

CITY OF BAY CITY**ORDINANCE #650****AN ORDINANCE GOVERNING TELECOMMUNICATIONS
SERVICES WITHIN THE CITY OF BAY CITY**

The City Council of the City of Bay City ordains as follows:

Section 1. Purpose. The purpose of this ordinance is to:

- A. Comply with the provisions of the 1996 Telecommunications Act as they apply to local governments, telecommunications carriers and the services they offer;
- B. Establish clear local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of telecommunications carriers and services;
- C. Promote competition on a competitively neutral basis in the provision of telecommunications services;
- D. Encourage the provision of advanced and competitive telecommunications services on the widest possible basis to businesses institutions and residents of the city;
- E. Permit and manage reasonable access to the public rights of way of the city for telecommunications purposes on a competitively neutral basis and conserve the limited physical capacity of those public rights of way held in trust by the city;
- F. Assure that the city's current and ongoing costs of granting and regulating private access to and the use of the public rights of way are fully compensated by the persons seeking such access and causing such costs;
- G. Secure fair and reasonable compensation to the city and its residents for permitting private use of the public right of way;
- H. Assure that all telecommunications carriers providing facilities or services within the city, or passing through the city, register and comply with the ordinances, rules and regulations of the city;
- I. Assure that the city can continue to fairly and responsibly protect the public

health, safety and welfare of its citizens;

J. Enable the city to discharge its public trust consistent with the rapidly evolving federal and state regulatory policies, industry competition and technological development.

Section 2. Jurisdiction and Management of the Public Rights of Way

A. The city has jurisdiction and exercises regulatory control over all public rights of way within the city under authority of the city charter and state law.

B. Public rights of way include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements and all other public ways or areas, including the subsurface under and air space over these areas.

C. The city has jurisdiction and exercises regulatory control 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 control over 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.

D. 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 by franchises, licenses and permits.

E. The exercise of jurisdiction and regulatory control over 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.

F. The city retains the right and privilege to cut or move any telecommunications facilities located within the public rights of way of the city, as the city may determine to be necessary, appropriate or useful in response to any public health or safety emergency.

Section 3. Applicability to Cable Service and Open Video System

To the extent not specifically precluded by the Cable Act or any other federal law, this title shall apply to cable service provided within the city and to Open Video Systems, as that term is used in section 653 of the Telecommunications Act, provided however that any existing Grantee shall not have to comply with the terms of this Ordinance until its current franchise agreement has expired.

Section 4. Regulatory Fees and Compensation Not a Tax

A. The regulatory fees and costs provided for in this title, and any compensation charged and paid for the public rights of way provided for in this title, are separate from, and in addition to, any and all federal, state, local and city taxes as may be levied, imposed or due from a telecommunications carrier, its customers or subscribers, or on account of the lease, sale, delivery or transmission of telecommunications services.

B. The city has determined that any fee imposed by this title is not subject to the property tax limitations of Chapter XI, Section 11(b) of the Oregon Constitution.

Section 5. Definitions

For the purpose of this title the following terms, phrases, words and their derivations shall have the meaning defined in this chapter. 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 words "shall" and "will" are mandatory and "may" is permissive. Words not defined in this chapter shall be given the meaning set forth in the Communications Policy Act of 1934, as amended, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996. If not defined there, the words shall be given their common and ordinary meaning.

A. Aboveground or Overhead Facilities means utility poles, utility facilities and telecommunications facilities above the surface of the ground, including the underground supports and foundations for such facilities.
Affiliated Interest shall have the same meaning as ORS 759.010.

B. Cable Act shall mean the Cable Communications Policy Act of 1984, 47 U.S.C. §521, et seq., as now and hereafter amended
Cable Service means the one-way transmission to subscribers of video programming, or 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. Control or Controlling Interest means actual working control in whatever manner exercised.

D. City Property means and includes all real property owned by the city, other than public streets and utility easements as those are defined in this chapter,

and all property held in a proprietary capacity by the city, which are not subject to right of way licensing and franchising as provided in this title.

E. Conduit means any structure, or section of any structure, containing one or more ducts, conduits, manholes, handholes, bolts, or other facilities used for any telegraph, telephone, cable television, electrical, or communications conductors, or cable right of way, owned or controlled, in whole or in part, by one or more public or private utilities.

F. Duct means a single enclosed raceway for conductors or cable.

G. FCC or Federal Communications Commission means the federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

H. Franchise means an agreement between the city and a grantee which grants a privilege to use public right of way and utility easements within the city for a dedicated purpose and for specific compensation.

I. Grantee means the person to which a franchise is granted by the city.

J. Gross Revenue. Except for a telecommunications utility, gross revenue means gross revenue derived by grantee from the provision of telecommunications services originating or terminating in the city on facilities covered by the franchise. For the purposes of this definition net uncollectibles from revenue included in gross revenues may be excluded from gross revenues. For a telecommunications utility, gross revenue means those revenues derived from exchange access services, as defined in ORS 401.710, less net uncollectibles from such revenues.

K. Local Exchange Service means service provided within the boundaries of an exchange as the exchange appears on the exchange maps filed with and approved by the Oregon Public Utility Commission. Local exchange service includes "shared telecommunications service," as defined in ORS Chapter 759.

L. Oregon Public Utilities Commission or OPUC means the statutorily created state agency in the State of Oregon responsible for licensing, regulation and administration of certain communications providers as set forth in Oregon Law.

M. Person means an individual, corporation, company, association, joint stock company or association, firm, partnership, or limited liability company.

N. Private Telecommunications Network means a system, including the construction, maintenance or operation of the system, for the provision of a

service or any portion of a service, by a person for the exclusive use of that person and not for resale, directly or indirectly. "Private telecommunications network" includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.

O. Public Rights of Way include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements and all other public ways, including the subsurface under and air space over these areas, but only to the extent of the city's right, title, interest or authority to grant a franchise to occupy and use such streets and easements for telecommunications facilities. Public Rights of Way do not include trails, paths, or sidewalks within parks or other areas of the city unless the trail, path or sidewalk has been dedicated as a right of way.

P. Public Street means any highway, street, alley or other public right of way for motor vehicle travel under the jurisdiction and regulatory control of the city which has been acquired, established, dedicated or devoted to vehicular travel and pedestrian purposes not inconsistent with telecommunications facilities.

Q. Telecommunications means the transmission between and among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

R. Telecommunications Act means the Telecommunications Act of 1996 (47 U.S.C. § 151 et seq.) as adopted and as hereafter amended.

S. Telecommunications Carrier means any provider of telecommunications services and includes every person that directly or indirectly owns, controls, operates or manages telecommunications facilities within the city and competitive providers of local exchange or inter-exchange services.

T. Telecommunications Facilities or System means the equipment, other than customer premises equipment, used by a carrier to provide telecommunications services.

U. 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. Telecommunications service includes but is not limited to any service provided for the purpose of voice, video or data transmission, including, but not limited to, local exchange service, access service, extended area service, call origination, interconnection, switching, transport, or call termination and any other telecommunications services identified and authorized by the FCC or the OPUC.

V. Telecommunications Utility has the same meaning as ORS 759.005(1)(a).

W. Reseller means any person that provides telecommunications service using a telecommunications facility within a public right of way for which service a separate charge is made, where that person does not own, lease, control or manage the telecommunications facility used to provide the service.

X. Underground Facilities means utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for "Overhead facilities."

Y. Usable Space means all the space on a pole, except the portion below ground level, the 20 feet of safety clearance space above ground level, and the safety clearance space between communications and power circuits.

Z. Utility Easement means any easement within the public right of way designated on a subdivision plat or partition map as a utility easement, public utility easement or "P.U.E." or any easement granted to or owned by the city and acquired, established, dedicated or devoted for public utility purposes not inconsistent with the telecommunications facilities.

AA. Utility Facilities means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cable, wires, transformers, 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 utility or telecommunications services.

Section 6. Registration of Telecommunications Carriers

The purpose for registration is:

A. To assure that all telecommunications carriers who have facilities or provide services within the city comply with the ordinances, rules and regulations of the city.

B. To provide the city with accurate and current information concerning the telecommunications carriers who offer to provide telecommunications services within the city, or that own or operate telecommunications facilities within the city.

C. To assist the city in the enforcement of this title and the collection of any city franchise fees or charges that may be due the city.

D. To assist the city in monitoring compliance with local, state and federal laws as they apply to grantees under this title.

Section 7. Registration Required

Except as provided in Section 9 herein, all telecommunications carriers having telecommunications facilities within the corporate limits of the city, and all telecommunications carriers that offer or provide telecommunications service to customer premises within the city, shall register with the city. The appropriate application and license from: a) the OPUC; or b) the FCC qualify as necessary registration information. Applicants also have the option of providing the following information:

A. The identity and legal status of the registrant, including the name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.

B. A description of the registrant's existing or proposed telecommunications facilities within the city, a description of the telecommunications facilities that the registrant intends to construct, and a description of the telecommunications service that the registrant intends to offer or provide, or is currently offering or providing, to persons, firms, businesses or institutions within the city.

C. Information sufficient to determine whether the transmission, origination or receipt of the telecommunications services provided or to be provided by the registrant constitutes an occupation or privilege subject to any business license requirements. A copy of the business license or license number must be provided.

Section 8. Registration Fee

Each application for registration as a telecommunications carrier shall be accompanied by a non-refundable registration fee as established by the city council.

Section 9. Exceptions to Registration

The following telecommunications carriers are excepted from registration:

A. Telecommunications carriers that are owned and operated exclusively for its own use by the state or a political subdivision of this state and provide telecommunications services for governmental purposes only.

B. A private telecommunications network, provided that such network does not use or occupy any public rights of way of the city.

C. Telecommunications carriers that are grantees under a telecommunications franchise with the city or previous grantees that have timely filed for, and are actively and expeditiously pursuing, a franchise renewal.

Section 9. Construction Standards

A. No person shall commence or continue with the construction, installation or operation of telecommunications facilities within public rights of way in the city except as provided in this Ordinance.

B. Telecommunications 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.

Section 10. Construction Permits

A. No person shall construct or install any telecommunications facilities within a public right of way in the city without first obtaining a construction permit and paying the construction permit fee established by the council.

B. No permit shall be issued for the construction or installation of telecommunications facilities in the public rights of way unless the telecommunications carrier has first applied for and received a franchise pursuant to Section 7 herein or previous grantees that have timely filed for, and are actively and expeditiously pursuing, a franchise renewal.

C. No permit shall be necessary for the installation of a customer specific wire ("a drop") by a franchise grantee where no excavation within the right of way occurs.

D. No permit shall be necessary for the installation of telecommunication facilities within a utility easement that is not otherwise within, under or over a public street, road, highway, bridge, alley, bikeway, sidewalk, trail or path.

Section 11. Permit Applications

Applications for permits to construct telecommunications facilities within a

public right of way shall be submitted upon forms to be provided by the city and shall be accompanied by drawings, plans, specifications and maps in sufficient detail for the Public Works Superintendent to verify that:

- A. That the facilities will be constructed in accordance with all applicable codes, rules and regulations and that the facilities will be constructed in accordance with the franchise agreement.
- B. The location and route of all facilities on or in the public rights of way to be installed aboveground or on existing utility poles. The location and route of all facilities to be located under the surface of the ground within the public rights of way. Existing facilities shall be differentiated on the plans from new construction.
- C. The location of all of applicant's existing underground utilities, conduits, ducts, pipes, mains and installations which are within the public rights of way along the underground route proposed by the applicant.
- D. A typical cross section shall be provided showing new or existing facilities in relation to the street, curb, sidewalk or right of way.
- E. The application shall also be accompanied by computer generated electronic maps of the proposed installations in a format specified by the city unless the applicant demonstrates that the format utilized was developed by the applicant and is proprietary.
- F. Show the location, dimension and types of all trees which will be substantially trimmed, removed or replaced as a result of the areas disturbed during construction and which are within or adjacent to the public rights of way along the route proposed by the applicant. The applicant shall submit a plan, satisfactory to the city, for the replacement of such trees.

Section 12. Traffic Control Plan

All work on, in, under, across or along any public rights of way shall be performed consistent with the Uniform Manual of Traffic Control Devices, to prevent injury or damage to persons or property and to minimize disruptions to efficient pedestrian and vehicular traffic.

Section 13. Construction Permit Fee

Unless otherwise provided in a franchise agreement, prior to issuance of a construction permit, the applicant shall pay a permit fee in an amount to be

determined by resolution of the city council. Nothing in this section shall require a telecommunications utility to pay a permit fee unless the utility is providing telecommunication services in addition to exchange access services.

Section 14. Construction Schedule

The permittee shall submit a written construction schedule to the Superintendent of Public Works before commencing any work in or about the public rights of way. The schedule is subject to approval by the Superintendent of Public Works.

Section 15. Locates

The permittee is responsible for becoming familiar with, and understanding the provisions of ORS Chapter 757, governing the location of underground facilities (the "One-Call statutes"). Grantee shall comply with the terms and conditions set forth in the OneCall statutes. Every grantee under this title shall join and maintain membership in the Oregon Utility Notification Center and shall comply with the rules adopted by the center regulating the notification and marking of underground facilities.

Section 16. Compliance with Permit

All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The Superintendent of Public Works and his representatives shall be provided access to the work site and such information that is not confidential, sensitive or proprietary as they may require to ensure compliance with such requirements.

Section 17. Non-complying Work

Upon order of the Superintendent of Public Works, after reasonable notice and an opportunity to cure has been given, all work which does not comply with the permit, the approved plans and specifications for the work, the franchise agreement or the requirements of this title, shall be removed at the sole expense of the permittee.

Section 18. Completion of Construction

The permittee shall promptly complete all construction activities so as to minimize disruption of the city rights of way and other public and private

property. All construction work authorized by a permit within city rights of way, including restoration, must be completed within 120 days of the date of issuance unless the city engineer agrees to a longer period.

Section 19. Restoration of Public Rights of Way, Other 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, other rights of way or city property, it shall, at its own expense, promptly remove any obstructions and restore such ways or property to as near the original condition as reasonably possible, unless otherwise directed by the city.

B. 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 if directed to do so by the city Public Works Superintendent. 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. For the purpose of this subsection, temporary restoration means restoring the property to a safe condition permitting such use of the property as was made prior to the work being undertaken. Temporary restoration does not require paving, landscaping or surfacing of a permanent nature.

C. If the permittee fails to restore rights of way or property to as near the original condition as reasonably possible, the city shall give the permittee written notice and provide the permittee a reasonable period of time, not exceeding 30 days, to restore the rights of way or property. If, after such notice, the permittee fails to restore the rights of way or property to as near the original condition as reasonably possible, the city shall cause such restoration to be made at the expense of the permittee.

D. A permittee or other person acting in its behalf shall use suitable barricades, flags, flagmen, 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.

E. All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, repair or replacement of telecommunications facilities, whether such work is done pursuant to a franchise, license, or permit shall be replaced or restored as nearly as may be practicable, to the condition existing prior to performance of work.

F. All restoration work within the public ways shall be subject to the approval of the city's Public Works Superintendent.

Section 20. Construction and Completion Bond

Unless otherwise provided in a franchise agreement, or unless the city otherwise specifically approves an alternative security to assure performance, a performance bond written by a corporate surety acceptable to the city, and authorized to transact business in Oregon, equal to at least 100% of the estimated cost of constructing grantee's telecommunications facilities within the public rights of way of the city shall be deposited before construction is commenced.

A. The performance bond shall remain in force until 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. The performance bond 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.

Section 21. Location of Telecommunications Facilities

All facilities located within the public right of way or utility easements shall be constructed, installed and located in accordance with the following terms and conditions, unless otherwise specified in a franchise agreement:

A. Grantee shall install its telecommunications facilities underground unless the city specifically permits attachments to utility poles or other aboveground facilities, provided, however, no entity with existing attachments to utility poles shall be required to install new or existing facilities underground except as provided in the following subsections.

B. Grantee shall install its telecommunications facilities within an existing underground duct or conduit owned by it whenever surplus capacity exists within such utility facility unless grantee demonstrates to satisfaction of city that

such installation is not feasible.

C. A grantee with permission to install overhead facilities shall install its telecommunications facilities on pole attachments to existing utility poles only, and then only if usable space is available as determined by the Department of Electric Utilities or the owner of the poles.

D. Whenever any existing electric utilities are located underground within a public right of way of the city, a grantee with permission to occupy the same public right of way must also locate its telecommunications facilities underground. Whenever any overhead electric utilities are relocated underground, any grantee with permission to occupy the same public right of way must also relocate underground.

E. Whenever any new or existing electric utilities, cable facilities or telecommunications facilities are located or relocated underground within a public right of way of the city, a grantee that currently occupies the same public right of way shall relocate its facilities underground at the grantee's sole expense concurrently with the other affected utilities to minimize disruption of the public right of way, absent extraordinary circumstances or undue hardship, as determined by the city and consistent with state law. The grantee may recover forced underground costs from its customers, to the extent allowed by law.

F. The city engineer or the city Public Works Superintendent may grant exceptions to some or all of the requirements of this section if the engineer or the Public Works Superintendent determines, in his or her sole discretion, that a waiver is necessary to fulfill the purpose and intent of this title.

Section 22. Interference with the Public Rights of Way

No grantee may locate or maintain its telecommunications facilities so as to unreasonably interfere with the use of the public rights of way by the city, by the general public or by other persons authorized to use or be present in or upon the public rights of way. All such facilities shall be moved by the grantee, temporarily or permanently, as reasonably determined by the city at the sole expense of the grantee. All use of public rights of way shall be consistent with city codes, ordinances and regulations.

Section 23. Relocation or Removal of Facilities

Within 60 days following written notice from the city, a grantee shall, at no expense to the city, temporarily or permanently remove, relocate, change or

alter the position of any telecommunications facilities within the public rights of way whenever the city shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

A. The construction, repairs, maintenance or installation of any city or other public improvement in or upon the public rights of way.

B. The operations of the city or other governmental entity in or upon the public rights of way unless such city operations are exclusively for its telecommunications purposes or cable services which compete with other telecommunications carriers or cable services. Notwithstanding the 60-day limit, a grantee shall, at no expense to the city, relocate overhead facilities within 30 days following written notice from the Public Works Superintendent that the city or a joint pole owner has space on poles for such purpose.

Section 24. Removal of Unauthorized Facilities

Within 30 days following written notice from the city, any grantee, telecommunications carrier, or other person that owns, controls or maintains any unauthorized telecommunications system, facility or related appurtenances within the public rights of way of the city shall, at its own expense, remove such facilities or appurtenances from the public rights of way of the city. A telecommunications system or facility is unauthorized and subject to removal in the following circumstances:

A. One year after the expiration or termination of the grantee's telecommunications franchise unless the grantee has timely filed for, and is actively and expeditiously pursuing, a franchise renewal.

B. Upon abandonment of a facility within the public rights of way of the city. 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 90 days or longer. A facility will not be considered abandoned if it is temporarily out of service during performance of repairs, if the facility is excess capacity of a current grantee who is not in default, if the facility is being replaced or if the facility has been disconnected because the building or property being served is vacant.

C. If the system or facility was constructed or installed without the prior grant of a telecommunications franchise.

D. If the system or facility was constructed or installed without the prior issuance of a required construction permit.

E. If the system or facility was constructed or installed at a location not permitted by the grantee's telecommunications franchise.

Section 25. Telecommunications Franchise

A telecommunications franchise shall be required of any telecommunications carrier who desires to occupy public rights of way of the city.

Section 26. Application

Any person that desires a telecommunications franchise pursuant to this chapter shall file an application with the City which shall include the following information:

A. The identity of the applicant:

B. A description of the telecommunications services that are to be offered or provided by the applicant over its telecommunications facilities within the city.

C. Preliminary engineering plans, specifications and a network map of the facilities to be located within the public rights of way in the city, including copies in a computerized format specified by the city (unless the applicant demonstrates that the format utilized was developed by the applicant and is proprietary) and all in sufficient detail to identify:

1. the location and route requested for applicant's proposed telecommunications facilities;

2. the specific trees, structures, improvements, facilities and obstructions, if any, that applicant proposes to temporarily or permanently remove or relocate.

D. If applicant is proposing to install aboveground facilities, to the extent that the applicant will be using utility poles, evidence from the Tillamook People's Utility District or pole owner that usable space is available for locating the applicant's telecommunications facilities on existing utility poles along the proposed route; and if usable space is not available in some or all service areas, an indication of these locations and a "make ready" schedule for completion.

E. If the applicant is proposing an underground installation in existing ducts or conduits within the public rights of way, provide information in sufficient detail to identify:

1. the excess capacity currently available in such ducts or conduits before installation of applicant's telecommunications facilities;
 2. the excess capacity, if any, that will exist in such ducts or conduits after installation of applicant's telecommunications facilities.
- F. If applicant is proposing an underground installation within new ducts or conduits to be constructed within the public rights of way:
1. the location proposed for the new ducts or conduits;
 2. the excess capacity that will exist in such ducts or conduits after the installation of applicant's telecommunications facilities.
- G. A preliminary construction schedule and completion date.
- H. Financial statements prepared in accordance with generally accepted accounting principles demonstrating the applicant's financial ability to construct, operate, maintain, relocate and remove the facilities.
- I. Information in sufficient detail to establish the applicant's technical qualifications, experience and expertise regarding the telecommunications facilities and services described in the application.
- J. 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 telecommunications services proposed.
- K. Whether the applicant intends to provide cable service, video dial tone service or other video programming service, and sufficient information to determine whether such service is subject to cable franchising.
- L. An accurate map showing the location of any existing telecommunications facilities in the city that applicant intends to use or lease.
- M. A description of the services or facilities that the applicant will offer or make available to the city and other public, educational and governmental institutions.
- N. As Built, after completion of initial construction .
- O. A description of applicant's access and line extension policies.
- P. The area or areas of the city the applicant desires to serve and a schedule

for buildout to the entire franchise area.

Section 27. Application and Review Fee

A. Any application for a franchise pursuant to this chapter shall pay an application and review fee in an amount to be determined by resolution of the city council. This section shall not apply to a telecommunication utility which provides only local exchange access.

B. The application and review fee shall be deposited with the city as part of the application filed pursuant to Section 26.

Section 28. Determination by the City

The city shall issue a written determination granting or denying the application in whole or in part, applying the standards listed below. If the application is denied, the written determination shall include the reasons for denial.

Section 29. Rights Granted

No franchise granted under this chapter shall convey any right, title or interest in the public rights of way, but shall be deemed a grant to use and occupy the public rights of way for the limited purposes and term, and upon the conditions stated in the agreement.

Section 30. Term of Grant

Unless otherwise specified in a franchise agreement, a telecommunications franchise granted under this title shall be in effect for a term of five years.

Section 31. Franchise Territory

Unless otherwise specified in a franchise agreement, telecommunications franchise granted under this chapter shall be limited to the specific geographic area of the city to be served by the franchise grantee, and the public rights of way necessary to serve such areas.

Section 32. Amendment of Grant

A franchise agreement may be amended upon the occurrence of any of the following conditions:

A. A new application and grant shall be required of any telecommunications carrier that desires to extend or locate its telecommunications facilities in public rights of way of the city which are not included in a franchise previously granted under this title unless the grantee has already received a franchise to occupy public rights-of-way in all areas of the city.

B. If ordered by the city to locate or relocate its telecommunications facilities in public rights of way not included in a previously granted franchise, the city shall grant an amendment without further application.

C. A new application and grant shall be required of any telecommunications carrier that desires to provide a service which was not included in a franchise previously granted under this title.

D. Upon mutual agreement of the parties to the franchise agreement.

Section 33. Renewal Applications

A grantee that desires to renew its franchise under this chapter shall, not less than 90 days before expiration of the current agreement, file an application with the city for renewal of its franchise which shall include the following information:

A. The information required pursuant to Section 25 that was not previously provided to the city in connection with grantee's existing franchise agreement.

B. Any information required pursuant to the franchise agreement between the city and the grantee.

Section 34. Renewal Determinations

The City Council shall make all renewal determinations. The city shall issue a written determination granting or denying the renewal application in whole or in part, applying the following standards. If the renewal application is denied, the written determination shall include the reasons for nonrenewal.

Section 35. Obligation to Cure as a Condition of Renewal

No franchise shall be renewed until any ongoing violations or defaults in the grantee's performance of the agreement, or of the requirements of this title, have been cured, or a plan detailing the corrective action to be taken by the grantee has been approved by the city.

Section 36. Assignments or Transfers of Grant, Notice to City

A. A franchise may not, directly or indirectly, be transferred or otherwise, assigned without the prior consent of the city, which consent shall not be unreasonably withheld, conditioned or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

1. Grantee and the proposed assignee or transferee of the franchise or system shall agree, in writing, to assume and abide by all of the provisions of the franchise.

2. Any transfer or assignment of a telecommunications franchise without prior written approval of the city under this section or pursuant to a franchise agreement shall be void and is cause for revocation of the franchise agreement.

3. Notwithstanding the foregoing in this Section 36, Grantee may assign the franchise in whole or in part without the City's prior written approval to (a) any entity controlled by or under common control with Grantee; (b) any surviving successor entity or newly created successor entity in the event of a merger, reorganization or consolidation involving Grantee; and (c) the purchaser of all or substantially all of Grantee's assets located in Bay City, Oregon.

Section 37. Revocation or Termination of Franchise

A franchise to use or occupy public rights of way of the city may be revoked for the following reasons:

A. Construction or operation in the city or in the public rights of way of the city without a franchise grant of authorization.

B. Construction or operation without a construction permit or at an unauthorized location.

C. Unauthorized substantial transfer of control of the grantee.

D. Failure to comply with section with respect to sale, transfer or assignment of a telecommunications system or franchise.

E. Unauthorized sale, assignment or transfer of grantees franchise assets, or a substantial interest in the franchise.

- F. Intentional misrepresentation by or on behalf of a grantee in any application to the city.
- G. Abandonment of telecommunications facilities in the public rights of way.
- H. Failure to relocate or remove facilities as required in this title.
- I. Willful or continued failure to pay taxes, compensation, fees or costs when and as due the city unless subject to a bona fide dispute.
- J. Insolvency or bankruptcy of the grantee.
- K. Violation of a material provision of this title.
- L. Violation of a material term of a franchise agreement.

Section 38. Notice and Duty to Cure

Pursuant to Section 37 herein, in the event that the city believes that grounds exist for revocation of a franchise, the city shall give the grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time not exceeding 60 days to furnish evidence:

- A. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.
- B. That rebuts the alleged violation or noncompliance.
- C. That it would be in the public interest to impose some penalty or sanction less than revocation.

Section 39. Termination/Sanctions of Franchise.

If persuaded that the grantee has violated or failed to comply with material provisions of this title, or of a franchise agreement, the city council shall determine whether to revoke the franchise, or to establish some lesser sanction and cure, considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

- A. Whether the misconduct was egregious.

- B. Whether substantial harm resulted.
- C. Whether the violation was intentional.
- D. Whether there is a history of prior violations of the same or other requirements.
- E. Whether there is a history of overall compliance.
- F. Whether the violation was voluntarily disclosed, admitted or cured.

Section 40. Damage to Grantee's Facilities

Unless directly and proximately caused by willful, intentional, malicious, or negligent acts by the city, the city shall not be liable for any damage to or loss of any telecommunications facility within the public rights of way of the city as a result of or in connection with any 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 from such work

Section 41. Nondiscrimination

A grantee shall make its telecommunications services available to any customer within its franchise area who shall request such service, without discrimination as to the terms, conditions, rates or charges for grantee's services; provided, however, that nothing in this chapter shall prohibit a grantee from making any reasonable classifications among differently situated customers.

Section 42. Franchise Fees

As compensation for the benefits and privileges under its franchise and in consideration of permission to use the right-of-way of the city, the grantee shall pay a quarterly franchise fee to the city, through the duration of its franchise, as follows:

- A. The minimum quarterly franchise fee shall be set by resolution of the council.
- B. The franchise fee for a telecommunication utility shall equal 4% of its gross revenue on exchange access services earned within the boundaries of the city.
- C. Except for limited use telecommunication grantees, the franchise fee shall

equal a percent of the grantee's gross revenues derived from grantee's provision of telecommunications services and telecommunications facilities to retail customers and four percent (4%) on all other gross revenues derived from grantee's provision of telecommunications services and telecommunications facilities to wholesale customers, including other telecommunications carriers, if such customers or carriers are also telecommunication grantees under this title. If such customers or carriers are not grantees, then the franchise fee shall equal the fee for retail customers. The amount of the percent for retail customers shall be set by resolution of the council.

D. The annual franchise fee collectable from a telecommunications utility shall not exceed the maximum amount under Oregon Law. The city shall accept from a telecommunications utility, in full payment of the franchise fee, the maximum amount allowed under Oregon law. On request, the telecommunications utility must provide documentation to support its calculation.

E. Grantee shall be "providing" telecommunications services or facilities if it sells, leases, resells, or otherwise conveys such services or facilities for consideration.

F. A grantee providing resold telecommunications services or facilities shall be entitled to a credit against its franchise fee for an amount equal to a percentage of the price paid for such services or facilities at wholesale. Such percentage shall be set by resolution of the council.

G. So long as it registers with the city as required and pays the fees required for grantees set forth in subsections A and B above, a reseller may use another person's facilities to engage in telecommunications activities in the right-of-way without obtaining a franchise, providing the reseller does not, either itself or through an affiliate, own or lease, control or manage any facilities in the right-of-way and is not involved in construction or repair of facilities in the right-of-way.

For purposes of calculating the fees to be paid by a reseller, the amount of compensation paid by the reseller to the owner or manager of facilities in the right-of-way for the services it resells shall be deducted from the reseller's gross revenues before applying the percentage rates described in subsection C above.

H. Payment shall be made by each April 30, July 31, October 31 and January 31 for the quarter just ended.

Any grantee who fails to remit any fee imposed by this chapter within 30 days

of the date it is due, shall pay interest at the rate of one and one-half percent (1 1/2%) per month or fraction thereof on the amount of the fee from the date on which the remittance first became due until paid.

Section 43. Cable Franchise

Telecommunication carriers providing cable service shall be subject to the city's cable franchise requirements.

Section 44. Insurance

Unless otherwise provided in a license or franchise agreement, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the city, and its elected and appointed officers, officials, agents and employees as coinsured:

- A. Comprehensive general liability insurance with limits not less than \$1,000,000 for bodily injury or death to each person; \$1,000,000 for property damage resulting from any one accident; and, \$1,000,000 for all other types of liability.
- B. Automobile liability for owned, non-owned and hired vehicles with a limit of \$1,000,000 for each person and \$1,000,000 for each accident.
- C. Workers' compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.
- D. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the telecommunications license or franchise, and such other period of time during which the grantee is operating without a franchise, or is engaged in the removal of its telecommunications facilities. Each such insurance policy shall contain the following endorsement: "This policy may not be canceled nor the intention not to renew be stated until 90 days after receipt by the city, by registered mail, of a written notice addressed to the city's risk manager of such intent to cancel or not to renew."

Within 60 days after receipt by the city of such notice, and in no event later than 30 days prior to the cancellation, the grantee shall obtain and furnish to the city evidence that the grantee meets requirements of this section.

The insurance policy requirements of this section may be met by a program of self-insurance acceptable to the city.

Section 45. General Indemnification

Each franchise agreement shall include, to the extent permitted by law, grantee's express undertaking 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, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed or prohibited by this title or by a grant agreement made or entered into pursuant to this title.

Section 46. Grant of Cable Franchise

- A. The city may grant one or more cable television franchises containing such provisions as are reasonably necessary to protect the public interest, and each such franchise shall be awarded in accordance with and subject to the provisions of this chapter.
- B. This chapter may be amended from time to time, and in no event shall this chapter be considered a contract between the city and a Grantee such that the city would be prohibited from amending any provision of this chapter, provided no such amendment shall in any way impair any contract right or increase obligations of a Grantee under an outstanding and effective franchise except in the lawful exercise of the city's police power.

Section 47. Franchise Required

- A. No person may construct, operate or maintain a cable system or provide cable service over a cable system within the city without a franchise granted by the city authorizing such activity. No person may be granted a franchise without having entered into a franchise agreement with the city pursuant to this chapter. For the purpose of this provision, the operation of part or all of a cable system within the city means the use or occupancy of rights-of-way by facilities used to provide cable service.
- B. To the extent permitted by law, a telecommunications utility, as defined by state law, which utilizes its system to provide cable service shall be subject to this chapter and shall require a cable franchise under this

chapter.

- C. Services similar to cable service, such as open video system service, shall also be subject to this chapter to the extent provided by law.
- D. A system shall not be deemed as operating within the city even though service is offered or rendered to one or more subscribers within the city, if no right-of-way is used or occupied. All cable franchises granted pursuant to this chapter shall contain substantially similar terms and conditions, which, taken as a whole and considering relevant characteristics of the applicants, do not provide more or less favorable terms and conditions than those required of other cable Grantees.

Section 48. Length of Franchise

Unless otherwise specified in a cable franchise, no cable franchise shall be granted for a period of more than five years.

Section 49. Cable Franchise Characteristics

- A. A cable franchise authorizes use of rights-of-way for installing, operating and maintaining cables, wires, lines, optical fiber, underground conduit and other devices necessary and appurtenant to the operation of a cable system to provide cable services within the city, but does not expressly or implicitly authorize a Grantee to provide service to, or install a cable system on private property without owner consent, or to use publicly or privately owned poles, ducts or conduits without a separate agreement with the pole owner.
- B. A cable franchise shall not mean or include any exclusive right for the privilege of transacting and carrying on a business within the city as generally required by the laws of the city. A cable franchise shall not confer any authority to provide telecommunications services or any other communications services besides cable services and a separate franchise shall be required for the provision of telecommunications services in addition to the cable franchise. A franchise shall not confer any implicit rights other than those mandated by federal, state or local law.
- C. A cable franchise is nonexclusive and will not explicitly or implicitly: preclude the issuance of other franchises to operate cable systems within the city; affect the city's right to authorize use of rights-of-way by other persons to operate cable systems; or for other purposes as it determines appropriate.
- D. Once a cable franchise has been accepted and executed by the city and a Grantee, such cable franchise shall constitute a valid and enforceable

agreement between the Grantee and the city, and the terms, conditions and provisions of such franchise, subject to this chapter and all other duly enacted and applicable laws and regulations, shall define the rights and obligations of the Grantee and the city relating to the franchise.

- E. All privileges prescribed by a cable franchise shall be subordinate to any prior lawful occupancy of the rights-of-way and the city reserves the right to reasonably designate where a Grantee's facilities are to be placed within the rights-of-way through its generally applicable permit procedures.
- F. A cable franchise shall be a privilege that is in the public trust and personal to the original Grantee. No franchise transfer shall occur without the prior written consent of the city council upon application made by the Grantee pursuant to this chapter, the franchise and applicable law. Consent shall not be unreasonably withheld, and any purported franchise transfer made without application and prior written consent shall be void and shall be cause for the city to revoke the cable franchise.

Section 50. Cable Grantee Subject to Other Laws, Police Powers

- A. A cable Grantee shall at all times be subject to and shall comply with all applicable federal, state and local laws and regulations, including this chapter. A cable Grantee shall at all times be subject to all lawful exercise of the police power of the city including, but not limited to, all rights the city may have under the cable act, all powers regarding zoning, supervision of construction, control of rights-of-way and consumer protection.
- B. The City shall have full authority to regulate cable systems, cable Grantees and franchises as may now or hereafter be lawfully permissible.

Section 51. Operation of a Cable System Without a Franchise

Any person who occupies rights-of-way for the purpose of operating or constructing a cable system or provides cable service over a cable system and who does not hold a valid franchise from the city shall be subject to all requirements of this chapter. The city administrator shall have the authority:

- A. To require such person to enter into a franchise within 30 days of receipt of written notice that a franchise is required; or
- B. To require such person to remove its property and restore the affected area to a condition satisfactory to the city. The city administrator may direct city personnel, or may employ contractors, to remove the property and restore the affected area to a condition satisfactory to the city and charge the person the costs therefor.

C. To take any other action it is entitled to take under applicable law.

In no event shall a franchise be created unless it is issued by the city pursuant to this chapter and subject to a written franchise agreement.

Section 52. Governing Law

Any franchise or license granted under this title is subject to the provisions of the Constitution and laws of the United States, and the State of Oregon and the ordinances and charter of the city.

Section 53. Written Agreement

No franchise or license shall be granted unless the agreement is in writing.

Section 54. Nonexclusive Grant

No franchise or license granted under this title shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights of way of the city for delivery of telecommunications services or any other purposes.

Section 55. Severability and Pre-emption

If any chapter, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this title is for any reason 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 the title shall not be affected but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this title 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 title, then the provision shall be read to be preempted to the extent and for the time required by law. In the event such federal or state law, rules or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision that had been preempted is no longer preempted, such provision shall return to full force and effect, and shall be binding, without the requirement of further action on the part of the city.

Section 56. Penalties

Any person or entity found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this title shall be fined not less than \$500.00 for each offense. A separate and distinct offense shall be

deemed committed each day on which a violation occurs.

Section 57. Other Remedies

Nothing in this title shall be construed as limiting any judicial remedies that the city may have, at law or in equity, for enforcement of this title.

Section 58. Captions

The captions to sections throughout this title are intended solely to facilitate reading and reference to the sections and provisions. Such captions shall not affect the meaning or interpretation of this title.

Section 59. Compliance with Laws

Any grantee under this title shall comply with all federal and state laws and regulations, including regulations of any administrative agency, as well as all ordinances, resolutions, rules and regulations of the city now in effect or adopted in the future or established during the entire term of any franchise or license granted under this title, which are relevant and relate to the construction, maintenance and operation of a telecommunications system.

Section 60. Consent

Wherever the consent of either the city or of the grantees under this title is specifically required in a franchise or license granted, such consent will not be unreasonably withheld.

Section 61. Application to Existing Ordinance and Agreements

To the extent that this title is not in conflict with and can be implemented with existing ordinance and franchise agreements, this title shall apply to all existing ordinance and franchise agreements for use of the public right of way for telecommunications, except that the terms of any existing franchise shall continue until the end of the franchise agreement.

Section 62. Confidentiality

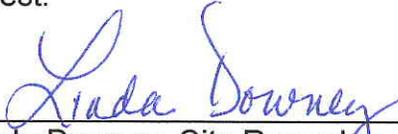
The city agrees to use its best efforts to preserve the confidentiality of information designated by the grantee as a trade secret, to the extent permitted by the Oregon Public Records Law.

PASSED and ADOPTED by the City Council this 11th day of January, 2011
and APPROVED by the Mayor this 12th day of January, 2011.



Shaena E. Peterson, Mayor

Attest:



Linda Downey, City Recorder

First Reading: January 11, 2011
Second Reading: January 11, 2011
Adoption: January 11, 2011

Ayes: 6

Nays: 0

Abstentions: 0