

Right-of-Way Code: Frequently Asked Questions

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Common Arguments Against Right-of-Way Reform

The City is overstepping its authority by...

- [imposing fees above and beyond “costs-based fees” for services other than small wireless facilities](#)
- [requiring information that is already provided to other regulators, and information it has no right to know](#)

There's a lack of transparency

- [The process has lacked transparency, and it has not been public](#)
- [The City hasn't made any changes based on utility comments](#)
- [The draft ordinance would shift Council authority to non-elected City staff](#)

There are problems with how the City is determining costs

- [The rate is changing](#)
- [This is a large hidden tax increase](#)
- [The City is charging each provider multiple times](#)
- [The City is charging both the owner and any leasees of any right-of-way facilities](#)
- [The City defines "gross revenue" differently than the Public Utilities Commission](#)
- [The City is charging "market rate rent" for right-of-way access](#)
- [The City is tying gross revenues to revenue earned outside the City limits](#)

The project is poorly conceived

- [The City is proposing these changes to generate more revenue](#)
- [The draft claims to create a more equitable system, but it actually provides an advantage to entities that signed permanent franchises in 2020](#)
- [The draft doesn't clearly and completely define "gross revenue"](#)
- [The draft introduces tax law concepts that create vagueness, uncertainty, and vast room for future debate](#)
- [The City is raising costs on residents during an already difficult time](#)

Overview

What is the right-of-way (ROW)?

- **The land from sidewalk to sidewalk** above, below, and on the surface of our streets.
 - where utilities like water, gas, electricity, and communications are run
 - how we all get around by foot, bike, or vehicle
- **One of the City's largest assets**
 - about 20% of the land
 - about 40% of the downtown core
- **Owned by Portlanders** and held in trust by the City
 - Please see this short video for more information: <https://vimeo.com/525218301>

What is the City's duty?

To Portlanders

- **Fiduciary** duty to ensure just and fair compensation for use of their property
- **Conserve limited physical capacity** of the right-of-way
- **Coordinate construction** to minimize disturbance and early degradation of asset

To entities using the right-of-way

- Ensure similarly situated utilities are treated similarly

What is wrong with our current system (individually negotiated franchise agreements)?

- Negotiation process is **costly and inefficient**
- Slightly different terms make **enforcement difficult and time consuming**
- In the four years since the City hired a Franchise and Utility Program auditor, the auditor has:
 - recovered **\$4.5 million in unpaid fees**
 - uncovered **inconsistencies in how gross revenue has been interpreted**
- Franchises are also **inequitable**: companies with more resources are able to spend more money on legal counsel and more time negotiating provisions

Why is it important to have a right-of-way code?

- **Equitable** rules for all utilities
- **Clarity** of terms
- **Ease the administrative burden** on staff
- Enable staff to **focus on compliance**
- Ensure **fair compensation** for private use of the City's largest physical asset

Why now?

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

- 2012: Gresham
- 2013: Oregon City
- 2016: Beaverton, Gladstone, Happy Valley, Hillsboro

- 2017: Milwaukie, Tualatin
- 2018: Corvallis, Sherwood
- 2019: Tigard, Lake Oswego
- 2021: Woodburn

The City's proposal builds on this regional work:

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

Frequently Asked Question - Topics

Gross Revenue

Concern: The rate is changing.

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

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

Response: The definition of gross revenue has not significantly changed, but rather simplified for greater adaptability to new technologies and federal rules.

Currently, "gross revenue" is defined as:

any revenue earned within the City, after adjustment for the net write-off of uncollectible accounts, from the sale of electrical energy, gas, district heating or cooling, or water, or sewage disposal and treatment service, from the furnishing or sale of communications or associated services by or from a telecommunications or cable

communications business, or any revenue earned by a Utility within the City from the use, rental, or lease of operating facilities, or any revenue earned within the City for supplying electricity or natural gas.

The proposal would define it as:

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

Concern: “It would not be a stretch to call this one of the largest hidden tax increases ever proposed in Portland’s history.” (Portland Business Alliance)

Response: The fee rate is not changing. For decades, utilities have paid 5% of gross revenues and, since fall 2021, the City has consistently told utilities that the rate would not be changing. This also is the same percentage that companies are paying under the Utility License code.

Concern: It is unclear whether the City will charge a right-of-way fee to both the owner of any facilities in the right-of-way, and any service provider the owner requires (for example, when wireless facilities are served by fiber for backhaul). (ATT, Verizon, T-Mobile)

Response: The fee is imposed upon any utility that uses facilities such as wires, ducts, cables, and conduits, within the City. The code creates an equitable environment where any utility that uses its own facilities, or those owned by another utility, compensates the residents for use of the right-of-way. Some utilities (wireless) claim they do not use the right-of-way. This is untrue. The wireless providers use facilities owned by other utilities to transport their signal, making their services possible. If they did not use the facilities within the right-of-way their service would not work.

Concern: Under the proposal, the City will charge entities that lease facilities in the right-of-way rather than only charging the owner of the facilities. (TC America)

Response: Historically, a utility that owned facilities was the only entity that used those facilities. Currently, many utilities use the same facilities, and the City has the right to require both the owner of the physical facility and the lessee to fairly and justly compensate Portlanders for that use. This is not unlike utilities charging customers for different lines of service using the same facilities such as phone, internet, and cable.

Concern: Portland’s definition of gross revenue should match the Public Utilities Commission (PUC) definition.

Response: The PUC only regulates utilities under the authority of the PUC, whereas the City’s definition must apply to all utilities using the right-of-way. All utilities are not subject to the PUC, therefore, the City can and should have its own definition that pertains to the utilities using the City’s right-of-way.

Concern: The City cannot charge “market rate rent” for “renting” the right-of-way.

Response: The City’s charges have nothing to do with the rate of the market. Rather, they are—and the proposal would keep them—at a fixed percentage of gross revenue. Many other cities in Oregon do this, and it is common practice.

Concern: The City is calculating its fee based on gross revenues derived from outside the City limits.

Response: The City has not and does not intend to require companies to pay fees on gross revenues derived from outside of Portland.

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

Response: These are not new terms or concepts. The City has simply given some examples to clarify these terms in the administrative rules.

Concern: The City is proposing these changes to generate more revenue.

Response: The goal is not to increase revenue. The City’s goal is to ensure all utilities are following the same rules and provide competitive equity between comparable utilities. Any increase in the City’s revenue will be due to increased compliance from utilities as the definition of “gross revenue” is clarified. We have learned through the City’s audit process that utilities interpret the current definition of “gross revenue” differently than the City.

Concern: City of Portland is raising costs on Portlanders during an already difficult time.

Response: The City of Portland imposes fees on utilities using the right-of-way, not on Portland residents – but it is also not raising fees on these utilities. The City will continue to charge 5% of

gross revenues as it has for decades. Though the City will continue to charge 5% of gross revenues, utilities such as NW Natural and Pacific Power are currently requesting rate increases.

Legal Framework

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

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

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

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

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

Concern: The City is overstepping its authority, by requiring information that is already provided to other authorities (PUC & FCC), and information it has no right to know.

Response: The City has the right and duty to know who is using the ROW, an asset belonging to residents. The City is responsible for maintaining the ROW and ensuring that companies have the necessary insurance, bonds, etc. for the safety and security of the public. Finally, the City does not have access to all the records held by the FCC or the Public Utility Commission and has a right to know the information that is provided to those authorities.

Transparency

Concern: The process has lacked transparency, and it has not been public. (Portland Business Alliance)

Response: The City has been transparent and thoughtful throughout the process. The Office for Community Technology conducted outreach to utilities from August-October 2021, including individual phone calls to many utilities in September before the first public comment period. That first public comment period ran from October-November 2021. After receiving provider

comments, the Office for Community Technology revised the right-of-way code and provided a second comment period which included the fee schedule and administrative rules. The Office for Community Technology, as well as Commissioner Rubio's office, also met numerous times with specific utilities upon request.

The City is not required to negotiate its policies, but it has nonetheless made changes to the code based on comments from utilities.

Concern: The City hasn't made any changes based on utility comments.

Response: The City has revised several points based on utility feedback, such as removing the City's reservation of right from the code, excluding telecommunication services for internal communications from any charges or fees, expanding and clarifying the definition of "Small Wireless Facility," adding an allowance for providers to have Self-Insurance, and clarifying the term of the license.

Concern: The draft ordinance would give non-elected City staff – specifically, the Office for Community Technology director – authority to increase taxes, fees, and rates without a public process. This authority must remain with the City Council, with transparent means to challenge issues that are in dispute. (Portland Business Alliance)

Response: The Director's authority is not increasing. The Director continues to have the same authority granted within the scope of their responsibilities, in the UL code, and similar to that of other jurisdictions and bureau directors.

Council will continue to set policy and rates. When there are updates to the code and fees, the Office for Community Technology would need Council approval. The Director can then clarify policy set by Council in administrative rules.

Equity

Concern: The draft creates unequal right-of-way policy by providing an advantage to entities that signed permanent franchises in 2020. (Portland Business Alliance)

Response: There are no "permanent franchises." As the current franchise agreements sunset, those utilities will be regulated by the right-of-way code. If there is a material inequality, the Office for Community Technology will work with those utilities to remedy the issue, in accordance with federal law. If the city were to issue a new franchise, the terms and provisions of that franchise would be very similar to the terms and provisions contained within the right-of-way code.