

TITLE 8
CHAPTER 7

RIGHT OF WAY MANAGEMENT

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8-7-1: SHORT TITLE: This Chapter shall be referred to as the "Right of Way Management Chapter."

8-7-2: JURISDICTION AND MANAGEMENT OF THE PUBLIC RIGHT OF WAY

- A. The City has jurisdiction and exercises regulatory management authority over all City Public Rights of Way pursuant to the City Charter and State law. The City's purpose for exerting its management authority over the Public Rights of Way is to protect and efficiently manage the public's resources, to ensure fair and non-discriminatory access to the Public Right of Way, and to protect the public health, safety and welfare.
- B. The City has jurisdiction and exercises regulatory management over each Public Right of Way whether the City has a fee, easement, or other legal interest in the Right of Way. The City has jurisdiction and regulatory management of each Right of Way whether the legal interest in the Right of Way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
- C. No Person may occupy or encroach on a Public Right of Way without the permission of the City. The City grants permission to use Rights of Way through Franchise Agreements and Construction permits.
- D. The exercise of jurisdiction and regulatory management of a Public 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.
- E. The City retains the right and privilege to cut or move any Communications Facilities located within the Public Rights of Way as the City may determine to be necessary, appropriate or useful in response to a public health or safety Emergency.
- F. The City desires champion the ready availability of Communications Services for all its residential and commercial citizens by providing infrastructure and amenities that make Florence a better place to do business. The City is committed to authorizing the private access and use of the Public Right of Ways for such Services so long as such use is consistent with and does not unduly burden or interfere with the principal purpose of the Public Ways, which is to facilitate the free transit of Persons and goods in commerce for the public's health, safety and welfare.

CITY	The City of Florence, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.
CITY COUNCIL	The elected governing body of the City of Florence, Oregon.
CONTROL	Actual working control in whatever manner exercised.
CITY PROPERTY	Means and includes all real property owned by the City and all property held in a proprietary capacity by the City but does not include Public Rights of Way and Utility Easements as defined herein.
COMMUNICATIONS FACILITIES OR FACILITIES	All plant, equipment and systems, other than customer premises equipment, used by any Communications Provider. For the purposes of this Chapter, Facilities used by Cable Service Providers to provide Cable Service are Communications Facilities.
COMMUNICATIONS PROVIDER(S) OR PROVIDER(S)	Any provider of Communications Services and includes, but is not limited to: every Person who directly or indirectly owns, controls, operates or manages Communications Facilities within the City and Cable Service Providers.
COMMUNICATIONS SERVICE(S) OR SERVICE(S)	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 and expressly includes Cable Service offered by a Cable Service Provider, but does not include: (1) open video system service, as defined in 47 C.F.R. 76; (2) private Communications System services provided without using the Public Rights of Way; (3) over-the-air radio or television broadcasting to the public-at-large from Facilities licensed by the Federal Communications Commission or any successor thereto; and (4) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.
CONDUIT	Any structure, or portion thereof, containing one or more Ducts, Conduits, manholes, bolts, cables, fiber, or other infrastructure used by or for any telegraph, telephone, electrical utility, conductors, or Cable Service.
CONSTRUCTION	Any activity in the Public Rights of Way resulting in physical change thereto, including excavation or placement of structures, but excluding routine maintenance or repair of existing Facilities.
DAYS	calendar Days unless otherwise specified.
DUCT	A single enclosed raceway for conductors or cable.
EMERGENCY	Has the meaning provided for in ORS 401.025.
FACILITIES	Communications Facilities as defined herein.
FEDERAL COMMUNICATIONS COMMISSION	The federal administrative agency, or its lawful successor, authorized to regulate and oversee Communications or Cable Service Providers on a national level.

FRANCHISE OR FRANCHISE AGREEMENT	An agreement between the City and a Communications Provider which grants a privilege to the Communications Provider to use Public Right of Way within the City for a limited, dedicated purpose and in return for specific compensation called a Franchise Fee.
FRANCHISEE	A Communications Provider who is a non-breaching party to an unexpired Franchise Agreement with the City.
OPUC	The statutorily created State agency in the State of Oregon responsible for licensing and regulation of certain Communications Providers as set forth in Oregon law, or its lawful successor.
OVERHEAD FACILITIES	Utility poles, Utility Facilities and Communications Facilities above the surface of the ground, including the underground supports and foundations for such Facilities.
PERSON	An individual, corporation, company, association, joint stock company or association, firm, partnership, or limited liability company.
PRIVATE COMMUNICATIONS NETWORK	A system, including the Construction, maintenance or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a Person for their own use and not for resale, directly or indirectly. "Private communications network" includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.
PUBLIC RIGHT(S) OF WAY OR RIGHT(S) OF WAY	Include, but are not limited to: City streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and other public ways generally open to travel, including the subsurface under and air space over these ways; but does not include parks, parkland or other City Property not generally open to the public for travel. This definition applies only to the extent of the City's right, title, interest or authority to grant a Franchise to occupy and use such areas for Communications Facilities. "Public Rights of Way or Right of Way" shall also include Utility Easements as defined below.
RIGHT OF WAY USE FEE	The fee imposed upon a Communications Provider for its occupation of or use of the City's Public Right of Way under this Chapter which is based upon all the Services provided by the Provider within the City.
STATE	The State of Oregon.
TELECOMMUNICATIONS ACT	The Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunications Act of 1996, 47 U.S.C. § 151 <i>et seq.</i>
UNDERGROUND FACILITIES	Utility and Communications Facilities located under the surface of the ground, but does not include underground foundations or supports for "Overhead Facilities."
UTILITY EASEMENT	Any easement granted to or owned by the City and acquired, established, dedicated, or devoted for public utility purposes. "Utility Easement" does not include any easement dedicated solely for City use or Facilities or any easement where the proposed use is inconsistent with the terms and conditions of the easement granted to or owned by the City.

UTILITY FACILITIES

The plant, equipment and property, including but not limited to the poles, pipes, mains, Conduits, Ducts, cable, wires, plant and equipment located under, on, or above the surface of the ground within the Public Right of Way of the City and used or to be used for the purpose of providing utilities, Cable or Communications Service.

8-7-5: SCOPE OF CHAPTER; REGISTRATION OF COMMUNICATIONS PROVIDERS

8-7-5-1: Scope of Chapter; Purpose of Registration. This Chapter shall apply to all Communications Providers who use or occupy the Public Rights of Way to provide Communications Services to Persons within the City. Communications Providers whose Facilities occupy the Public Rights of Way but who provide no Communications Services within the City are not subject to this Chapter, but must comply with Ordinance No 14. Series 2007. The purpose of registration is:

- A. To assure that all Communications Providers who have Facilities within the City Rights of Way and who provide Communications Services within the City using the Public Right of Way comply with the ordinances, rules and regulations of the City.
- B. To provide the City with accurate and current information concerning Communications Providers who offer Communications Service within the City and who own or operate Communications Facilities within the City Right of Way.
- C. To assist the City in the enforcement of this Chapter, management and caretaking of the Public Right of Way, and the collection of any City Franchise fees or Right of Way Use Fees or charges.

8-7-5-2: Registration Required.

- A. Unless excepted in this Section 8-7-5-2-B., all Communication Providers who own, operate or use Facilities within the City's Public Right of Way and who provide Communication Services to any Person or customer within the City, shall register with the City, on a form provided by the City, within forty-five (45) Days of the effective date of this Chapter. Any prospective Communications Providers who want to install or use Communications Facilities within the City's Public Right of Way to provide Communications Services within the City after the effective date of this Chapter shall register with the City, on a form provided by the City, prior to installing Facilities or providing Services.
- B. Unless excepted in Section 8-7-5-2-B 1 and 2 below, after registering with the City pursuant to subsection 8-7-5-2-A, the Communication Provider shall, by December 31st of each year, file with the City a new annual registration form if it intends to maintain Facilities or provide Services at any time in the following calendar year.
 1. Communications Providers who file an initial registration pursuant to subsection 8-7-5-2-A on or after September 30th shall not be required to file an annual registration until December 31st of the following year.
 2. Communications Providers who are non-breaching parties to an unexpired Franchise Agreement and pay all Franchise Fees or Right of Way Use Fees due and owing on all the Services they provide within the City.

- C. In lieu of filing the City's registration form, a Communications Provider may submit to the City a copy of its application and approved license from either: a) the Oregon Public Utility Commission (PUC); or b) the Federal Communications Commission. To the extent not included in the application and license materials submitted pursuant to this subsection 8-7-5-2-C, registrants also shall provide the following information:
1. The identity and legal status of the registrant, including the name, address, and telephone number of the duly authorized officer, agent, or employee responsible for the accuracy of the registration information.
 2. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an Emergency.
 3. A description of the registrant's existing or proposed Facilities within the City, a description of the Facilities that the registrant intends to construct, and a description of the Communications Service that the registrant intends to offer or provide to Persons, firms, businesses, or institutions within the City.

8-7-5-3: Registration Fee. Unless excepted in Section 8-7-5-3-A., each registration form shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council. The registration fee required by this Section shall be subject to all applicable limitations imposed by federal or State law.

- A. Communications Providers who are non-breaching parties to an unexpired Franchise Agreement and pay all Franchise Fees or Right of Way Use Fees due and owing on all the Services they provide within the City.

8-7-5-4: Exemptions from Registration. The following Communications Providers and Facilities are exempted from registration:

- A. Communications Facilities owned and operated exclusively by the State or a political subdivision of this State, for their own use.
- B. A Private Communications Network, provided in a manner that does not occupy any Public Rights of Way.

8-7-6: CONSTRUCTION STANDARDS

8-7-6-1: General. No Person shall commence or continue with the Construction, excavation, installation or operation of Facilities within a Public Right of Way except as provided in Sections 8-7-6-4 through 8-7-7-5, and in compliance with all applicable City and State codes, rules, and regulations.

8-7-6-2: Construction Codes. Facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, State and local codes, rules and regulations including the National Electrical Code and the National Electrical Safety Code.

8-7-6-3: Construction Permits Requests. Except in the event of an emergency, no Person shall construct or install any Facilities within a Public Right of Way without first obtaining a Construction or Excavation permit and paying any applicable Construction permit fee as established by City Code and the City's Right of Way permitting process. No permit shall be issued for the Construction or installation of Communications Facilities within a Public Right of Way unless:

- A. The requestor, if so required, has first filed a registration form with the City as required by Section 8-7-5 of this Chapter; and
- B. The requestor has applied for and received a Franchise pursuant to Sections 8-7-8-1 through 8-7-8-16 of this Chapter.
- C. In the event of an emergency and in compliance with City Code, a permittee or its contractor may perform work on its Facilities to address the emergency without first obtaining a permit from the City provided it attempts to notify the City prior to commencing the emergency work and in any event applies for a permit from the City and pays any applicable permit fee as soon as reasonably practicable. As used in this Section 8-7-6-3, “emergency” means a circumstance in which immediate repair to damaged or malfunctioning Facilities is necessary to restore lost service or prevent immediate harm to Persons or property.

8-7-6-4:Construction Permits. Requests for permits to construct Communications Facilities shall be submitted upon forms to be provided by the City and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

- A. That the Facilities will be constructed in accordance with all Federal, State, and City applicable codes, rules and regulations.
- B. That the Facilities will be constructed in accordance with any applicable Franchise Agreement.
- C. The location and route of all Facilities to be installed aboveground or on existing utility poles.
- D. The location and route of all Facilities on or in the Public Rights of Way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route within the City. Existing Facilities shall be differentiated on the plans from new Construction. If requested, a cross section shall be provided showing new or existing Facilities in relation to the street, curb, sidewalk or Right of Way.
- E. The Construction methods to be employed for protection of existing structures, fixtures, and Facilities within or adjacent to the Public Rights of Way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.

8-7-6-5:Verification. All Construction permit requests shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative affirming that the drawings, plans and specifications submitted comply with applicable technical codes, rules and regulations.

8-7-6-6:Construction Schedule. All Construction permit applications shall be accompanied by a written Construction schedule, which shall include an estimated date for completion of Construction. The Construction schedule is subject to approval by the Public Works Director.

8-7-6-7:Construction Permit Fee. Prior to issuance of a Construction permit, the requestor shall pay a permit fee in an amount established in the City Code and City’s Right of Way excavation and permitting process. Such fee shall be designed to defray the costs of City administration of the Construction. The City shall waive the Construction Permit Fee if the requestor is a non-breaching party to an unexpired Franchise Agreement with the City or is a Provider acting in compliance with this Chapter, including Right of Way Use Fee payment obligation.

8-7-6-8:Issuance of Permit. If satisfied that the plans and documents submitted comply with all requirements of this Chapter and with any applicable Franchise Agreement, the Public Works Director shall issue a permit authorizing Construction of the Facilities, subject to such further conditions affecting the time, place and manner of performing the work.

8-7-6-9: Notice of Construction. Except in the case of an Emergency, the permittee shall notify the Public Works Director not less than two (2) working Days in advance of any excavation or Construction in the Public Rights of Way.

8-7-6-10: Compliance with Permit. All Construction practices and activities shall be in accordance with the permit and the approved final plans and specifications for the Facilities. The Public Works Director and representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

8-7-6-11: Noncomplying Work. Subject to the notice requirements in Section 2-7-7-4, all work which does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Chapter, shall be removed at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provision of this Chapter.

8-7-6-12: Completion of Construction. The permittee shall promptly complete all Construction activities so as to minimize disruption of the Public Rights of Way and other public and private property. All Construction work within Public Rights of Way, including restoration, must be completed within one hundred twenty (120) Days of the date of issuance of the Construction permit unless an extension or an alternate schedule has been approved by the appropriate City official.

8-7-6-13: As-Built Drawings. Unless otherwise provided in an unexpired Franchise Agreement, if requested by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and accurately depicting the location of all Facilities constructed pursuant to the permit. These plans shall be submitted to the City Engineer or designee within sixty (60) Days after completion of Construction, in a format acceptable to the City.

8-7-6-14: Restoration of Public Rights of Way and City Property.

- A. When a permittee, or any Person acting on its behalf, does any work in or affecting any Public Rights of Way or City Property, it shall at its own expense promptly restore such ways or property to as good an order and condition as existed prior to the work, unless otherwise directed by the City. Repairs guaranteed by permittees shall meet all of the following conditions in order to remain in conformance with this Chapter:
1. The entire area shall be free from delamination of the approved surface material.
 2. No distortion of one-half inch (1/2" or greater shall exist over more than five percent (5%) of the total surface area of the repair.
 3. No cracks of one-quarter inch (1/4") or greater shall exist in the surface or edges of the repair totaling more than five percent (5%) of the repair perimeter.
 4. Distortion conditions over one inch may necessitate that full repairs be completed within twenty-four (24) hours of notification by the City.
- B. Unless otherwise provided in an unexpired Franchise Agreement, the permittee shall, for a period of five (5) years thereafter, be fully liable for all defects in materials and workmanship relating to such Construction or Restoration.
- C. If weather or other conditions do not permit the complete restoration required by this Section, the permittee shall temporarily restore the affected Rights of Way or property. Such temporary restoration shall be at the permittee's sole expense and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

- D. If the permittee fails to restore Rights of Way or property to good order and condition, the City shall give the permittee written notice and provide the permittee a reasonable period of time not exceeding thirty (30) Days to restore the Rights of Way or property. If, after notice, the permittee fails to restore the Rights of Way or property to as good an order and condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the permittee.
- E. A permittee or other Person acting on its behalf shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any Person, vehicle or property by reason of such work in or affecting such Rights of Way or property.

8-7-6-15: Performance and Completion Bond. Unless otherwise provided in an unexpired Franchise Agreement, a performance bond or other form of surety acceptable to the City equal to at least 100% of the estimated cost of Constructing Permittee’s Facilities within the Public Rights of Way of the City shall be provided to the City before Construction is commenced.

- A. Unless otherwise provided in an unexpired Franchise Agreement, the surety shall remain in force until sixty (60) Days after substantial completion of the work, as determined in writing by the City, including restoration of Public Rights of Way and other property affected by the Construction.
- B. Unless otherwise provided in an unexpired Franchise Agreement, the surety shall guarantee, to the satisfaction of the City:
 1. Timely completion of Construction;
 2. Construction in compliance with applicable plans, permits, technical codes and standards;
 3. Proper location of the Facilities as specified by the City;
 4. Restoration of the Public Rights of Way and other property affected by the Construction; and
 5. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

8-7-7: LOCATION OF FACILITIES

8-7-7-1: Location of Facilities. All Facilities located within the Public Right of Way shall be constructed, installed and located in accordance with the terms of the Construction permit and approved final plans and specifications for the Facilities, and all applicable City codes, rules and regulations. Whenever any existing electric utilities or Communications Facilities are within a Public Right of Way and are located underground or required to be located underground by City Code, a Communications Provider occupying or proposing to occupy the same Public Right of Way must also locate its Facilities underground at its own expense.

8-7-7-2: Interference with the Public Rights of Way. No Communications Provider may locate or maintain its Facilities so as to interfere with the City’s use of the Public Rights of Way or to unreasonably interfere with use by the general public or by other Persons authorized to use or occupy the Public Rights of Way. All use of Public Rights of Way shall be consistent with City codes, ordinances and regulations.

8-7-7-3: Relocation or Removal of Facilities.

- A. A Communications Provider shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any Facilities within the Public Rights of Way, including relocation of aerial Facilities underground, when requested to do so in writing by the City.
- B. Nothing in this Section 8-7-7-3 shall be deemed to preclude a Communications Provider from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements, provided that the Communications Provider shall timely comply with the requirements of this Section 8-7-7-3 regardless of whether or not it has requested or received such reimbursement or compensation.
- C. The City shall provide at least 30 days written notice of the time by which the Communications Provider must remove, relocate, change, alter or underground its Facilities. The City may grant extensions upon the Communications Provider's request. If a Communications Provider fails to remove, relocate, alter or underground any Facility as requested by the City and by the date established by the City, the Communications Provider shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays. Upon such failure, the City may cause the Facility to be removed, relocated, altered or undergrounded at the Communications Provider's sole expense and shall use qualified personnel or contractors consistent with applicable State and federal safety laws and regulations. Upon receipt of a detailed invoice from the City, the Communications Provider shall reimburse the City for the costs the City incurred within thirty (30) Days.

8-7-7-4: Removal of Unauthorized Facilities. Within thirty (30) Days following written notice from the City or at a later date agreed upon by the parties, any Communications Provider or other Person who owns, controls or maintains any unauthorized system, Facility, or related appurtenances within the Public Rights of Way shall, at its own expense, remove such system, Facilities and/or appurtenances from the City Public Rights of Way. A system, Facility, or appurtenance is subject to removal under this Section in the following circumstances:

- A. One (1) year after the expiration or termination of the Communications Provider's Franchise Agreement, unless the City has provided written authorization for abandonment in place.
- B. Upon abandonment of a Facility within the Public Rights of Way. A Facility will be considered abandoned when it is deactivated, out of service, or not used for its intended and authorized purpose for a period of ninety (90) Days or longer. A Facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the Facility is being replaced. The City shall contact the Provider before concluding that a Facility is abandoned. A Facility may be abandoned in place and not removed if the City authorizes such abandonment and non-removal in writing and there is no apparent risk to the public safety, health, or welfare.
- C. If the Facility was Constructed or installed without the appropriate prior authority at the time of Construction or installation.
- D. If the Facility was Constructed or installed at a location not authorized by the Communications Provider's Franchise or other legally sufficient permit.

8-7-7-5: Coordination of Construction Activities. A Communications Provider is required to make a good faith effort to cooperate with the City.

- A. By January 1 of each year, a Communications Provider shall provide the City with a schedule of their known proposed Construction activities in or near the Public Rights of Way or affecting the Right of Way.

- B. If requested by the City, a Communications Provider shall meet with the City to schedule and coordinate Construction in the Public Rights of Way.
- C. All Construction locations, activities and schedules shall be coordinated, as ordered by the City Engineer or designee, to minimize public inconvenience, disruption or damages.

8-7-8: COMMUNICATIONS FRANCHISE AGREEMENTS REQUIRED

8-7-8-1: Registration, Franchise Application and Franchise Agreement Required.

- A. Prior to occupying City Public Rights of Way, all Communications Providers who plan to provide Services within the City or who provide Services within the City shall register with the City pursuant to Section 8-7-5-2, shall file a Franchise Application with the City pursuant to Section 8-7-8-2, and shall enter into a Franchise Agreement with the City.
- B. Multiple Franchises Not Required. Notwithstanding anything to the contrary in this Chapter, a Communications Provider who is a non-breaching party to an unexpired Franchise Agreement for a Service it provides within the City shall not be required to enter into a multiple or different Franchise Agreements for its provision of a different Service within the City as long as the Provider has registered all its Services with the City pursuant to Section 8-7-5-2 of this Chapter. Further, nothing in this subsection waives a Provider's duty to pay Franchise Fees or Right of Way Use Fee as required under Section 8-7-8-7 of this Chapter.
- C. Any Person whose Communications Facilities occupy the Public Right of Way and are used to provide Services within the City, with or without a valid Franchise Agreement from the City, must comply with all provisions of this Chapter, specifically including payment of any applicable Right of Way Fees pursuant to Section 8-7-8-7.

8-7-8-2: Franchise Application.

- A. Any Person who desires a Franchise Agreement with the City must first file a Franchise Application with the City Manager. The purpose of a Franchise Application is to provide the City with necessary information regarding the Communications Provider's Services and Public Right of Way needs. The Franchise Application shall include, at minimum, the following information:
 - 1. The identity of the applicant.
 - 2. A description of the services to be offered or provided by the applicant over its Facilities, including an indication of whether the applicant will provide solely Cable Service.
 - 3. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the Facilities located or to be located within the Public Rights of Way in the City, including the location and route requested for applicant's proposed Facilities.
 - 4. The area or areas of the City the applicant desires to serve and a preliminary Construction schedule for build-out to the entire Franchise area.
 - 5. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the Facilities and to offer or provide the Communications Service proposed.
 - 6. An accurate map showing the location of any existing Facilities in the City that applicant intends to use or lease.

- B. Any Communications Provider occupying the Public Rights of Way without a Franchise Agreement as of the effective date of this Chapter shall file a Franchise Application pursuant to this Section within forty-five (45) Days of the effective date of this Chapter.

8-7-8-3: Determination by the City. The City shall issue a written preliminary determination granting or denying the Franchise application in whole or in part. If the Franchise Application is denied, the written determination shall include the reasons for denial. The City shall evaluate the Franchise Application based upon: the continuing capacity of the Public Rights of Way to accommodate the prospective Franchisee's proposed Facilities; the prospective Franchisee's legal, technical and financial ability to comply with the provisions of this Chapter; and the prospective Franchisee's compliance with applicable Federal, State and local laws, rules, contractual obligations and regulations.

8-7-8-4: Scope of Franchise Agreement; Effect of Chapter on Franchise Agreement

- A. No Franchise granted pursuant to this Chapter shall convey any right, title or interest in the Public Rights of Way, but shall be a non-exclusive grant to use and occupy the Public Rights of Way for the limited purposes, terms, and conditions provided in the Franchise Agreement.
- B. The rights granted by any Franchise Agreement are limited to the right to use the Public Rights of Way for the provision of Communications Services as defined herein. Nothing in the Franchise shall be construed to prevent the City from grading, paving, repairing and/or altering any Public Rights of Way, constructing, laying down, repairing, relocating or removing City infrastructure or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any City Infrastructure. If a Franchisee's Facilities interfere with the Construction, repair, replacement, alteration or removal of any Public Rights of Way, public work, City utility, City improvement or City infrastructure, except those used to provide competing Communications Services, such Facilities shall be removed or relocated as provided in Section 8-7-7-3 and 8-7-7-4 of this Chapter, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.
- C. Application to Franchise Agreements Adopted After this Chapter. A Franchise Agreement granted hereunder shall at all times comply with the requirements of this Chapter unless this Chapter expressly authorizes different terms. In this Chapter, such authorization is indicated by the introductory phrase, "Unless otherwise specified in an unexpired Franchise Agreement..."
- D. Application to Franchise Agreements Adopted Prior to this Chapter. To the extent that this Chapter can be implemented consistently with an unexpired Franchise Agreement adopted prior to this Chapter, the terms of this Chapter shall prevail. To the extent that this Chapter conflicts with and cannot be implemented consistently with an unexpired Franchise Agreement adopted prior to this Chapter, the terms of the unexpired Franchise Agreement shall prevail.

8-7-8-5: Term of Grant. Unless otherwise provided in an unexpired Franchise Agreement, a Franchise granted hereunder shall be in effect for an initial term of five (5) years and may be renewed subject to Sections 8-7-8-9 and 8-7-8-10 of this Chapter.

8-7-8-6: Franchise Territory. Unless otherwise provided in an unexpired Franchise Agreement, a Franchise granted hereunder shall be limited to a specific geographic area of the City to be served by the Franchisee and the Public Rights of Way necessary to serve such areas and may include the entire City.

8-7-8-7: Franchise Fee and Right of Way Use Fee.

- A. Franchise Agreement and Franchise Fee. A Franchise Agreement granted hereunder shall require the Franchisee to pay a Franchise Fee in an amount determined by resolution of the City Council.
- B. Right of Way Use Fee Imposed. Every Communications Provider occupying or using the Public Rights of Way to provide Services within the City, whether or not the Provider owns the Facilities used to provide its Services, shall pay a Right of Way Use Fee, which shall be based upon all the Communications Services it provides within the City. Such Right of Way Use Fee shall be in an amount determined by resolution of the City Council.
- C. Credit and Waiver.
 - 1. The City shall provide a Right of Way Use Fee Credit to any Communications Providers who, pursuant to a Franchise Agreement, pays to the City Franchise Fees due and owing. The amount of the Right of Way Use Fee Credit shall be equal to the Franchise Fees paid to the City during that Right of Way Use Fee billing period.
 - 2. The City Manager or designee may, at his or her sole discretion and through the adoption of a written rules, grant a full or partial Right of Way Use Fee annual waiver for a Communications Provider who can demonstrate that it has received, earned, or derived (or expects to receive, earn or derive) little or no gross revenues from its use or occupation of the Right of Way during that year. Such written rule shall establish the maximum threshold gross revenue amounts necessary for such waiver to apply.
- D. If the Communications Provider's sole use of the Public Right of Way is to place wireless Facilities above the ground on existing poles or similar structures in the Public Right of Way and the operator does not install or use lines, wires or cables, such Communications Provider is not required to pay a Right of Way Use Fee or a Franchise Fee under this Section, as long as it complies with all other applicable requirements of this Chapter and all other applicable City codes, regulations and rules. Nothing in this Subsection C limits the City's authority to charge reasonable rental or pole attachment rates for the private use of City property.
- E. Unless otherwise specified in an unexpired Franchise Agreement, the Franchise Fees required by this Section shall be paid within thirty (30) Days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues and a calculation of the amount payable. Unless otherwise specified in an unexpired Franchise Agreement, the Franchisee shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.
- F. The Franchise Fee or Right of Way Use Fee required in this Section remain subject to any applicable limitations imposed by federal or State statutes.

8-7-8-8: New Facilities or Services.

- A. A new registration shall be required of any Franchisee who desires to extend or locate its Facilities within Public Rights of Way if such Facilities are not previously included in a Franchise Agreement with the City.
- B. A new registration shall be required of any Franchisee who desires to provide an additional Communication Service which was not previously included in a Franchise Agreement with the City.

8-7-8-9: Franchise Term Renewals. Unless otherwise provided in an unexpired Franchise Agreement and unless prohibited under State or federal law, a Franchise, if renewed, shall be renewed in the following manner. Franchisees who desire to renew an unexpired Franchise under this Chapter shall, not less than one hundred eighty (180) Days before expiration of the current Franchise Agreement, file a request for renewal with the City, which shall include the following information:

- A. The information required pursuant to Section 8-7-8-2 of this Chapter.
- B. Any additional information required pursuant to the existing Franchise Agreement between the City and the Franchisee.
- C. Any desired amendments to the existing Franchise Agreement, including the desired renewal term, provided that such amendments do not violate or conflict with this Chapter.

8-7-8-10: Renewal Determinations. Within ninety (90) Days after receiving a complete renewal request under Section 8-7-8-9, the City shall issue a written determination granting or denying the renewal request in whole or in part. Such renewal shall be for a renewal term or terms to be mutually decided on by the parties. If the renewal request is denied, the written determination shall provide the reasons for non-renewal. The City shall evaluate the renewal based upon the capacity of the Rights of Way to accommodate the Franchisee's Facilities; the Franchisee's legal, technical and financial ability to comply with the provisions of this Chapter; and Franchisee's compliance with any applicable federal, State and local laws, contractual obligations, rules, or regulations.

8-7-8-11: Obligation to Cure As a Condition of Renewal. The City shall not renew a Franchise Agreement unless the Franchisee has cured any violations or defaults in the Franchisee's performance of the Franchise Agreement, this Chapter, or has provided the City with a City-approved plan detailing the corrective action to be taken.

8-7-8-12: Assignments or Transfers of Franchise. A Franchise granted under this Chapter may not be directly or indirectly transferred, assigned or disposed of by sale, lease, merger, consolidation or by other act of the Franchisee, by operation of law or otherwise, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed. City consent conditions shall include, but shall not be limited to:

- A. The Franchisee and the proposed assignee or transferee of the Franchise shall agree in writing to assume and abide by all of the provisions of the Franchise Agreement.
- B. No transfer shall be approved unless the City determines the assignee or transferee has the legal, technical and financial ability to comply with the provisions of this Chapter and applicable Federal, State and local laws, rules, regulations.
- C. The Franchisee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a Franchise, unless City is expressly prohibited from requesting such reimbursement by state or federal statutes.
- D. Any transfer or assignment of a Franchise, system or integral part of a system without prior City approval or without a valid Franchise Agreement shall be void and is cause for revocation of the Franchise.

8-7-8-13: Termination of Franchise Agreement. A Franchise Agreement to use or occupy Public Rights of Way may be terminated by the City for the following reasons:

- A. Construction or operation in the City or in the Public Rights of Way without a Construction permit.
- B. Construction or operation at an unauthorized location or in violation of any required City approvals or permits.
- C. Failure to comply with Section 8-7-8-12 herein with respect to sale, transfer or assignment of a system or Franchise.
- D. Misrepresentation by or on behalf of a Franchisee to the City in any Registration request or Franchise Application or Franchise Renewal Request.
- E. Unauthorized abandonment of Facilities in the Public Rights of Way.
- F. Failure to relocate or remove Facilities as required in this Chapter.
- G. Failure to pay taxes, compensation, fees or costs when and as due the City under this Chapter or under an applicable Franchise Agreement.
- H. Insolvency or bankruptcy of the Franchisee.
- I. Violation of material provisions of this Chapter.
- J. Violation of the material terms of a Franchise Agreement.

8-7-8-14: Notice and Duty to Cure. In the event that the City believes that grounds exist for termination of a Franchise Agreement, the City shall give the Franchisee written notice of the alleged violation and shall provide a short and concise statement of the nature and general facts of the violation. City shall provide the Franchisee a reasonable period of time, not exceeding thirty (30) Days, to furnish evidence that:

- A. Corrective action has been or is being expeditiously pursued to remedy the violation;
- B. Rebutts the alleged violation; and/or
- C. Explains why it would be in the public interest to impose a penalty or sanction less than termination.

8-7-8-15: Public Hearing. In the event that a Franchisee fails to provide evidence reasonably satisfactory to the City as provided in Section 8-7-8-14, the City Manager shall refer the alleged violation to the City Council. The City Council shall provide the Franchisee with notice and a reasonable opportunity to be heard concerning the matter.

8-7-8-16: Standards for Termination or Lesser Sanctions. If persuaded that the Franchisee has violated a material provision of this Chapter or of a Franchise Agreement or has committed the violations listed in Section 8-7-8-13 above, the City Council may terminate the Franchise or may establish some lesser sanction and cure, including but not limited to the assessment of penalties pursuant to Section 8-7-9-5. In doing so, the City Council shall consider the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors, whether:

- A. The violation was egregious.
- B. Substantial harm resulted.

- C. The violation was intentional or repeated.
- D. There is a history of prior violations of the same or other requirements.
- E. There is a history of overall compliance.
- F. The violation was voluntarily disclosed, admitted or cured.

8-7-8-17: Other City Costs. All Franchisees or Communications Providers shall, within thirty (30) Days after City's written demand therefore, reimburse the City for all reasonable direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of the Franchise or any Franchise Agreement, unless the City is expressly prohibited from requesting such reimbursement by federal or state statute.

8-7-8-18: Damage to Communication Provider's Facilities. Unless otherwise provided in an unexpired Franchise Agreement or expressly prohibited by federal or state statute, the City shall not be liable for any damage or injury to or loss of any Facility, property, or Person as a result of or in connection with any City public works, public improvements, Construction, excavation, grading, filling, or work of any kind in the Public Rights of Way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom unless such damage or injury is directly caused by the City's negligent, intentional or malicious acts. City liability hereunder shall at all times be limited by Oregon's statutory and constitutional tort claim limits.

8-7-8-19: Duty to Provide Information.

- A. Except in emergencies, within sixty (60) Days of the City's written request, a Communications Provider shall provide the City with the following:
 - 1. Information sufficient to demonstrate that Communications Provider has complied with all requirements of this Chapter and any applicable Franchise Agreement, including but not limited to the Franchise Fee or Right of Way Use Fee payments required by Section 8-7-8-7.
 - 2. Unless otherwise provided in an unexpired Franchise Agreement, all books, records, maps, and other documents, maintained by the Communications Provider with respect to its Facilities within the Public Rights of Way.
- B. If the City's audit or review of the Communications Provider's books, records and other documents or information demonstrates that the Communications Provider has underpaid the applicable Franchise Fee or the Right of Way Use Fee by three percent (3%) or more in any one fiscal year, the Communications Provider shall correct the underpayment and pay any interest or penalties owed. Unless otherwise provided in an unexpired Franchise Agreement, the Provider shall also reimburse the City for the cost of the audit or review. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) Days of the City's notice to Communications Provider of such underpayment, unless other payment timelines are otherwise provided in an unexpired Franchise Agreement.

8-7-8-20: City Use of Provider's Services or Facilities. Unless otherwise provided in an unexpired Franchise Agreement, if the City contracts for the use of a Communications Provider's Facilities, services, installation, or maintenance, the Communications Provider shall offer the City its' most favorable current rate charged to similar Oregon users for similar services. With the City's written permission, the Communications Provider may deduct the agreed-upon applicable City charges for such City use of the Provider's Facilities or services any Franchise Fees or Right of Way Use Fees due and owing. The terms and conditions of the City's use of such services or facilities shall be specified in a written Franchise Agreement or other agreement between the City and the Communications Provider.

8-7-8-21: Compensation for City Property. If any right is granted by lease, Franchise Agreement, or other manner, to use and occupy City Property (not Right of Way) for the installation of Facilities or other infrastructure, the compensation to be paid for such right and use shall be fixed by the City through a separate agreement with the Communications Provider.

8-7-8-22: Cable Franchise. Cable Service Providers shall be subject to this Chapter to the extent not inconsistent with the Cable Act. The City and the Cable Provider shall enter into a Cable Franchise Agreement pursuant to Section 8-7-8-1 of this Chapter and such Franchise Agreement shall be subject to all applicable provisions of State and federal law, including the Cable Act.

8-7-8-23: Leased Capacity. A Communications Provider may, without prior City approval, offer or provide capacity or bandwidth to its customers by lease, use agreements or otherwise, provided that the Communications Provider shall notify the City of the following: that such lease or use agreement has been granted and the type or nature of the use or lease granted.

8-7-8-24: Insurance. Unless otherwise provided in an unexpired Franchise Agreement, each Communications Provider shall, as a condition of the grant, secure and maintain liability insurance policies in amounts and types satisfactory to the City which insure both the Communications Provider and the City and its elected and appointed officers, officials, agents and employees as additional insured. Unless otherwise provided in an unexpired Franchise Agreement, the liability insurance policies required by this Section shall be maintained by the Communications Provider throughout the term of the Franchise Agreement, and any such other period of time during which the Communications Provider is operating or has Facilities within the Public Rights of Way. Unless otherwise provided in an unexpired Franchise Agreement, each Communications Provider shall maintain continuous uninterrupted coverage and shall provide such policies upon City's request. As an alternative to the insurance requirements contained herein, a Communications Provider may provide evidence of self-insurance, subject to written acceptance by the City.

8-7-8-25: General Indemnification. Each Franchise Agreement shall include, unless prohibited by State or federal statutes, the Franchisee's express promise to defend, indemnify and hold the City and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, relating to, resulting from or alleged to arise out of, relate to or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Franchisee or its affiliates, officers, employees, agents, contractors or subcontractors in the Construction, operation, maintenance, repair or removal of its Facilities or related to the Communication Provider's provision of Services over the Facilities, whether or not such acts or omissions are authorized, allowed or prohibited by this Chapter or by a Franchise Agreement.

8-7-8-26: Performance Surety. Unless otherwise provided in an unexpired Franchise Agreement, before a Franchise granted pursuant to this Chapter is effective, and as necessary thereafter, the Communications Provider shall provide a performance bond, in form and substance acceptable to the City, as security for the full and complete performance of a Franchise Agreement granted under this Chapter, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the Franchisee to comply with the City Code, ordinances, rules, regulations or permits. This obligation is in addition to the performance surety required by Section 8-7-6-15 for Construction of Facilities.

8-7-9: GENERAL PROVISIONS

8-7-9-1:Governing Law. Any Franchise Agreement granted under this Chapter is subject to the provisions of the constitutions and laws of the United States and the State of Oregon and the ordinances and Charter of the City.

8-7-9-2:Written Agreement. No Franchise Agreement shall be granted hereunder except by a writing duly executed by the Franchisee and the City.

8-7-9-3:Nonexclusive Grant. No Franchise Agreement granted under this Chapter shall confer any exclusive right, privilege, license or Franchise to occupy or use the Public Rights of Way for delivery of Communications Service or any other purposes.

8-7-9-4:Severability and Preemption. If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason held to be invalid or unenforceable by a court of competent jurisdiction, or superseded by State or federal legislation, rules, regulations or decision, the remainder of the Chapter shall not be affected thereby but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions of the Chapter, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this Chapter shall be valid and enforceable to the fullest extent permitted by law. In the event that federal or State laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Chapter, then the provision shall be read to be preempted only to the extent required by law. In the event such federal or State law, rule, or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the City.

8-7-9-5:Penalties. Any Person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Chapter or a valid Franchise Agreement shall, pursuant to Section 1-4-2 of the City Code. A separate and distinct offense shall be deemed committed each day on which a violation occurs.

8-7-9-6:Other Remedies. Nothing in this Chapter shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Chapter.

8-7-9-7:Captions. The captions to sections throughout this Chapter are intended solely to facilitate reading and reference to the sections and provisions contained herein. Such captions shall not affect the meaning or interpretation of this Chapter.

8-7-9-8:Compliance with Laws. Any Communications Provider under this Chapter shall comply with all federal and State laws and regulations, as well as all ordinances, resolutions, rules and regulations of the City.

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