid agreement between the licensee and the lessee, provided that the licensee takes reasonable steps to ensure that its lessees are in 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 fourteen (14) calendar days of the sale being executed and becoming final, the licensee will provide written notice to the City, describing the portions of the utility facilities sold by the licensee, identifying the purchaser of the utility facilities, the location of the utility facilities and providing an executed counterpart or certified copy of the sales documents;

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

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

M. Renewal. At least ninety (90), but no more than one-hundred eighty (180), calendar days prior to the expiration of a license granted pursuant to this Section, a licensee seeking renewal of its license will submit a license application to the City, including all information required in Subsection B of this Section and the application fee required in Subsection C of this Section. The City will review the application as required by Subsection D of this Section and grant or deny the license within ~~ninety~~ 30 (~~90~~30) calendar days of submission of the application. If the City determines that the licensee is in violation of the terms of this Chapter at the time it submits its application, the City may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the City, before the City will consider the application or grant the license. If the City requires the licensee to cure or submit a plan to cure a violation, the City will grant or deny the license application within ninety (90) calendar days of confirming that the violation has been cured or of accepting the licensee's plan to cure the violation.

N. 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 placement, maintenance or operation of a utility facility; or

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

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

3. Notice and Cure. The City will give the utility operator written notice of any apparent violations before revoking or terminating a license. The notice will include a clear and concise statement of the nature and general facts of the violation and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar days) for the utility operator to demonstrate that the utility operator has remained in compliance, that the utility operator has cured or is in the process of curing any violation, or that it would be in the public interest to impose a penalty or sanction less than revocation or termination. If the utility operator is in the process of curing a violation, the utility operator must demonstrate that it acted promptly and continues to actively work on compliance. If the utility operator does not respond, the Director may determine whether the license will be revoked or terminated.

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

5. Removal of Utility Facilities. If the City has revoked or terminated a license or if a license has expired without being renewed or extended, all the utility operator's rights under the license will immediately cease and be divested. Thereafter, except as otherwise provided in writing by the Director, the utility operator 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. Utility operators will comply with the design and aesthetic requirements for wireless communications facilities adopted by the Bureau of Transportation.

2. Collocation. Wireless communications facilities will be attached to poles and other infrastructure located within the right-of-way. Utility operators 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 utility operator 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 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 utility operator will take all reasonable steps necessary to correct and eliminate the interference including but not limited to powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of forty-eight (48) hours or two business days following notification, the City may require the utility

operator to reduce power or cease operations until the utility operator can repair the interfering equipment. If, after a period of six (6) months, the utility operator is unable to fully eliminate the interference, the City may require the utility operator 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 utility operator to any reduction of the right-of-way access fee, nor result in any liability to the City.

B. Pipeline Services.

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

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

C. Public Pay Phones Services.

1. At the City's request, any utility operator 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 twenty (20) calendar days' written notice, may require a utility operator to remove or relocate any public telephone installed in the right-of-way. A utility operator will comply with applicable City Code and regulations to obtain permits and other permissions and may otherwise remove any public telephone after twenty (20) calendar days' written notice to the City; and may otherwise relocate

any public telephones with the City's approval. When any telephone booth installed is removed or relocated, the utility operator will restore the location site to a condition satisfactory to the Bureau of Transportation. If the utility operator fails to remove any public telephone when required to do so, the City may remove the public telephone and will be reimbursed for its full costs.

12.15.100 Right-of-Way Access Fee.

A. Except as set forth in Subsection B of this Section, every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, will pay the right-of-way access fee for every utility service provided using the right-of-way in the amount determined by ordinance of the City Council.

Commented [A1]: What are the ROW access fees? Will this be a per service fee or per connection fee, consistent with our current payments?

B. A utility operator whose only facilities in the right-of-way do not serve any customers within the corporate boundaries of the City will pay the linear per-foot fee set by City Council ordinance for those facilities. Unless otherwise agreed to in writing by the City, the fee will be paid annually, in advance, for each year during the term of the license by January 2 each calendar year, and will be accompanied by information sufficient to illustrate the calculation of the amount payable and on a form satisfactory to the Director. The utility operator will pay interest at a rate of 0.833 percent simple interest per month or a fraction of ten percent (10%) per year, computed from the original due date of the fee to the fifteenth (15th) day of the month following the date of payment.

C. Right-of-way access fee payments required by this Section will be reduced by any franchise fee payments received by the City, but in no case will be less than zero dollars ($0).

D. Unless otherwise agreed to in writing by the City, the fee set forth in Subsection A of this Section will be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) calendar days after the end of each calendar quarter, will be accompanied by an accounting of gross revenue, if applicable, and a calculation of the amount payable, and be in a form satisfactory to the Director. For any payment made after the due date, the utility operator will pay interest at a rate of 0.833 percent simple interest per month or a fraction of ten percent (10%) per year, computed from the original due date of the fee to the fifteenth (15th) day of the month following the date of payment.

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

F. 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 right-of-way access fee or any other fees required by this Chapter.

H. 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.

I. 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.

12.15.110 Audits.

A. Payment of the right-of-way access fee under this Chapter will be subject to audit for compliance with the requirements of this Chapter. The scope of the audit shall be limited to determining whether fees were paid correctly for the services provided during the audit period, which shall not exceed ~~Director may determine the audit's scope, provided that the audit will be limited to fees due during a~~ the three (3) years ~~period~~ prior to the date of the City's written request under this Section.

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

1. Every utility operator will furnish the City with information sufficient to demonstrate that the operator is in compliance with all the requirements of this Chapter, and its franchise agreement, if any, including but not limited to payment of any applicable license or registration fee, right-of-way access fee or franchise fee.

2. Every utility operator will make available for inspection by the City at reasonable times and intervals all maps, records, books, diagrams, plans and other documents maintained by the utility operator necessary to demonstrate compliance with City license requirements, consistent with Section ~~w~~12.15.080. ~~ith respect to its facilities within the right-of-way~~. Access will be provided within the City unless prior arrangement for access elsewhere has been made with the City.

3. If any utility operator fails, refuses or neglects to provide or make records available to the Director for determining 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 utility operator 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 within thirty (30) canlendar days.

4. Final audit determinations appealable to the Business License Appeals Board using the process set forth in City Code Section 7.02.290. The utility operator must file an appeal within thirty (30) calendar days of the date of the final audit determination letter. In such an appeal, the utility operator 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, will be paid within thirty (30) calendar days of the City's notice to the utility operator of such underpayment. Any overpayment, including interest, will either be paid to the utility operator within thirty (30) calendar days of its discovery or shall be deducted from future payments required. The decision on how to manage overpayments shall be determined by the utility operator.

D. Penalties. A penalty of five percent (5%) of any underpayment will be due within forty-five (45) calendar days of written notice from the City, if the City's review of payments under this Chapter discloses that a utility operator has paid ninety percent (90%) or less of the principal amount owing for the period under review.

12.15.120 Insurance and Indemnification.

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

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

Commented [A2]: The redlined language is the available notice from our carriers. There is no such provision preventing the insurance from being cancelled if the city is not notified.

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 commercial general liability and automobile 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 commercial general liability and commercial automobile 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 utility operator 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. The required coverage limits may be satisfied by any combination of underlying and excess/umbrella liability insurance.

   a. Commercial General Liability. A utility operator will provide and maintain commercial general liability and property damage insurance in the amount of $2,000,000 (two million dollars) per occurrence, and aggregate limit of $4,000,000 (four million dollars) that protects the utility operator 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 utility operator's work under this Chapter.

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

   c. Workers' Compensation. A utility operator will comply with the workers' compensation law, ORS Chapter 656, as it may be amended. If required, a utility operator 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

Commented [A3]: Clarifying that his coverage will not be provided by the employer's liability policy which is part of the workers compensation policy.

Commented [A4]: Many general liability policies are 1M/2M but (as is our case) the limit requirement can be satisfied by utilizing umbrella coverage

Commented [A5]: The coverage will be provided per accident.

with the City Auditor for the entire period during which work is performed under a license.

B. Indemnification.

1. To the fullest extent permitted by law, each utility operator 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 reasonable attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failure to act or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the construction, operation, maintenance, repair or removal of its facilities, and in providing or offering utility services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this Chapter or by a franchise agreement. The acceptance of a license under Section 12.15.080 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 utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

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

3. Every utility operator will also ~~forever~~ indemnify 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 directly attributable to the utility operator's work in the right-of-way. Hazardous substances will have the meaning given by ORS 465.200(16).

12.15.130 Financial Assurance.

A. Unless otherwise agreed to in writing by the City, before a franchise granted or a license issued pursuant to this Chapter is effective, and as necessary thereafter, the utility operator will provide a financial assurance, such as a performance bond or other security, in a form acceptable to the City, as security for the full and

complete performance of the franchise or license, and for compliance with the terms of this Chapter, including any costs, expenses, damages or loss to the City because of any failure attributable to the utility operator to comply with this Chapter and accompanying ordinances, resolutions, rules, regulations or policies. The utility operator will also provide, upon request, written evidence of payment of the required premium.

B. The amount of such financial assurance will be in an amount of one-hundred thousand dollars ($100,000). A utility operator will immediately replace or replenish to the full amount any draw-down of the financial assurance by the City. The financial assurance will be in effect until the later of: (i) termination of a franchise or license; or (ii) removal of all or part of a utility operator's utility facilities. This obligation is in addition to any performance guarantees required by applicable City Code and regulations.

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

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

12.15.140 Compliance.

A. Every utility operator 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 utility operator 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 utility operator, nor a waiver of rights by the City or acquiescence in the utility operator's conduct. The acts or omissions of affiliates are not beyond the utility operator's control, and the knowledge of affiliates will be imputed to the utility operator.

C. The Director will have authority to issue an administrative subpoena for the purpose of collecting any information necessary to enforce any provision of this Chapter.

12.15.150 Confidential/Proprietary Information.

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

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

A. The utility operator 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 utility operator will furnish the City a copy of the utility operator's annual statistical report filed with the FCC, if applicable, along with proof of the utility operator's annual certification of compliance. The utility operator will immediately notify the City in the event the utility operator is at any time determined to be out of compliance with FCC rules or regulations.

B. The utility operator 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 utility operator'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 utility operator 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 utility operator 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 utility operator will participate in the City's Minority and Female Business Enterprise Certification Program.~~

12.15.170 Penalties.

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

B. Violations of this Chapter include but are not limited to:

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

2. Any failure to pay the right-of-way access fee when due;

3. Any failure to file the documentation required to accompany the right-of-way access fee;

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

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

6. Any false statement on any registration or license application, on any documentation required to accompany the right-of-way fee, or in response to any audit or compliance investigation conducted under this Chapter.

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

1. The extent and nature of the violation;

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

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

4. Whether the violation appeared willful or negligent;

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

6. Any other factors the Director deems relevant.

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

E. Except as provided in Section 12.15.110 B.4., a determination made by the Director is a quasi-judicial decision and is not appealable to the City Council. Appeals from any determination made by the Director will be solely and exclusively by writ of review to the Circuit Court of Multnomah County, as provided in ORS 34.010 to 34.100.

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

12.15.180 Enforcement.

In addition to other enforcement authority, upon written approval of the Commissioner in Charge, the Director may have the City Attorney institute legal proceedings to enforce this Chapter or any determinations made by the Director under this Chapter.

12.15.190 Severability and Preemption.

A. The provisions of this Chapter will be interpreted to be consistent with applicable state and federal law, and will be interpreted, to the extent possible, to cover only matters not preempted by state or federal law.

B. If any article, Section, Subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this Chapter will not be affected thereby but will be deemed as a separate, distinct and independent provision, and such holding will not affect the validity of the remaining portions hereof, and each remaining article, Section, Subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter will be valid and enforceable to the fullest extent authorized by law. In the event any provision is preempted by state or federal laws, rules, regulations or decision, the provision will be preempted only to the extent required by law and any portion not preempted will survive. If any

preemptive state or federal law is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision of this Chapter will thereupon return to full force and effect and will thereafter be binding without further action by the City.

12.15.200 Application to Existing Agreements.

To the extent that this Chapter is not in conflict with and can be implemented consistent with existing franchise agreements, this Chapter will apply to all existing franchise agreements granted to utility operators by the City.

NW Natural®

250 SW Taylor Street
Portland, OR 97204

503-226-4211
nwnatural.com

November 15, 2021

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

RE: Comments on City of Portland proposed ROW ordinance

Dear Commissioner Rubio and Ms. Perez,

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

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

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

<u>Process</u>

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

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

Authority and administration

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

Lack of clarity and transparency

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

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

Language and definitions

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

Cost to customers

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

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

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

Kind regards,

Nina Carlson
NW Natural, Government Affairs

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

November 15, 2021

Dear Commissioner Rubio and Ms. Perez,

Thank you for the opportunity to provide comments on the City's proposed changes to how it manages the public right-of-way (ROW). Portland General Electric (PGE) and Pacific Power together provide electricity service to all of Portland and count on use of the ROW to deliver this vital service to our customers.

While our more detailed comments on the proposal follow, PGE and Pacific Power want to highlight one issue of primary concern. The draft utility license does not define 'gross' revenues for purposes of calculating the ROW fee, and instead leaves that definition to a separate set of administrative rules that have not been released. Our concern is driven by recent engagement with the city on this issue connected to audits of past ROW fee payments and attempts by the city to increase the utility license fee collection by broadening definition of gross revenues to include, among other things, the collection of taxes and other pass-through items on customer bills that cannot reasonably be considered revenue earned through use of the ROW.

We believe that a common and mutually agreeable definition of gross revenues can be attained that will both allow the city to recover costs needed to maintain the public ROW and protect customers from cost increases for a vital service that are not connected to the service they receive. We want to ensure that no matter the path (either in the utility license, a separate administrative process, or via a franchise agreement), that the City works with its utility partners to clearly identify the definition and scope of gross revenues, and that it is codified in a clear and transparent manner.

We have included as an attachment to this letter, our shared comments, questions, and recommendations to certain sections of the proposed utility license. We ask that you consider these comments as you work your way through the process for approval. Both PGE and Pacific Power look forward to working with Director Perez and City Staff to find the most equitable and efficient path forward on this effort to revise the City's oversight of the ROW.

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

Sincerely,

Scott D. Bolton
PacifiCorp
Senior Vice President

Dave Robertson
Portland General Electric
Vice President, Public Affairs

PERKINSCOIE

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

T +1.503.727.2000
F +1.503.727.2222
PerkinsCoie.com

November 15, 2021

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

VIA EMAIL AND U.S. MAIL

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

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

To whom this may concern:

This law firm represents Tata Communications (America) Inc. ("TC America"). We are writing to provide comments on the City's proposed ordinance to replace the franchise process for granting access to the City's rights-of-way ("ROW") with new provisions in the City Code.

There are two strengths of the current franchise approach for telecommunications firms like TC America that would be eliminated under the proposed new regime. First, 10-year franchises provide stability and predictability to the rates that companies using the ROW pay the City. This enables service providers to know an important part of their cost structure and to utilize that information in setting rates for services and making other financial decisions.

Second, franchises for companies like TC America that pay the City on a linear-foot basis appropriately exclude facilities that providers lease from third parties who already pay the City for use of the ROW for their entire facilities. This "lease exclusion" places the fee burden on facility owners who install and maintain facilities in the ROW and are in a position to apportion those costs to lessees if they desire. It also encourages an efficient and non-wasteful use of the ROW where fees are based on the impact a provider has on the ROW and a more intensive use of the same space is encouraged, not penalized. Not only is this good policy, it also respects limitations on ROW charges established in state and federal law.

As a general matter, TC America is not aware of any flaw in the current franchising process that requires its rejection and replacement at this time and urges the City not to adopt its proposal. If the City, however, is committed to abandoning franchises and adopting new Code provisions, TC America offers the following comments and recommendations.

1. Linear-foot ROW fees should not be allowed to exceed current levels.

Franchises for grantees without customers in the City impose fees that are based on the number of linear feet of facilities a provider owns that are located in the City's ROW. For decades, the level of those fees has been set in franchises valid for a period of 10 years, subject to annual adjustments based on changes to the CPI. This historical treatment afforded providers rate stability and predictable costs they could rely on in pricing services to customers and making other financial decisions, including the amount and location of capital investments.

The proposed ordinance does not establish the fee for linear-foot arrangements. Instead, it leaves that to be set by the City Council, presumably to be revised from time-to-time. This provides no information that providers can use to reliably forecast their costs to price their services and make other financial plans. It is also unfair because providers who have invested considerable sums in installing facilities in, and typically under, the City's ROW cannot practically relocate those facilities if the City were to raise the fee to unacceptable levels.

In contrast to the treatment of providers like TC America that pay the City on a linear-foot basis, the City has stated that the fee for other providers will not be changed under the new regime: "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." Initial ROW Code FAQ dated Sept. 15, 2021. All providers are entitled to the same assurance and predictability—to do otherwise would unlawfully discriminate among users of the ROW in violation of 47 U.S.C. § 253 and state and federal constitutional protections.

TC America is not aware of any problems or unfairness under the existing franchise system and thinks the City should continue to utilize 10-year franchises with predictable rates instead of moving to a Code-governed regime. If the City is committed to abandoning franchises, however, it should address this issue by establishing ROW fees in the ordinance and limiting adjustments to changes in the CPI. This will give providers the predictability they deserve.

2. The City Should Not Eliminate the Lease Exclusion.

TC America's current franchise excludes from the per-foot charge facilities that are leased from another licensee (see definition of "System"). The new Code provisions would eliminate that exclusion and would base the fee on all facilities that a licensee "uses" without regard to ownership.

TC America and other carriers have relied on the lease exclusion for decades so they would not be required to pay duplicative ROW fees where the facility owner pays an ROW fee for the entire extent of the impact of its facilities on the ROW. Under the existing regime, the owner of

the facility (typically, a conduit containing fiber optic cables) pays the full linear charge for the incursion of the facility into the ROW. If the owner has excess capacity (which is a common occurrence for fiber optic cables), it may choose to make that available for use by other providers, and it may also recover a portion of the ROW charges from those other users. This use of the fibers by other providers imposes no additional impact on the ROW, for example in terms of space used or the need to open the street to install facilities. Under these facts, there is no reasonable basis for the City to charge the other providers for use of the ROW when the full cost is already being borne by the facility owner. The lease exclusion in current franchises implements this policy by not requiring a lessee to pay linear-foot fees when the facility owner is already doing so.

Charging for use of the ROW based on the impact to the City is both reasonable and lawful. It is reasonable because it imposes fees based on the extent of the impact, which is the primary justification for fees stated in the proposed ordinance ("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.") Section 12.15.020.B. Lessees of fiber installed and owned by another party do not cause any ROW-related costs to the City. Therefore, they should not be required to make any payments to the City, which is the laudable purpose that has been served by the lease exclusion for many decades.

Moreover, encouraging the use of excess capacity in existing facilities makes efficient use of resources and avoids additional impacts on the ROW. The City should encourage a provider seeking to utilize the ROW to use facilities that have already been installed, rather than creating additional impact on the ROW by trenching and digging to install its own facilities. The lease exclusion perfectly serves that purpose; without it, the opportunity to avoid all or a portion of ROW fees by using another provider's facilities would no longer exist and this may lead to additional installations, duplication of facilities, and further impact on the ROW. Maintaining the lease exclusion would better serve the City's stated goal to "to conserve the limited physical capacity of the right-of-way consistent with applicable state and federal law." Section 12.15.020.A.

TC America believes that the City's charges for use of the ROW must be based upon and limited to the City's costs for impact to the ROW and ROW management under both state and federal law. (This is discussed in more detail in the next section.) While TC America also takes issue with the calculation of the linear-foot charge, it is beyond dispute that imposing that charge on the owner of the facility recovers the City's costs in full. Imposing the identical charge on other providers who utilize the same facilities through a lease arrangement cannot be justified as cost-based because these additional users do not create any incremental impact on the ROW or impose any additional costs on the City.

By analogy, real property taxes are imposed on property owners, not lessees. Property owners are in a position to pay the taxes and recover all or a portion of them from their lessees. Local governments do not impose duplicative property taxes on both owners and lessees. Similarly here, the City should impose ROW fees only upon the owners of facilities in the ROW, not lessees regardless of the form of the lease arrangement.

Moreover, elimination of the lease exclusion would drastically increase lessees' ROW fees and would treat current linear-foot franchisees differently from revenue-based franchisees. As shown by the City's recent audit of TC America's franchise fee payments, without the lease exclusion, TC America would be subject to fees several times greater than what it has been paying. TC America understands that other providers would face similar fee increases if the City were to eliminate the lease exclusion. The result would be that the City recovers fees from multiple users of the same conduit in the same ROW, and lessees may be paying ROW fees twice—once directly to the City and a second time to the owner of the facilities in the ROW for a portion of the owner's ROW fee obligations.

The City determined in the recent audit that the course of performance between the City and TC America justifies application of the lease exclusion for the years under review. Those same facts, as well as the strong policy considerations identified above and legal restrictions discussed below, justify its continuation in future years as well. Absent a complete recalibration of the fees among owners and users of ROW facilities, retention of the lease exclusion is also the only way the City can avoid discriminating against linear-foot franchisees because the City has stated it does not intend to increase revenue-based fees under the proposed ordinance.

3. City Charges for Use of the ROW Should Not Exceed the City's Costs.

The Ordinance recites that the fees imposed by the ordinance are "Regulatory Fees and Compensation Not a Tax." TC America agrees with the characterization that these are fees and not taxes. Both state and federal law, however, limit the level of fees the City may charge for use of the ROW to recovery of the City's reasonable costs.

State law clearly limits the level of fees a city may impose to recovery of the city's reasonable costs of regulation. "It is well established that a license imposed for regulatory purposes should not materially exceed the expense of issuing the license, and of necessary inspection and regulation of the business licensed." *Eugene Theatre Co. v. City of Eugene*, 194 Or. 603, 613, 243 P.2d 1060, 1065 (1952). The Oregon Supreme Court recently reapproved this principle in *Rogue Valley Sewer Servs. v. City of Phoenix*, 357 Or. 437, 457, 353 P.3d 581 (2015).

In addition, federal law limits cities to charging "fair and reasonable compensation" for telecommunications providers' use of the ROW. 47 U.S.C. § 253. As the Ninth Circuit Court of Appeals recently stated:

> We also conclude that the FCC's fee limitation does not violate Section 253(c) of the Act, which ensures that cities receive "fair and reasonable" compensation for use of their rights-of-way. The FCC explained that the calculation of actual, direct costs is a well-accepted method of determining reasonable compensation, and further, that a standard lacking a cost anchor would "have left providers entirely at the mercy of effectively unconstrained requirements of state or local governments." Small Cell Order ¶ 74. 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. 47 U.S.C. § 253(c).

City of Portland v. United States, 969 F.3d 1020, 1036 (9th Cir. 2020), *cert. denied sub nom. City of Portland, Oregon v. Fed. Commc'ns Comm'n*, 141 S. Ct. 2855 (2021).

These legal limits on the level of reasonable ROW charges to cost-based fees puts into question the lawfulness of both the City's revenue-based and linear-foot charges. Even if imposing linear-foot charges on the facility owner could be sustained as cost-based, however, imposing the same charge on one or more lessees of the same facilities cannot be justified as cost-based or reasonable because those lessees' use of the ROW does not impose any additional cost on the City or burden or impact on the ROW.

Further, the City should retain the lease exclusion and should not consider imposing its own allocation of cost-based fees between the facility owner and the facility users because that would prove to be unmanageable. By what standard would the City determine that each party's contribution was fair and reasonable? How would the City account for users being added to the facility, or users being removed? The current arrangement, in which the facility owner bears the responsibility and then recovers its reasonable expenses from the users, is time-tested and simple. Any allocation of cost-based fees by the City would not be.

4. Recommended Changes.

TC America has several recommendations including proposed revisions to the draft ordinance:

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

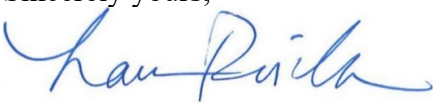
2. If the City proceeds with its plan to replace the franchise system with Code provisions, the City should:

    a. Incorporate linear-foot fees into the Code at no greater than current levels and limit fee increases to changes in the CPI; and

    b. Maintain the "lease exclusion" for linear-foot payment arrangements to preserve the status quo for providers; to avoid double, triple, and greater levels of duplicative fees for use of the same facilities in the ROW; to treat operators subject to per-linear-foot fees the same as revenue-based operators by not increasing the level of fees for only one of these groups; and to encourage and reward efficient use of the ROW.

3. The City should also re-examine its ROW fee structure to ensure it recovers only the City's reasonable costs including impact to the ROW.

Sincerely yours,



Lawrence H. Reichman

LHR:dma

November 15, 2021

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

Via Email

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

Dear Elisabeth and Jillian,

We write to you on behalf of AT&T, T-Mobile, and Verizon (hereinafter, the "Telecommunications Providers") as stakeholders in the draft Utility Access to the Right-of-Way code (Chapter 12.15) currently under consideration by the City of Portland ("City").

The Telecommunications Providers share serious concerns about the draft ordinance. At our meeting with the City on October 26th, the Telecommunications Providers posed many questions regarding process and requested reasonable foundational information regarding the draft ordinance, including the proposed method to calculate the right-of-way access fee, how pole attachment fees would be integrated in the new right-of-way access assessments, and how the City plans to avoid double charging operators that do not own or control facilities in the right-of-way.

From the City's response, it is clear that the requested information necessary for understanding and meaningfully assessing the proposed ordinance will not be forthcoming prior to the current comment period's November 15th deadline. The draft ordinance, as currently proposed, is confusing, internally inconsistent, and at times contradictory to what we have understood from City staff. Additionally, it lacks critical provisions required for implementation; not everything can or should be left to regulations. Moreover, some elements of the ordinance appear contrary to federal law. Without the threshold information requested by the Telecommunications Providers at the meeting, it is not possible to prepare meaningful comments on this draft.

The Telecommunications Providers are also very concerned about the lack of an iterative and transparent process for development of the draft ordinance given the significant impact that it will have on users of the public right-of-way. To remedy the flaws in both the proposal and the process, we request that the drafters restart the process entirely, beginning with comprehensive stakeholder and community engagement prior to penning any new ordinance. Recently, as part of the wireless process improvement efforts initiated by the Bureau of Development Services, the City offered a series of stakeholder meetings and iterative drafts based on redlines and other feedback gleaned from the stakeholders. The process was thorough and transparent and led to a mutual understanding of the challenges on both sides and a plan for improvement. The

Telecommunications Providers request that the City utilize a similar collaborative approach for this ordinance.

Finally, the Telecommunications Providers request a more detailed timeline for the ordinance review process and responses to the collective questions previously posed to the City so the stakeholders may provide comprehensive feedback based on all the necessary information.[1] The Telecommunications Providers would very much appreciate the opportunity to work with the City to build an unambiguous right-of-way access methodology that meets the City's objectives and is equitable to all users of the right-of-way.

Thank you for your consideration of these preliminary comments.

Sincerely,

DocuSigned by:
Timothy Halinski
D19989B8E4E2405...

Tim Halinski, Siting Advocacy Manager
For T Mobile

DocuSigned by:
Alex Leupp
B2E025DDB8D141B...

Alex Leupp, Executive Director
External Affairs, For Verizon

DocuSigned by:
Amir Johnson
3394D04F2BF64A5...

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

[1] A list of the questions posed by the Telecommunications Providers at the October 26th meeting is attached.

T-Mobile verizon AT&T

OCT/Wireless Provider Meeting Questions – 10-26-2021

1. **Code/Policy Change Process**
    - Concern: ROW users are asked to provide comments prior to understanding the proposed fees and other details for the new right-of-way license program. The wireless industry just had a positive, collaborative experience with BDS's preparation of a new Program Guide for reviewing and approving wireless facilities, with the opportunity to comment on multiple drafts. In comparison, it appears that the comment period ending November 15, 2021, will be the only comment period for this significant program change.
    - Questions:
        - Will the City set another comment period once it discloses proposed fees and the fee ordinance and resolution referenced in the draft ROW code?
        - What other opportunities for input will industry have prior to the ordinance being set for Council?
2. **Changes to Fee Structure**
    - Concern: The FAQ says the ROW charges imposed under licenses will be the same as are currently charged (using attachment fees as an example), but there is no reference to attachments in the ROW Usage fee section of the draft ordinance (in contrast, the fee calculated by linear feet is called out expressly).
    - Questions:

- Will ROW Usage fees for wireless still be calculated and imposed on a per-attachment basis?
- Will the separate fee ordinance referenced in the ROW Usage fee section have other details about the calculation of fees?
- Please explain proposed Subsection 12.15.080(J) regarding fees for multiple services.
- How will the City avoid duplicate charges under the new structure?

3. **Fee Ordinance and Resolution**
   - Concern: A referenced future fee ordinance and resolution will apparently provide the fee amounts and presumably more details about the City's intent for how the new program will work.
   - Question: What is the status of these documents being available for review?

4. **Cost study**
   - Concern: ROW fees for small wireless facilities must be cost-based, under the 2018 FCC Order.
   - Question: Does the City have a cost study to support the proposed fees and when/how will it be available for review?

5. **Applicability of Ordinance**
   - Concern: Some of the FAQ/ordinance language is ambiguous regarding applicability.
   - Question: Does the City intend any portion of the ordinance to be applicable immediately, regardless of when relevant franchises expire?

6. **Director Rule-Making Authority, etc.**
   - Concern: Section 12.15.060 describes broad rule-making authority, etc.
   - Question: What is the intended scope of rule-making authority vs. what matters will need to go to Council for approval.
7. **Reservation of Rights**
   - Concern: Section 12.15.080(I) appears to reserve to the City broad rights to attach its facilities, including wireless facilities, to poles owned by utility providers, without charge.
   - Question: What is the scope of facilities the City intends to attach to others' poles? What is the process for a pole owner to demonstrate that such attachment is not feasible, etc.?

November 15, 2021

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

Via Email

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

Dear Elisabeth and Jillian,

We write to you on behalf of AT&T, T-Mobile, and Verizon (hereinafter, the "Telecommunications Providers") as stakeholders in the draft Utility Access to the Right-of-Way code (Chapter 12.15) currently under consideration by the City of Portland ("City").

The Telecommunications Providers share serious concerns about the draft ordinance. At our meeting with the City on October 26th, the Telecommunications Providers posed many questions regarding process and requested reasonable foundational information regarding the draft ordinance, including the proposed method to calculate the right-of-way access fee, how pole attachment fees would be integrated in the new right-of-way access assessments, and how the City plans to avoid double charging operators that do not own or control facilities in the right-of-way.

From the City's response, it is clear that the requested information necessary for understanding and meaningfully assessing the proposed ordinance will not be forthcoming prior to the current comment period's November 15th deadline. The draft ordinance, as currently proposed, is confusing, internally inconsistent, and at times contradictory to what we have understood from City staff. Additionally, it lacks critical provisions required for implementation; not everything can or should be left to regulations. Moreover, some elements of the ordinance appear contrary to federal law. Without the threshold information requested by the Telecommunications Providers at the meeting, it is not possible to prepare meaningful comments on this draft.

The Telecommunications Providers are also very concerned about the lack of an iterative and transparent process for development of the draft ordinance given the significant impact that it will have on users of the public right-of-way. To remedy the flaws in both the proposal and the process, we request that the drafters restart the process entirely, beginning with comprehensive stakeholder and community engagement prior to penning any new ordinance. Recently, as part of the wireless process improvement efforts initiated by the Bureau of Development Services, the City offered a series of stakeholder meetings and iterative drafts based on redlines and other feedback gleaned from the stakeholders. The process was thorough and transparent and led to a mutual understanding of the challenges on both sides and a plan for improvement. The

Telecommunications Providers request that the City utilize a similar collaborative approach for this ordinance.

Finally, the Telecommunications Providers request a more detailed timeline for the ordinance review process and responses to the collective questions previously posed to the City so the stakeholders may provide comprehensive feedback based on all the necessary information.[1] The Telecommunications Providers would very much appreciate the opportunity to work with the City to build an unambiguous right-of-way access methodology that meets the City's objectives and is equitable to all users of the right-of-way.

Thank you for your consideration of these preliminary comments.

Sincerely,

DocuSigned by:
Timothy Halinski
D19989B8E4E2405...

Tim Halinski, Siting Advocacy Manager
For T Mobile

DocuSigned by:
Alex Leupp
B2E025DDB8D141B...

Alex Leupp, Executive Director
External Affairs, For Verizon

DocuSigned by:
Amir Johnson
3394D04F2BF64A5...

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

[1] A list of the questions posed by the Telecommunications Providers at the October 26th meeting is attached.

T-Mobile verizon AT&T

OCT/Wireless Provider Meeting Questions – 10-26-2021

1. **Code/Policy Change Process**
    - Concern: ROW users are asked to provide comments prior to understanding the proposed fees and other details for the new right-of-way license program. The wireless industry just had a positive, collaborative experience with BDS's preparation of a new Program Guide for reviewing and approving wireless facilities, with the opportunity to comment on multiple drafts. In comparison, it appears that the comment period ending November 15, 2021, will be the only comment period for this significant program change.
    - Questions:
        - Will the City set another comment period once it discloses proposed fees and the fee ordinance and resolution referenced in the draft ROW code?
        - What other opportunities for input will industry have prior to the ordinance being set for Council?
2. **Changes to Fee Structure**
    - Concern: The FAQ says the ROW charges imposed under licenses will be the same as are currently charged (using attachment fees as an example), but there is no reference to attachments in the ROW Usage fee section of the draft ordinance (in contrast, the fee calculated by linear feet is called out expressly).
    - Questions:

- Will ROW Usage fees for wireless still be calculated and imposed on a per-attachment basis?
- Will the separate fee ordinance referenced in the ROW Usage fee section have other details about the calculation of fees?
- Please explain proposed Subsection 12.15.080(J) regarding fees for multiple services.
- How will the City avoid duplicate charges under the new structure?

3. **Fee Ordinance and Resolution**
   - Concern: A referenced future fee ordinance and resolution will apparently provide the fee amounts and presumably more details about the City's intent for how the new program will work.
   - Question: What is the status of these documents being available for review?

4. **Cost study**
   - Concern: ROW fees for small wireless facilities must be cost-based, under the 2018 FCC Order.
   - Question: Does the City have a cost study to support the proposed fees and when/how will it be available for review?

5. **Applicability of Ordinance**
   - Concern: Some of the FAQ/ordinance language is ambiguous regarding applicability.
   - Question: Does the City intend any portion of the ordinance to be applicable immediately, regardless of when relevant franchises expire?

6. **Director Rule-Making Authority, etc.**
   - Concern: Section 12.15.060 describes broad rule-making authority, etc.
   - Question: What is the intended scope of rule-making authority vs. what matters will need to go to Council for approval.
7. **Reservation of Rights**
   - Concern: Section 12.15.080(I) appears to reserve to the City broad rights to attach its facilities, including wireless facilities, to poles owned by utility providers, without charge.
   - Question: What is the scope of facilities the City intends to attach to others' poles? What is the process for a pole owner to demonstrate that such attachment is not feasible, etc.?

GLOBAL HQ
1821 30th Street, Unit A
Boulder, CO 80301 USA
www.zayo.com
@ZayoGroup

VIA Electronic Mail Only

November 15, 2021

Director Elisabeth Perez
Office of Community Technology
111 SW Columbia Street, Suite 600
Portland, OR 97201

Re: Zayo Comments to Proposed Changes to City of Portland Right-of-Way Code

Dear Director Perez:

Please accept the following comments from Zayo Group, LLC in response to the City of Portland's proposed right-of-way ordinance. Given that Zayo did not receive notice or an invitation to review and provide comments on the City of Portland's proposed right-of-way ("ROW"), we respectfully reserve the right to submit additional comments in any future forum should an opportunity present itself.

From the outset, Zayo recognizes and respects the importance of striking a proper balance in providing essential telecommunications services to local businesses and citizens, while also managing access to public rights-of-way. Although Zayo supports the City's efforts to modernize its ROW code, Zayo emphasizes that any fee structure imposed by the City that is at odds with federal law is detrimental to the deployment of fiber optic networks within the City, and to downstream communities, because it takes capital needed for physical network maintenance and expansion.

Federal Law Regarding ROW Fees

Access to ROWs by communications providers like Zayo is carefully regulated by federal law and policy to ensure that providers can access ROW on reasonable and non-discriminatory terms and conditions. Such access is critical for timely, efficient, and cost-effective deployment of advanced communications networks and services.

Specifically, the Federal Telecommunications Act of 1996 ("Act") promotes competition in local markets by removing barriers to entry,[1] including removal of barriers to the public ROW necessary to provide service.[2] Section 253(a) of the Act expressly provides: "No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."[3]

[1] *See* 47 U.S.C. § 251 et seq.
[2] *See generally* 47 U.S.C. § 253
[3] 47 U.S.C. § 253(a).

The Act further limits local governments to receiving "***fair and reasonable*** compensation from telecommunications providers, on a ***competitively neutral and nondiscriminatory basis***, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is ***publicly disclosed*** by such government."[4] (emphasis added).

The Federal Communications Commission ("FCC") recently issued an Order[5] clarifying that under section 253(a), state and local authorities cannot "materially inhibit" the provisioning of telecommunications services.[6] Notably, the FCC confirmed that local authorities materially inhibit the provisioning of telecommunications services when they charge fees greater than actual cost.[7] Additionally, any fees cannot be higher than fees charged to other providers.[8]

On August 12, 2020, the Ninth Circuit affirmed the Order,[9] holding that the materially inhibit standard set forth in the FCC's California Payphone decision was the correct method to determine whether a state or local fee prohibits or effectively prohibits the provisioning of telecommunications services and is therefore preempted by 253(a).[10]

The Court's holding as to the applicability of California Payphone to 253(a) results in complete preemption of any state or local government, including your office, from assessing any fee above the City's actual cost to permit access to public right-of-ways. As noted by the FCC, Section 253 applies to "any interstate or intrastate telecommunications services.[11]" "All telecommunications services" includes the wireline telecommunication services provided by Zayo. In interpreting 253(a), the FCC's analysis in California Payphone and the materially inhibit standard set forth therein applies equally to wireless and wireline, i.e., all telecommunications services.[12]

In the Order, the FCC determined that state and local government fees for access to ROW violate 253 and materially inhibit the provisioning of telecommunications services "unless these conditions are met:"

> (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;

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[4] *See id.*

[5] *See FCC's Declaratory Ruling and Third Report & Order, Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, 33 FCC Red. 9088 (rel. September 26, 2018) ("FCC Order").

[6] Para 10, p.4 of the FCC Order.

[7] Para 10, p.4 of the FCC Order.

[8] Para 77, p. 41 of the FCC Order.

[9] Excepting the objective aesthetics standard that is not at issue here.

[10] City of Portland, 969 F3d 1020; 1034, 1035. The Court also affirmed the FCC's actual cost and safe harbor fee provisions as well as the Moratorium Order.

[11] Para 34, p. 14 of the FCC Order.

[12] City of Portland, 969 F3d 1020; 1034, 1035, 1048.

(3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.[13]

Any fee assessed against Zayo must meet the requirements set out by the FCC. As the Ninth Circuit noted, "fair and reasonable" does not mean cities should be making a "profit by charging fees above costs.[14]" (emphasis added). The actual cost standard is the standard for determining whether a fee materially inhibits the provisioning of telecommunications services and is preempted by 253 – whatever the telecommunication service may be.

Portland's proposed utility fees structure is at odds with federal law because it does not make it clear that any fee structure for access to the ROW must be based on actual cost.

Portland's Proposed Alternate Procedure For Assessing Fees is Anti-Competitive and Discriminatory

As set forth above, it is Zayo's position that any fees imposed by Portland for access to right-of-ways must be actual cost based. Further, to the extent that the Council sets fees that distinguish between LECs, as they do today,[15] then such fees are in violation of 47 U.S.C. 253(c).[16] The unbridled discretion provided to the City Council to set fees invites the potential for the City to violate state and federal law.

Conclusion

The need for deployment of broadband facilities is critical. The City's ROW stewardship should promote infrastructure deployment rather than stifling deployment. As noted above, Zayo did not receive notice of the proposed ROW ordinance so has not had the ability to thoroughly examine all implications associated with the proposed language. However, some items of particular concern are apparent: 1) taxation implications; 2) unfettered discretion of the City Counsel to set fees; 3) requirements to provide in-kind services;[17] 4) infringing on the jurisdiction of the Oregon Public Utility Commission; and 5) conflicts with statutory language.

Thank you for your time. We look forward to further discussions on the proposed ROW ordinance. If you should have any questions, please feel free to contact the undersigned at ted.gilliam@zayo.com.

[13] Para 50, p. 25 of the FCC Order.
[14] City of Portland, 969 F3d 1020; 1039.
[15] Currently the City imposes a gross revenue fee of 5% for CLECs and a 7% of local exchange access revenue on ILECs.
[16] 47 U.S.C. 253(c) provides in part: "Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis..."
[17] *See City of Eugene, Oregon et al. v. Federal Communications Commission, et. al*; May 27, 2021, No. 19-4161

GLOBAL HQ
1821 30th Street, Unit A
Boulder, CO 80301 USA
www.zayo.com
@ZayoGroup

Sincerely,

Ted Gilliam

Ted Gilliam
General Counsel, Strategic and Regional Networks
Zayo Group, LLC

135 Lake Street South, Suite 155
Kirkland, WA 98033
Jessica Epley
M. (503) 431-0458
jessica.epley@ziply.com

November 5, 2021

Director Elisabeth Perez
Office of Community Technology
111 SW Columbia Street, Suite 600
Portland, OR 97201

Re: Draft Right of Way Code – City of Portland

Dear Director Perez:

Thank you for the opportunity to comment on the draft Right of Way code. We have completed a close review of the proposal, identify the following issues and respectfully offering our rationale for each issue:

Issue 1: Communications Service definition conflicts with the Telecommunications Act of 1996 and the Oregon Revised Statutes:

12.15.030 Definitions

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

R. Utility service means the provision, by means of utility facilities permanently located within, under or above the right-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, wireless communications services, cable services, water, sewer or storm sewer, pipeline, public pay phones or other services to or from customers within the corporate boundaries of the City, or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.

The proposed definitions of “Communications Service” and “Utility service” conflict with the statutory definitions applicable to Ziply Fiber Northwest, LLC (“Ziply Fiber”) as a telecommunications utility regulated by and operating under the authority of the Oregon Public Utilities Commission. The Oregon Revised Statutes define:

ORS 759.005 (9)(a) “Telecommunications utility” means:

(A)Any corporation, company, individual or association of individuals, or its lessees, trustees or receivers, that owns, operates, manages or controls all or a part of any plant or equipment in this state for the provision of telecommunications service, directly or indirectly to or for the public, whether or not the plant or equipment, or any portion of the plant or equipment, is wholly within any town or city.

(B)Any corporation, company, individual or association of individuals that is party to an oral or written agreement for the payment by a telecommunications utility, for service, managerial construction, engineering or financing fees, and has an affiliated interest with the telecommunications utility.

(b)"Telecommunications utility" does not include:

(A)Any plant owned or operated by a municipality.

(B)Any corporation not providing intrastate telecommunications service to the public in this state, whether or not the corporation has an office in this state or has an affiliated interest with a telecommunications utility as defined in this chapter.

(C)Any person acting only as a competitive telecommunications provider.

(D)Any corporation, company, individual or association of individuals providing only telephone customer premises equipment to the public.

As a telecommunications utility, Ziply Fiber provides telecommunications service over its network. Telecommunications service is defined in the federal Telecommunications Act of 1996 and in the Oregon Revised Statutes:

47 U.S.C. § 3: ''(51) TELECOMMUNICATIONS SERVICE.—The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.''.

ORS § 759.005 (8): "Telecommunications service" means telecommunications that are offered for a fee to the public, or to such class of users as to be effectively available to the public, without regard to the facilities used to provide the telecommunications. "Telecommunications service" does not include:

(a)Services provided by radio common carrier.

(b)One-way transmission of television signals.

(c)Private telecommunications networks.

(d)Communications of the customer that take place on the customer side of on-premises equipment.

As an OPUC-regulated telecommunications utility, Ziply Fiber's network provides telecommunications services precisely as defined in the Federal and State statutes. The City's attempt to expand the definition beyond that required by the Federal and State laws conflicts with the jurisdiction of both the FCC and the OPUC.

Issue 2: Gross revenue definition conflicts with Oregon Revised Statutes:

12.15.030 Definitions

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

The proposed definition of “Gross revenue” conflicts with the state statutory definition applicable to Ziply Fiber in the Oregon Revised Statutes:

ORS 221.515 (2) As used in this section, “gross revenues” means those revenues derived from exchange access services, as defined in ORS 403.105 (Definitions for ORS 305.823 and 403.105 to 403.250), less net uncollectibles from such revenues.

As a telecommunications utility, gross revenue is defined in ORS § 221.515 and § 403.105:

ORS § 221.515 (2) As used in this section, “gross revenues” means those revenues derived from exchange access services, as defined in ORS 403.105 (Definitions for ORS 305.823 and 403.105 to 403.250), less net uncollectibles from such revenues.

ORS § 403.105 (11) “Exchange access services” means:

(a) Telephone exchange access lines or channels that provide access by a consumer or subscriber in this state to the local telecommunications network to effect the transfer of information; and

(b) Unless a separate tariff rate is charged therefor, any facility or service provided in connection with the services described in paragraph (a) of this subsection.

Issue 3: Right of Way fee conflicts with taxation limitations on telecommunications utilities in the Oregon Revised Statutes:

> *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.*
>
> *12.15.100 Right-of-Way Access Fee.*
>
> *A. Except as set forth in Subsection B of this Section, every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, will pay the right-of-way access fee for every utility service provided using the right-of-way in the amount determined by ordinance of the City Council.*

The proposed rule assesses a right of way fee upon gross revenue but specifies the fee is not a tax. Upon closer examination, the base for the fee is the identical base for the statutorily authorized telecommunications utility privilege tax. Municipalities are authorized to levy a privilege tax on a telecommunications utility’s gross revenues as defined and may not be required to pay other fees:

221.515 Privilege tax on telecommunications carriers; maximum rate; deduction of additional fees. (1) The council of every municipality in this state may levy and collect from every telecommunications carrier operating within the municipality and actually using the streets, alleys or highways, or all of them, in such municipality for other than travel, a privilege tax for the use of those streets, alleys or highways, or all of them, in such municipality in an amount which may not exceed seven percent of the gross revenues of the telecommunications carrier currently earned within the boundaries of the municipality. The privilege tax authorized in this section shall be for each year, or part of each year, that such telecommunications carrier operates within the municipality.

(2) As used in this section, “gross revenues” means those revenues derived from exchange access services, as defined in ORS 403.105, less net uncollectibles from such revenues.

(3) A telecommunications carrier paying the privilege tax authorized by this section shall not be required to pay any additional fee, compensation or consideration, including the free use or construction of telecommunications facilities and equipment, to the municipality for its use of public streets, alleys, or highways, or all of them, and shall not be required to pay any additional tax or fee on the gross revenues that are the measure of the privilege tax. As used in this subsection, “use” includes, but is not limited to, street openings, construction and maintenance of fixtures or facilities by telecommunications carriers. As used in this subsection, “additional fee, compensation or consideration” does not include commissions paid for siting public telephones on municipal property. To the extent that separate fees are imposed by the municipality on telecommunications carriers for street openings, construction, inspection or maintenance of fixtures or facilities, such fees may be deducted from the privilege tax authorized by this section. However, telecommunications carriers shall not deduct charges and penalties imposed by the municipality for noncompliance with charter provisions, ordinances, resolutions or permit conditions from the privilege tax authorized by this section.

(4) For purposes of this section, “telecommunications carrier” has the meaning given that term in ORS 133.721.

If a municipality does not wish to seek a franchise agreement with telecommunications utility, its authority to levy a privilege tax upon a telecommunications utility is further restricted:

ORS 221.450 Privilege tax on public utilities operating without franchise

Except as provided in ORS 221.655 (Privilege tax on distribution utilities), the city council or other governing body of every incorporated city may levy and collect a privilege tax from Oregon Community Power and from every electric cooperative, people’s utility district, privately owned public utility, telecommunications carrier as defined in ORS 133.721 (Definitions for ORS 41.910 and 133.721 to 133.739) or heating company. The privilege tax may be collected only if the entity is operating for a period of 30 days within the city without a franchise from the city and actually using the streets, alleys or highways, or all of them, in such city for other than travel on such streets or highways. The privilege tax shall be for the use of those public streets, alleys or highways, or all of them, in such city in an amount not exceeding five percent of the gross revenues of the cooperative, utility, district or company currently earned within the boundary of the city. However, the gross revenues earned in interstate commerce or on the business of the United States Government shall be exempt from the provisions of this section. The privilege tax authorized in this section shall be for each year, or part of each year, such utility, cooperative, district or company, or Oregon Community Power, operates without a franchise.

As a telecommunications utility, Ziply Fiber has the same rights to condemnation that a municipality enjoys:

ORS 759.075 (1) Any telecommunications utility may:

> (a) Enter upon lands within this state for the purpose of examining, locating and surveying the line thereof and also other lands necessary and convenient for the purpose of construction of service facilities, doing no unnecessary damage thereby.
>
> (b) Condemn such lands not exceeding 100 feet in width for its lines (including poles, towers, wires, supports and necessary equipment therefor) and in addition thereto, other lands necessary and convenient for the purpose of construction of service facilities.

(2) Notwithstanding subsection (1) of this section, any telecommunications utility may, when necessary or convenient for transmission lines (including poles, towers, wires, supports and necessary equipment therefor) designed for voltages in excess of 330,000 volts, condemn land not to exceed 300 feet in width. In addition, if the lands are covered by trees which are liable to fall and constitute a hazard to its wire or line, such telecommunications utility may condemn such trees for a width not exceeding 100 feet on either side of the condemned land, as may be necessary or convenient for such purpose.

(3) The proceedings for the condemnation of such lands shall be the same as that provided in ORS chapter 35, provided that any award shall include, but shall not be limited to, damages for destruction of forest growth, premature cutting of timber and diminution in value to remaining timber caused by increased harvesting costs.

Issue 3: Licenses Transfer or Assignment conflicts with municipal authority over telecommunications utilities in Oregon Revised Statutes:

> *12.15.080 Licenses.*
>
> *K. Transfer or Assignment. Unless exempted by applicable state and federal laws, the licensee will obtain the written consent of the City prior to the transfer or assignment of the license. The license will not be transferred or assigned unless the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under state or federal laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee will become responsible for fulfilling all the obligations under the license with respect to all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license. 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 12.15.120.*

The proposed rule requires a telecommunications utility seek written approval of the municipality for transfer or assignment of the licenses, which directly infringes upon the authority of the Oregon Public Utilities Commission over such matters as defined:

ORS § 759.375 Approval prior to sale, mortgage or disposal of operative utility property. (1) A telecommunications utility doing business in Oregon shall not, without first obtaining the Public Utility Commission's approval of such transaction:

> (a) Sell, lease, assign or otherwise dispose of the whole of the property of such telecommunications utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $100,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such

telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility;

(b) Mortgage or otherwise encumber the whole or any part of the property of such telecommunications utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility; or

(c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any telecommunications utility property, or perform any service as a telecommunications utility, or any part thereof, with any other public utility or telecommunications utility.

(2) A telecommunications utility that sells, leases, assigns or otherwise disposes of the whole of the property of such telecommunications utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $25,000, but less than $100,000, shall notify the commission of the sale within 60 days following the date of the sale.

(3) Every sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation subject to subsection (1) of this section made other than in accordance with the order of the commission authorizing the same is void.

(4) This section does not prohibit or invalidate the sale, lease or other disposition by any telecommunications utility of property which is not necessary or useful in the performance of its duties to the public.

Issue 4: Licenses – Leases and Sales of Utility Facilities conflicts with municipal authority over telecommunications utilities in Oregon Revised Statutes:

12.15.080 Licenses.

L. Leases and Sales of Utility Facilities.

1. Leases. The licensee will obtain the written consent of the City prior to leasing any portion of its utility facilities, which consent will not be unreasonably withheld, conditioned or delayed. However, the licensee may lease any portion of its utility facilities in the ordinary course of its business without otherwise obtaining the City's written consent, so long as the licensee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its 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 or a valid agreement between the licensee and the lessee, provided that the licensee takes reasonable steps to ensure that its lessees are in compliance with this Chapter.

The proposed rule requires a telecommunications utility seek written approval of the municipality for the leasing of its facilities, which directly infringes on the authority of the Oregon Public Utilities Commission:

ORS § 759.375 Approval prior to sale, mortgage or disposal of operative utility property.

(1) A telecommunications utility doing business in Oregon shall not, without first obtaining the Public Utility Commission's approval of such transaction:

(a) Sell, lease, assign or otherwise dispose of the whole of the property of such telecommunications utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $100,000, or sell, lease, assign or otherwise dispose of any franchise, permit or right to maintain and operate such telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility;

(b) Mortgage or otherwise encumber the whole or any part of the property of such telecommunications utility necessary or useful in the performance of its duties to the public, including any franchise, permit or right to maintain and operate such telecommunications utility or telecommunications utility property, or perform any service as a telecommunications utility; or

(c) By any means whatsoever, directly or indirectly, merge or consolidate any of its lines, plant, system or other property whatsoever, or franchise or permit to maintain or operate any telecommunications utility property, or perform any service as a telecommunications utility, or any part thereof, with any other public utility or telecommunications utility.

(2) A telecommunications utility that sells, leases, assigns or otherwise disposes of the whole of the property of such telecommunications utility necessary or useful in the performance of its duties to the public or any part thereof of a value in excess of $25,000, but less than $100,000, shall notify the commission of the sale within 60 days following the date of the sale.

(3) Every sale, lease, assignment, mortgage, disposition, encumbrance, merger or consolidation subject to subsection (1) of this section made other than in accordance with the order of the commission authorizing the same is void.

(4) This section does not prohibit or invalidate the sale, lease or other disposition by any telecommunications utility of property which is not necessary or useful in the performance of its duties to the public.

Furthermore, as a telecommunications utility Ziply Fiber is required by the federal Telecommunications Act of 1996 to lease portions of its facilities to other providers. These leases are approved by and recorded at the OPUC. City involvement in this process would infringe directly on the OPUC's statutory authority, and could be construed as a barrier to entry under 47 USC §253.

Furthermore, the City's intended mandate that Ziply Fiber provide certain customer information directly conflicts with Ziply Fiber's duty to secure customer proprietary network information (CPNI) under 47 U.S.C. § 222.

Issue 5: Licenses – Termination conflicts with municipal authority over telecommunications utilities in the Oregon Revised Statutes:

12.15.080 Licenses

N. Termination.

5. Removal of Utility Facilities. If the City has revoked or terminated a license or if a license has expired without being renewed or extended, all the utility operator's rights under the license will immediately cease and be divested. Thereafter, except as otherwise provided in writing by the Director, the utility operator 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.

The proposed rule seeks removal of a telecommunications utility's facilities in the event that a license is expired, revoked or terminated. However, the area in which Ziply Fiber operates is an Oregon Public Utilities Commission allocated service territory whereby Ziply Fiber serves as the "carrier of last resort" obligated to provide safe and adequate telephone service to any eligible customer. The rule directly conflicts with the telecommunications utility's statutory obligations:

ORS § 759.035 Duty to furnish adequate and safe service at reasonable rates. Every telecommunications utility is required to furnish adequate and safe service, equipment and facilities, and the charges made by any public utility for any service rendered or to be rendered in connection therewith shall be reasonable and just, and every unjust or unreasonable charge for such service is prohibited.

ORS § 759.500 Definitions

(1) "Allocated territory" means a geographic area for which the Public Utility Commission has allocated to no more than one person the authority to provide local exchange telecommunications service, the boundaries of which are set forth on an exchange map filed with and approved by the commission.

(2) "Person" includes:

(a) An individual, firm, partnership, corporation, association, cooperative or municipality; or

(b) The agent, lessee, trustee or referee of an individual or entity listed in paragraph (a) of this subsection.

(3) "Local exchange telecommunications service" has the meaning given that term in ORS 759.005, except that "local exchange telecommunications service" does not include service provided through or by the use of any equipment, plant or facilities:

(a) For the provision of telecommunications services that pass through or over but are not used to provide service in or do not terminate in an area allocated to another person providing a similar telecommunications service;

(b) For the provision of local exchange telecommunications service, as defined in ORS 759.005, commonly known as "private lines" or "farmer lines"; or

(c) For the provision of shared telecommunications service.

ORS § 759.506 Purpose of allocated territory laws; carrier of last resort obligations; exemptions from obligations; reinstatement of obligations.

(1) The purpose of establishing allocated territories under ORS 759.500 to 759.570 is to ensure that telecommunications utilities, cooperative corporations and municipalities certified by the Public Utility Commission to provide local exchange telecommunications service:

(a) Provide adequate and safe service to the customers of this state; and

(b) Serve all customers in an adequate and nondiscriminatory manner.

(2) The obligations described in this section may be referenced as carrier of last resort obligations.

(3) The commission, upon petition from a telecommunications utility, cooperative corporation or municipality, may exempt the telecommunications utility, cooperative corporation or municipality from the obligations described in this section if the commission finds, for a property with four or more single-family dwellings, that the owner or developer of the property, or a person acting on behalf of the owner or developer:

(a) Permits an alternative service provider to install its facilities or equipment used to provide local telecommunications service based on a condition of exclusion of the telecommunications utility, cooperative corporation or municipality during the construction phase of the real property;

(b) Accepts or agrees to accept incentives or rewards from an alternative service provider that are contingent upon the provision of any or all local telecommunications services by one or more alternative service providers to the exclusion of the telecommunications utility, cooperative corporation or municipality; or

(c) Collects from the occupants or residents of the property mandatory charges for the provision of any local telecommunications service provided to the occupants or residents by an alternative service provider in any manner, including, but not limited to, collection through rent, fees or dues.

(4) If the commission, upon petition from any interested person located within the property for which the commission has waived the carrier of last resort obligations under subsection (3) of this section, finds that the existing public convenience and necessity requires reinstatement of the carrier of last resort obligations, then the commission has the power to assign the obligations to a telecommunications utility, cooperative corporation or municipality after a public hearing. The commission shall determine how the costs of serving the customers are allocated so that the telecommunications utility, cooperative corporation or municipality will be allowed an opportunity to recover reasonable and prudent costs that exceed the costs that would have been incurred to initially construct or acquire facilities to serve customers of the territory. The determination of cost allocation by the commission must also divide the costs allowed equitably among all customers of the territory to which service is being reinstated.

Issue 6: Insurance and Indemnification requirements are extraordinary:

12.15.120 Insurance and Indemnification

B. Indemnification

3. Every utility operator will also forever indemnify 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 directly attributable to the utility operator's work in the right-of-way. Hazardous substances will have the meaning given by ORS 465.200(16).

The proposed rule requires a period of "forever" for indemnification to the City and its agents for environmental conditions which is well beyond the reasonable limits of insurance policy coverage as well as beyond all applicable Oregon statutes of limitation.

Issue 7: Financial Assurance requirements are will disproportionately affect smaller ROW occupants or those with fewer overall customers:

12.15.130 Financial Assurance.

B. The amount of such financial assurance will be in an amount of one-hundred thousand dollars ($100,000). A utility operator will immediately replace or replenish to the full amount any draw-down of the financial assurance by the City. The financial assurance will be in effect until the later of: (i) termination of a franchise or license; or (ii) removal of all or part of a utility operator's utility facilities. This obligation is in addition to any performance guarantees required by applicable City Code and regulations.

The proposed rule requires a blanket financial assurance amount of $100,000 which will have a disproportionate impact upon similarly situated occupants of the public right of way. In the case of Ziply Fiber, as a telecommunications utility the maximum amount a municipality may levy taxation is either five or seven percent of the gross revenues (defined as revenues derived from exchange access services- telephone exchange access lines or channels that provide access by a consumer or subscriber in this state to the local telecommunications network to effect the transfer of information and any facility or service provided in connection with the services - less net uncollectibles from such revenues. Given the current small number of subscribers Ziply Fiber has within the boundary of the City of Portland and statutory constraints on the fees and taxes that may be levied, the likely fee will be less than $1,000 per month. Mandating a bond or similar instrument of one hundred times the amount of forecasted monthly remittance is excessive.

Issue 8: Equal Employment Opportunity/Affirmative Action/Minority Business Enterprises conflicts with privately negotiated collective bargaining agreements:

> *12.15.160 Equal Employment Opportunity/Affirmative Action/Minority Business Enterprises.*
>
> *B. The utility operator 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 utility operator'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.*

In Ziply Fiber's case, a majority of its employees are represented by either the Communications Workers of America (CWA) or the International Brotherhood of Electrical Workers. The City has no legal authority to insert itself into the process or operation of bargained-for agreements between the unions and the Company.

Issue 9: Penalties do not provide sufficient due process:

> *12.15.170 Penalties*
>
> *A. The City will give the utility operator written notice of any violations and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar days) for the utility operator to remedy the violations. If the Director determines the utility operator is guilty of violating any of the provisions of this Chapter or the license after the time to remedy has passed, the Director will consider the standards found in Subsection C of this Section and: (i) issue a hold on any permit applications filed by the utility operator for work in the right-of-way; (ii) fine the utility operator not less than one hundred dollars ($100) nor more than one thousand dollars ($1,000) for each offense; or (iii) both (i) and (ii). A separate and distinct offense will be deemed committed each day on which a violation occurs or continues.*
>
> *E. Except as provided in Section 12.15.110 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.*

The City cannot grant itself fine assessment authority and then deny the utility the opportunity to pursue administrative due process through a hearing or similar procedure before the City Council. This proposed measure would also usurp the OPUC's jurisdiction over alleged misconduct by public utilities in the state, and bypasses that procedure (which provides due process) at the Commission.

Please feel free to contact me with any further questions or concerns.

Sincerely,

Jessica Epley
Vice President, Regulatory & External Affairs