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BY JM CODIFIED
Date 1/20/10

ORDINANCE NO. 1970

(An ordinance adding Chapter 3.32, amending Section 8.04.050 and Chapter 13.36, and repealing Chapter 14.01 of the Hood River Municipal Code)

WHEREAS, the City of Hood River currently manages the use of the public rights of way through franchise agreements with utilities and telecommunications entities (ROW Users) and through the City's regulatory authority of the rights of way, codified primarily in Chapter 13.36 of the Hood River Municipal Code;

WHEREAS, some ROW Users seeking to limit cities' franchising authority and regulatory authority over public rights of way have brought and continue to bring lawsuits challenging that authority, and have sought and continue to seek adoption of new federal and state legislation limiting that authority;

WHEREAS, as a result of litigation challenging cities' authority, courts have consistently upheld a city's regulatory authority to manage public rights of way when the laws are of general applicability;

WHEREAS, the City has individually negotiated franchise agreements for use of the public rights of way with three telecommunications providers (Embarq, Charter, and Hood River Electric Coop), an electric utility (PacifiCorp), and a gas utility (Northwest Natural Gas) and each of these agreements have different provisions regarding the rights and obligations of the franchisees in using the public rights of way;

WHEREAS, the City believes there may be other ROW Users providing service to City residents who do not have franchise agreements and/or are not compensating for use of the public rights of way;

WHEREAS, managing public rights of way through individually negotiated and drafted franchise agreements is an old model that provides minimal efficiency and use of public resources due to the time and expense of negotiating, approving and administering these agreements;

WHEREAS, a regulatory approach to managing use of public rights of way by ROW Users would create laws of general applicability that would apply to all ROW Users desiring

to occupy the public rights of way, whether with wire, pipes, or poles;

WHEREAS, by moving to a regulatory approach, ROW Users will be treated more equally;

WHEREAS, by moving to a regulatory approach, the City will be better able to adapt to changes in law and technology with respect to the services delivered by ROW Users and will be better prepared in the future as industries evolve and the services provided change;

WHEREAS, the City recognizes that some ROW Users, such as cable service providers, are still required to have a franchise agreement with the City, but those franchise agreements would only address matters not addressed by the Hood River Municipal Code, such as the franchise fee and public, educational and governmental access (PEG);

WHEREAS, the City recognizes that it may be in the City's best interests to have individually negotiated franchise agreements with ROW Users when certain issues need to be addressed and are not addressed via City ordinance; and

WHEREAS, the purposes of this ordinance are to:

- A. Comply with the provisions of the 1996 Telecommunications Act as they apply to local governments, telecommunications carriers and the services those carriers offer;
- B. Promote competition in the provision of services provided by ROW Users on a competitively neutral basis;
- C. Encourage the provision of advanced and competitive services provided by ROW Users on the widest possible basis to businesses, institutions, and residents of the City;
- D. Permit and manage reasonable access to the public rights of way of the City for ROW Users on a competitively neutral basis and conserve the limited physical capacity of those public rights of way held in trust by the City;
- E. 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 ROW Users seeking access and causing costs;
- F. Secure fair and reasonable compensation to the City and its residents for permitting ROW Users to use of the public right of way;
- G. Assure that all ROW Users providing facilities and/or services within the

City, or passing through the City, comply with the ordinances, rules and regulations of the City;

H. Assure that the City can continue to fairly and responsibly protect the public health, safety and welfare of its citizens;

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

NOW, THEREFORE, THE CITY OF HOOD RIVER ORDAINS AS FOLLOWS:

1. Chapter 3.32 is added to the Hood River Municipal Code as set forth in Exhibit A.

2. Section 8.04.050 of the Hood River Municipal Code (pertaining to garbage service franchise fees) is amended to read as follows [addition shown in underline; deletion shown in ~~strikeout~~]:

8.04.050 Franchise - Application and Franchise Fee; Granting and Transfer of Franchises [Garbage Service].

A. Any person desiring to provide a collection service shall apply to the City for a franchise on a form provided by the City. Attachments required by the form shall be included with the application form. The application shall be accompanied by a non-refundable application fee in an amount set by Council resolution.

1. The franchisee shall pay a franchise fee in an amount set by resolution of the Council ~~equal to three percent (3%) of the franchisees gross revenue from the collection service.~~ The fee shall be payable on either a quarterly basis, on the fifteenth days of April, July, October, and January of each year, or on a monthly basis by the 20th of each month, at the option of the franchisee. The amount of the annual franchise fee shall be reviewed on an annual basis, and may be increased upon the Council's determination that an increase is in the public interest.

2. All solid waste collected by a franchisee within the City for processing and/or disposal shall be delivered to the transfer station operated by Hood River Garbage Company with ultimate disposal at the Wasco County Landfill, or directly to the Wasco County Landfill.

3. The City Council may increase or limit the number of franchises which may be in effect at any given time, to protect the public health and welfare, and ensure the ability of existing franchisees to operate in an efficient and successful manner. Franchises shall be transferable only upon the express approval of the transferee by the City Council.

4. The franchise shall not take effect until the franchisee has filed with the City Recorder a written acceptance of the franchise.

5. A franchise granted by the City shall be for a continuing five (5) year term from and after the issuance date. Unless the franchisee notifies the City in writing thirty (30) days prior to the annual anniversary of the issuance date of its election not to extend the franchise, the franchise shall automatically extend an additional five (5)

years on the same terms and conditions as provided in this ordinance, as it may from time to time be amended.

a. Upon delivery of the notice required in subsection (4) above, the remaining term for the franchise shall be for a period of four (4) years from the anniversary of the issuance date of that year.

b. The City may elect not to extend a franchise by written notice to the franchisee ninety (90) days prior to the anniversary of the issuance date, in which case, the franchisee shall have a flat term of four (4) years remaining following the anniversary of the issuance date.

3. Chapter 13.36 of the Hood River Municipal Code is replaced as set forth in Exhibit B.

4. Chapter 14.01—Telecommunications Registration and Franchising (Ord 1781 (1999)) is repealed in its entirety.

5. Franchise Agreements. The amendments in Sections 1 and 3 of this Ordinance become effective with respect to the following utilities as of the following expiration dates. With respect to Hood River Electric Cooperative, the amendments in Sections 1 and 3 of this Ordinance become effective on the effective date of this Ordinance.

<u>Utility</u>	<u>Ordinance No.</u>	<u>Expiration Date</u>
PacifiCorp	Ordinance 1860 Extended by Ordinance 1973	11/9/09
Charter	Ordinance 1723	3/13/11
Embarq	Ordinance 1639	12/22/11
Northwest Natural Gas	Ordinance 1832	3/26/13

6. Severability. If any provision of this Ordinance 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 this Ordinance shall not be affected as a result, but shall be deemed as a separate, distinct and independent provision and the holding shall not affect the validity of the remaining portions of this Ordinance and each remaining provision of this Ordinance 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 Ordinance, then the provision shall be read to be preempted only to the extent required by law. In the event the federal or state law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision of this Ordinance that had been preempted is no longer preempted, the provision shall then return to full force and effect, and shall thereafter be binding, without the

requirement of further action on the part of the City.

Read for the first time: Sept 28th, 2009.

Read for the second time and passed: Oct 13th, 2009, to become effective thirty (30) days hence.

Signed Oct 14th, 2009.



Arthur Babitz, Mayor

ATTEST:



Jennifer McKenzie, City Recorder

CHAPTER 3.32 – RIGHT OF WAY PRIVILEGE TAX

SECTIONS:

3.32.010	Purpose
3.32.020	Definitions
3.32.030	Tax Imposed
3.32.040	Amount of Tax
3.32.050	Payment; Interest on late payments
3.32.060	Accounting and Audit
3.32.070	Confidential/Proprietary Information
3.32.080	Refunds
3.32.090	Exemptions
3.32.100	Notice of Amendments
3.32.110	Preemption and Severability

3.32.010 Purpose. The purpose of this chapter is to require utilities and others occupying public rights of way to compensate the public for the use of those rights of way and to assure that the City's costs related to maintenance, administration and preservation of rights of way for such use are paid for by those who cause such costs. Provisions regarding the occupation and use of the rights of way are located in Chapter 13.36 of this code.

3.32.020 Definitions. As used in this chapter, the following terms have the following meanings:

“Equipment or Facilities” means any tangible component, whether referred to singly or collectively, installed, maintained, or operated by a utility.

“Right of Way” has the same meaning as in HRMC Sections 13.52.010 and 13.36.020.

“Telecommunications services” means the transmission for hire of information in electromagnetic frequency, electric or optical form, including, but not limited to, voice, video or data, whether or not the transmission medium is owned by the provider itself and whether or not the transmission medium is wireline. Telecommunications service includes all forms of telephone services and voice, data and video transport, but does not include: (1) cable service; (2) open video system service as defined 47 C.F.R. 76; (3) private communications system services; (4) 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 (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996.

“Gross revenues” has the meaning given that term in ORS 221.515 for purposes of Section 3.32.040(A). For purposes of Section 3.32.040(B), "gross revenues" means any and all revenue derived from utility operations within the City, of any kind, nature or form, without deduction for expense, less net uncollectibles and excluding public purpose charges in any tariff approved by the Oregon Public Utility Commission. Gross revenues does not include proceeds from the sale of bonds, mortgages, or other evidence of

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indebtedness, securities, stock, or wholesale sales to another when the purchaser is not the ultimate consumer.

“Utility” means a person required to pay the privilege tax under this chapter.

13.32.030 Tax Imposed. Except as otherwise provided in this chapter, a privilege tax (also known as a right of way use fee) is imposed on all persons who have or place equipment or facilities in or on rights of way in the City. The compensation charged and paid for use of the public right of way provided for in this chapter is separate from and in addition to any and all federal, state, local, and City charges as may be levied, imposed or due from a utility, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.

3.32.040 Amount of Tax. The privilege tax is established by resolution of the City Council or, if not separately established by resolution, as follows:

A. The privilege tax for a telecommunications utility as defined in ORS 759.005, with equipment or facilities in the right of way and who provides service within the City is 7% of gross revenues as defined in ORS 221.515 .

B. The privilege tax for all others with equipment or facilities in rights of way within the City and serving City residents is 5% of gross revenues earned within the City, but in no event no less than \$1,000 per quarter. All others includes, but is not limited to, telecommunications services providers, except telecommunications utilities.

C. The privilege tax for those with antennas or other facilities in the right of way, e.g., wireless/CMRS providers, will be as negotiated and agreed to by the City and provider.

D. The privilege tax for persons who do not provide service within the City but who have equipment or facilities in rights of way is \$.75 per calendar quarter per foot of line, wire, pipe, or conduit in the right of way.

E. The privilege tax is cumulative for each utility service provided by a utility.

F. The calculation of the privilege tax required by this section is subject to all applicable limitations imposed by federal or state law.

G. Privilege tax payments required by this section shall be reduced by any franchise fee payments received by the City, but in no case will be less than \$0.

3.32.050 Payment; Interest on late payments.

A. The privilege tax shall be paid quarterly on or before the last day of the month following the end of the quarter. Unless otherwise agreed to by the City in writing, quarters shall end on March 31, June 30, September 30 and December 31 of each year. Each payment shall be accompanied by an accounting of applicable gross revenues and a

calculation of the amount payable. The privilege tax may be paid monthly pursuant to a written agreement with the City Finance Director.

B. If the privilege tax is not received by the City on or before the due date, interest shall be owed on the privilege tax in the amount of 12% per annum from the date due to the date on which the payment is received by the City.

3.32.060 Accounting and Audit.

A. The City may, at any time within 3 years of receipt of an accounting required in Section 3.32.060, investigate any accounting submitted and determine the accuracy of the amount reported. If the utility failed to submit the required accounting or as part of the investigation of an accounting and upon receipt of a written request from the City, the utility shall make available for investigation all records, including historical records and books of the utility necessary for verification of payments and/or accountings. The investigation may be done by the City or any person selected by the City. Neither acceptance of payment nor a failure to make an investigation shall be deemed to prevent subsequent investigation by the City, or to estop the City from collecting any amount due.

B. If, upon investigation or otherwise, the fee or tax paid is determined to be excessive, a refund of the excess will be paid. If the fee paid is found to be insufficient, the City shall notify the utility of the amount of the deficiency and demand payment of the amount. Any liability for underpayment or overpayment is limited to the 3 year audit period.

C. If a utility fails to properly report the true amount of gross revenue or other basis from all accounts within the City as determined by the City after investigation, a late payment charge of 2% of the total amount due will be owed on the under-reported gross revenue calculated from the 1st day of the calendar quarter in which the error occurred to the date on which the City received payment, compounded monthly. The late payment charge shall be due at the same time that the utility is required to make payment of any insufficiency of the privilege tax. If the insufficiency is greater than 15% of the total amount due or if at arbitration, trial or on appeal it is determined that the insufficiency is due to fraud and/or intent to evade the tax, a penalty of 25% of the amount of the total tax shall be paid in addition to the amount due and the late payment charge.

D. Within 10 days from the receipt of notice from the City that the privilege tax paid is insufficient and that payment is demanded, the utility may appeal to the City Council. The appeal must be in writing and specifying the grounds of appeal. If no appeal is taken, if the Council decides adversely, or if the Council decides that any other amount is due, the City shall proceed to collect the amount determined to be due and unpaid.

E. In addition to any other penalties prescribed by law, if a utility fails to make payment of any deficiency determined to be due and unpaid in accordance with the provisions of this subsection within 10 days of final determination, the City Manager may suspend any license or permit issued by the City to the utility.

3.32.070 Confidential/Proprietary Information. When requested by the utility, and subject to the provisions of state law and the Oregon Public Records laws, the City shall treat as confidential any public record or information provide and designated by the utility as confidential.

3.32.080 Refunds. In the event that a utility is ordered to refund any revenues by a governmental entity or agency with jurisdiction to make such an order and the refund will affect the privilege tax paid pursuant to this chapter, the calculation of the privilege tax shall not include the refund except pursuant to a mutually agreed upon schedule. If there is a substantial budgetary impact to the City, the schedule may include spreading the impact of the refund on the future privilege tax to be paid to the City over a period of time commencing the 1st full fiscal year following the ordering of the refund. The schedule shall minimize the administrative impact to the utility and may include interest on the unpaid refund. This section does not apply to credits or other rate adjustments that regularly occur pursuant to a utility's OPUC approved tariff schedules.

3.32.090 Exemptions. Any facility placed in the right of way solely to provide service for transportation or vehicular use of the right of way is exempt from the tax.

3.32.100 Notice of Amendments. The City shall provide not less than 30 days prior written notice of any amendments to this chapter to all utilities paying the privilege tax required by this chapter. Failure to provide the notice required by this section does not affect the validity of the proceedings or the amendment(s).

3.32.110 Preemption and Severability.

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

B. If anything in this chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal law, rule, regulation or decision, the remainder of this chapter shall not be affected thereby but shall be deemed as a separate and distinct and independent provision, and such holding shall not affect the validity of the remaining parts of this chapter and each remaining part shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state law, rule or regulation, the provision shall be preempted only to the extent required by law and any portion not preempted shall survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, the provision shall immediately return to full force and effect and be binding without further action by the City.

CHAPTER 13.36 – MANAGEMENT OF CITY RIGHTS OF WAY

SECTIONS:

- 13.36.010 Intent and Scope
- 13.36.020 Definitions
- 13.36.030 Right of Way Permit
- 13.36.040 Construction
- 13.36.050 Relocation/Undergrounding
- 13.36.060 Repairs and Restoration
- 13.36.070 Adherence to Terms of Permit – Permit Exhibition
- 13.36.080 Maintenance
- 13.36.090 Vegetation
- 13.36.100 Discontinued Use
- 13.36.110 Vacation
- 13.36.120 Insurance
- 13.36.130 Financial Assurance
- 13.36.140 Liability and Indemnification
- 13.36.150 Revocation of Permits
- 13.36.160 Application to Existing Agreements
- 13.36.170 Notice of Amendment
- 13.36.180 Preemption and Severability
- 13.36.190 Violation – Penalty

13.36.010 Intent and Scope.

A. Pursuant to the statutes of the State of Oregon and the powers granted in the Charter of the City, the City Council declares its intent to acquire, own, operate, maintain, and manage rights of way and to acquire, maintain, and manage public easements.

B. The purpose of this chapter is to provide for the non-discriminatory and competitively neutral management of the public rights of way and public easements in the interest of public safety and convenience and the protection of public infrastructure.

C. When any of the words or requirements under this chapter are ambiguous and subject to interpretation, they shall be interpreted and applied so as to avoid a violation of federal or state law.

D. If any section, sentence, clause or provision in this chapter is held by a court of competent jurisdiction to be invalid or unenforceable, or is preempted by federal or state law, the remainder of this chapter shall not be affected.

E. The fees and costs provided for in this chapter are separate from, and in addition to, any and all federal, state, local and City charges as may be levied, imposed or due from a user, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.

F. The fees and costs provided for in this chapter are not subject to the property tax

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limitations of Article IX, Sections 11 and 11b of the Oregon Constitution. These fees and costs are not imposed on property or property owners.

13.36.020 Definitions. The following words when used in this chapter have the meaning respectively ascribed to them in this section except in those instances where the context clearly indicates a different meaning. Words not defined in this chapter have the meaning ascribed to them in the Engineering Standards.

"City Engineer" means that person designated by the City to serve as the City Engineer, or his or her designee(s).

"City facilities" means City or publicly-owned structures or equipment located within the right of way or public easement used for governmental purposes.

"Engineering Standards" means the most recent version of the City of Hood River Engineering Standards adopted by the City Engineer under Title 16.

"Facilities" means any tangible component installed, maintained, or operated by user within the right of way. By way of example, the term means any pole, wire, sensor, loop, light, stabilization or "guy" wire, anchor, pipe, conduit, line, main, duct, cable, wire, switch, transformer, valve, antennae or other equipment, including any equipment box or vault, located wholly or in part under, on, or above the surface of the ground within any right of way or easement. "Facility" also includes any item placed in the right of way for the purpose of providing electric power, natural gas, telephone, telecommunications, radio, cable television, internet access, sewer, water, storm sewer or other utility or similar service.

"Franchise" means an agreement between the City and user which grants a privilege to use public right of way within the City for a dedicated purpose and for specific compensation.

"Non-City facilities" means light poles, utility poles, pipes, cable, wire, conduit, vaults, ducts, fiber or similar equipment that is not owned or operated by the City and that is lawfully placed in the right of way or public utility easement.

"Public rights of way" or "right of way" has the same meaning as in Hood River Municipal Code Section 13.52.010. "Public rights of way" or "right of way" also includes utility easements as defined below, unless specifically stated otherwise.

"User" means a person that performs work and/or has facilities within the right of way, whether or not the user has a permit.

"Utility easement or public utility easement" means any easement designated on a subdivision or partition map as a utility easement or public utility easement, or any easement granted or owned by the City and acquired, established, dedicated or devoted for public utility purposes. The term does not include easements not owned by or for the public.

"Work" means excavation or fill, or the construction, demolition, installation, replacement, repair, maintenance, or relocation of facilities, within the right of way.

13.36.030 Right of Way Permit.

A. Permit Required. No person shall occupy or encroach on public right of way , nor

store materials in, or perform work, or place, relocate or maintain facilities located within public right of way without first obtaining a Right of Way Permit from the City. No permit shall be granted if the applicant has any outstanding payments due to the City under this chapter or Chapter 3.32. No permit shall be issued for an excavation in a pavement surface less than 2 years old unless the applicant can clearly demonstrate to the City Engineer's satisfaction that public health or safety require the work to be performed or unless an emergency exists. No permit shall be issued for an excavation in any pavement unless the applicable degradation fee has been paid.

B. Exceptions.

1. Permits are not required for routine maintenance or repair of above ground equipment, the installation of new replacement cables or wires on existing aerial facilities, when the installation, maintenance or repair will not impact vehicular, pedestrian, or bicycle traffic by closing or blocking or partially obstructing a lane of travel and for the installation of individual customer service connections, repairs or maintenance that does not require cutting or breaking of the roadway, curb or sidewalk.

2. Emergency responses related to existing facilities, in order to prevent service interruptions or the imminent threat of harm to persons and property, may be undertaken without first obtaining a permit. The user must notify the City Engineer immediately, or as soon as reasonably possible after cessation of the emergency regarding work performed, or being performed, in the rights of way; the user must pay all applicable fees, including the permit fee; and the user must comply with all other provisions of this chapter.

3. The provisions of this Chapter do not apply to work within right of way by the City, its employees, or persons operating under contract with the City. However, the degradation fee applies to any underground utility work performed by or for the City and shall be deposited into the City's Street Fund.

C. Permit Application and Review. The City Engineer is authorized to establish application forms, reasonable right of way management procedures, terms, and conditions for the permit, approve or deny permit applications, and perform such other acts as provided by this ordinance. The City Engineer shall, within 10 days of receipt of a complete permit application, issue a written determination granting, granting with conditions, or denying the permit in whole or in part. If the permit is denied, the written determination shall include the reasons for denial. The permit shall be evaluated based upon the demonstrated ability of the permit applicant to meet the terms of this chapter, the continuing capacity of the public right of way or public easement to accommodate the permit applicant's proposed facilities and the applicable federal, state and local laws, rules and policies. If denied, the applicant may appeal to the City Council.

D. Permit Nonexclusive. The permit is not exclusive. The City expressly reserves the right to grant permits or rights to other persons, as well as the City's right to use the right of way for similar or different purposes, as allowed hereunder. The permit is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the right of way. Nothing in

the permit shall be deemed to grant, convey, create, or vest in user a real property interest in land, including any fee, leasehold interest, or easement.

E. Reservation of City Rights. Nothing in the permit shall be construed to prevent the City from constructing sewers, grading, paving, repairing and/or altering any right of way, laying down, repairing or removing water or sewer mains, or constructing or establishing any other public work, utility or improvement, including repairs, replacement or removal of City facilities. If any of user's facilities interferes with the construction or repair of any right of way, public work, City utility, City improvement, or City facility, and the City and user are unable to find a reasonable alternative, user's facilities shall be removed or relocated as provided in Section 13.36.050 below, in a manner acceptable to the City, and subject to industry standard engineering and safety codes.

F. Permit Fee. The permit fee is established by resolution of the City Council and will be in an amount which helps to defray the costs of design reviews, construction observation and administration of the requirements of this Chapter. The permit fee will include a degradation fee for all requested excavations to pavements less than 10 years old. The degradation fee will be deposited in the City's Street Fund for the ongoing maintenance of City streets.

G. Permit Securities. Along with the application for the Right of Way Permit, the applicant shall deposit such securities as required by the City Engineer to comply with the provisions of this Chapter and with the specifications of the City Engineer pertaining to the conduct of the work. Securities may include the securities required by Section 13.36.140 and both a performance guarantee and a warranty guarantee as required by Chapter 16.12.

H. Application Requirements. Applications for the Right of Way Permit shall conform to the following minimum requirements. Applications shall conform to the requirements of the City Engineering Standards and be accompanied by the permit fee. Applications for permits to construct, install or modify facilities within a public right of way must be accompanied by documentation, drawings, plans and specifications as required by the Engineering Standards. The documentation, drawings, plans and specifications must be in sufficient detail to demonstrate or show that the facilities will be constructed or installed in accordance with all applicable codes, rules and regulations and that the facilities will be constructed or installed in accordance with the applicant's franchise agreement, if any. All documentation, drawings, plans and specifications submitted with permit applications must be accompanied by the verification of a registered professional engineer that the drawings, plans and specifications comply with applicable technical codes, rules and regulations. In the City Engineer's sole discretion, documents, drawings, plans and specifications may be verified by a person who is not a registered engineer but who is a qualified and authorized representative of the applicant. All permit applications must be accompanied by a written schedule, including the anticipated deadline for completion of the work. The schedule is subject to approval by the City Engineer.

I. Assignment. Except as provided below, a Right of Way Permit cannot be assigned

or transferred without the prior written consent of the City, which consent may not be unreasonably withheld, conditioned, or delayed. User may assign a permit to a parent, subsidiary, affiliate, or to any entity that acquires all or substantially all the equity or assets of user by sale, merger or otherwise without the consent of the City, but upon written notice to the City.

J. Franchise.

1. A franchise is not required if the user desires to provide a commercial service, but may be required by state or federal law. In the event of conflict between a franchise and the provisions of this Chapter, the more restrictive requirements apply.

2. If the City Council determines that the public interest warrants, the City and a user may enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this chapter, consistent with applicable state and federal law. The franchise may conflict with the terms of this chapter but the franchisee will otherwise be subject to the provisions of this chapter to the extent that such provisions are not in conflict with the franchise. A franchise agreement will be adopted by ordinance of the City Council.

13.36.040 Construction.

A. Construction and Installation. Subject to the terms of the Right of Way Permit, user may enter upon the right of way to perform all work that is necessary to install, operate, maintain, remove, reinstall, relocate, and replace equipment in or on user's facilities or in or on City facilities. All work shall be in conformance with all applicable permits, this Chapter, the City Engineering Standards and other federal, state, or local laws and ordinance, and in a manner approved by the City Engineer.

B. No Interference; Protection of Facilities.

1. User, in the performance and exercise of its rights and obligations under a Right of Way Permit, shall not unreasonably interfere with the existence and operation of any rights of way, City facilities, non-City facilities, and other telecommunications, utility, communication system, or municipal property, without the express written approval of the owner or owners of the affected personal property or properties. Upon notification by the City, user may be required to review plans of others to determine if interference may occur.

2. All users shall use reasonable care to preserve and protect from injury other user's facilities in the right of way, the public using the right of way, and any adjoining property, and take other necessary measures to protect life and property, including but not limited to buildings, walls, fences, and vegetation that may be subject to damage from the permitted work. All users are responsible for all damage to public and private property resulting from the user's failure to comply with this subsection.

C. Undergrounding Required—New Facilities. Whenever any existing facilities are located underground within a right of way, user must also locate new facilities

underground. The City Engineer shall provide an exception for transmission facilities when such transmission lines are not customarily located underground in accordance with industry engineering standards or when the cost of placing the facilities underground substantially increases the cost of the project for the customers within the City receiving service from the facilities. Telecommunications users shall co-locate new facilities in existing underground ducts or conduits whenever surplus capacity exists, unless the user can demonstrate to the City Engineer's satisfaction that collocation is not feasible. All new facilities shall be constructed underground pursuant to Chapter 12.05 or when required to do so by the City in conjunction with a publicly funded construction project. User is prohibited from installing any new aerial cables, wire, or conduit unless otherwise permitted by Chapter 12.05.

D. Hours of Work. Except for emergencies, work shall be performed between the hours of 7 AM and 7 PM, Monday through Friday, unless approved otherwise by the City Engineer in writing.

E. Notification. Except in the case of an emergency affecting the public safety, user shall notify the City Engineer not less than 2 business days in advance of any work in the right of way. In the event of an emergency affecting the public safety, work may be made in a right of way provided that user notifies the City Engineer within 48 hours of doing the work, and complies thereafter with all provisions of this Chapter, including submitting an application for a permit.

F. Coordination of Work. All users are required to make a good faith effort to cooperate and coordinate construction schedules with each other, with the City, and with other users of the right of way. At least annually by January 1 of each year, all users shall provide the City and all other users with a schedule of known proposed construction activities for that year to determine if joint projects are feasible to minimize duplication of work and excavation in the right of way. For those persons expressing an interest in a joint project, the user shall give them reasonable notice of the particular dates for the work to begin. Upon mutual agreement, the user shall make the trench available to those persons participating in the joint project for installation of equipment. The payment for the cost of trenching and installation will be as mutually agreed to by the parties.

G. Obtaining Required Permits. If the work in the right of way requires any additional permits, user shall obtain the permits and pay any applicable permit fees.

H. Plans.

(1). When documentation, drawings, plans or specifications have been required for a permit application, the user shall furnish the City with 2 complete sets of record drawings drawn to scale and certified to the City as accurately depicting the location of all facilities constructed pursuant to the permit, one set on paper and the other set in electronic format. These record drawings shall be submitted to the City Engineer within 60 days following acceptance of the facilities by the City, in a format mutually acceptable to the user and City Engineer.

(2). When requested by the user, and subject to the provisions of state law and the Oregon Public Records laws, the City shall treat as confidential any public record or information provided and designated by the user as confidential.

I. Use by City. The City, at its cost, may install pipes or conduit in any trench or excavation created by user, to the extent that space is reasonably available. The City may also require user to excavate trenches larger than needed by user, with the excess capacity to be utilized by the City and with the City responsible for the incremental cost provided that requiring the user to do so does not impose unreasonable delay on the user's construction activities. This section does not apply where collocation would not comply with federal or state safety or environmental laws.

J. Safety. User shall perform all work in a manner that ensures safety of workers and the public. Safety requirements and traffic maintenance shall be in conformance with the City Engineer Standards.

K. Moving of Structures and Equipment. Whenever it becomes necessary to allow for the passage of buildings, machinery or other objects, user shall temporarily rearrange, remove, lower or raise its wires, cables or other facilities as necessary, at no cost to the City whether or not requested by the City. Whenever any person other than the City requests passage to move buildings, machinery or other objects, that person shall pay the entire actual cost incurred by user for changing, altering, moving, removing or replacing its wires, cables, or other facilities so as to permit passage, and shall deposit in advance with user a sum equal to such cost as estimated by user. The person undertaking the move shall pay all damages caused directly by the changing, altering, moving, removing or replacing of such wires, cables or other facilities, except for damages and claims that are the direct result of user's negligent acts. Except in an emergency, user shall be given not less than 30 days written notice by the party desiring to move a building or other objects. The notice shall detail the route of movement of the buildings or other objects over and along the rights of way of the City. Upon receiving required notice, user shall complete the moves as soon as practicable, and without undue delay. Furthermore, the passage of buildings, machinery or other objects shall be with as much haste as possible and shall not be necessarily delayed or cause user unnecessary expense or waste of time. Moving buildings or part of buildings must also comply with Chapter 15.12.

L. Work in Right of Way by City. Whenever the City shall perform or cause or permit to be performed any work for the City in any right of way where the work may disturb or interfere with a user's facilities, the City shall, or require its permittee, to notify the user in writing in a reasonable time prior to the contemplated work to enable the user to take those measures, including relocation or removal, as may be deemed necessary to protect its facilities, at the user's own expense.

13.36.050 Relocation/Undergrounding.

A. Whenever the City determines that it is necessary, the City may require user to change the location of its facilities, including relocating underground, or to remove its equipment from the right of way. Within a reasonable time period specified in written

notice, or immediately in the case of an emergency, user shall, at user's expense, temporarily or permanently (as specified by the City) relocate any of its equipment or facilities within the right of way whenever the City determines that relocation is reasonably necessary for:

1. The construction, repair, maintenance or installation of any City or other public improvement in the right of way.
2. The construction, installation or improvement of any public right of way by a private developer as a condition of property development, provided that neither the City nor the user are required to pay the relocation costs.
3. The operations of the City or other governmental entity in the right of way.
4. The public interest.

If any of the foregoing improvements eliminate space available for user's existing overhead facilities within an existing public utility easement or within the right of way, user shall at no expense to the City, relocate facilities underground or secure a private utility easement. The City is not obligated to provide right of way solely for the use of any user's facilities.

B. In cases of capital improvements (as opposed to public improvements to rights of way as described in subsection (A) above) undertaken by either the City or a private contractor on behalf of the City, user shall at user's own expense, underground existing overhead facilities at the request of the City where other users are similarly required to do so.

C. Costs for moving facilities necessitated for anything other than publicly-funded projects shall be borne by the person requesting relocation or removal. User shall pay the cost for relocation of user's equipment for publicly-funded projects to the extent the City is not reimbursed. When a project is funded with both private and public funds, user shall pay the percentage of the costs that is equal to the percentage of City funds that were spent on the relocation.

D. The City shall provide written notice as soon as practicable to affected users of a project planned by the City that would require relocation of users' facilities. Prior to requesting relocation, the City shall make a reasonable effort to find an alternative location within a right of way for relocated facilities.

E. If user fails to move any facilities as requested by the City by the date specified in the written notice, the City may cause the facilities to be moved at user's own expense. Upon receipt of a detailed invoice for payment from the City, user shall reimburse the City for the costs the City incurred within 60 days, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

F. Nothing in this chapter prohibits a user from seeking reimbursement and/or payment for relocation costs under this section from a third party or the City in

accordance with applicable state laws and rules, provided that such reimbursement or payment does not delay the user's obligation to comply with this section in a timely manner.

13.36.060 Repairs and Restoration.

A. When a user, or any person acting on their behalf, does any work in or affecting any public rights of way or City property, they shall, at their own expense, promptly remove any obstructions therefrom and restore the ways or property to a condition equal to or better than its condition prior to commencement of the work unless otherwise directed by the City Engineer, or unless otherwise specified by a permit.

B. If weather or other conditions do not permit the complete restoration required by this Section, the user shall temporarily restore and maintain the affected rights of way or property if directed to do so by the City Engineer. Temporary restoration shall be at the user's own expense and the user shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent permanent restoration. Any corresponding modification to the construction schedule is subject to approval by the City. Temporary restoration means restoring the property to a safe condition permitting the 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 user fails to restore rights of way or property to good order and condition, the City shall give the user written notice and provide the user a reasonable period of time, not exceeding 30 days, to restore the rights of way or property. If the user fails thereafter to restore the rights of way or property to good order and condition, the City may cause the restoration to be made at the expense of the user, and the user shall reimburse the City for such costs, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

13.36.070 Adherence to Terms of Permit - Permit Exhibition.

A. No work shall be undertaken other than that specified in the Right of Way Permit. All construction practices and activities shall be in accordance with this Chapter and the Permit.

B. The City Engineer and the City's representatives shall have access to the work site and any further information as they may require to insure compliance with this Chapter or the permit, or protection of the right of way. Upon request of the City Engineer, his assistants or any police officer, the Permit shall be produced at the place where the work is in progress. If the Permit is not produced, the work shall be stopped until the Permit is produced.

C. Any work that does not comply with this Chapter or the Permit, shall be removed, replaced or corrected at the user's own expense immediately following oral or written notification by the City Engineer. The City Engineer is authorized to stop work in order to assure compliance with the provisions of this Chapter. If the work is not replaced or corrected as required by this Section and the City Engineer's notice, the work shall be

removed or corrected by the City at the user's own expense. Upon receipt of a detailed invoice from the City, user shall reimburse the City for the costs the City incurred within 60 days, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

13.36.080 Maintenance. User shall install and maintain all equipment in a manner that prevents injury to the right of way, the City's property or the property belonging to another person, except as this chapter otherwise permits or requires. User shall, at its own expense, repair, and maintain equipment from time to time as may be necessary to accomplish this purpose.

13.36.090 Vegetation. User shall prune any vegetation in accordance with Chapter 13.12.

13.36.100 Discontinued Use. Whenever user discontinues use of any facilities and does not intend to use the facilities within 12 consecutive months, user shall remove the facilities from the right of way unless the City agrees, in writing, that the facilities may remain in the right of way. The City shall not unreasonably withhold agreement and a condition requiring user to convey title or ownership of the facilities to the City shall not be considered unreasonable. If user fails to remove facilities that are no longer going to be used within a reasonable time not to exceed one year, and the City has not agreed to allow user to abandon the facilities in place, the City may remove the facilities at user's own expense. Upon receipt of a demand for payment from the City, user shall pay the City for the estimated costs or a detailed invoice of the costs the City incurred within 60 days, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

13.36.110 Vacation. If the City vacates any right of way, or portion thereof, that user uses, user shall remove its facilities from the right of way at its own expense unless the City reserves a public utility easement, which the City shall make a reasonable effort to do. User shall be notified of proposed vacation at least 90 days before user is required to relocate or remove its facilities. If user fails to remove its facilities within 30 days, or as otherwise necessary to complete removal, after a right of way is vacated, the City may remove the facilities at user's own expense. Upon receipt of a detailed invoice from the City, user shall reimburse the City for the costs the City incurred within 60 days, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

13.36.120 Insurance.

A. The City Engineer may require, in his sole discretion, as a condition of permit issuance that user maintain public liability and property damage insurance and motor vehicle liability insurance that protects user and the City, as well as the City's officers, agents, and employees, from the claims referred to in Section 13.36.150. The insurance shall provide coverage at all times of not less than the statutory maximum limits of liability imposed on municipalities of the State of Oregon and shall include costs of defense. The insurance shall be without prejudice to coverage otherwise existing and

shall name as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The Certificate of Insurance shall provide that the insurance shall not be canceled or materially altered without 30 days' prior written notice first being given to the City. If the insurance is canceled or materially altered, user shall provide a replacement policy with the terms as outlined in this Section. User shall maintain continuous uninterrupted coverage, in the terms and amounts required. User may self insure any or all of the above coverage. The insurance policy(s) may provide for self-retention or deductibles in reasonable amounts.

B. Users with facilities already in the public right of way as of the effective date of Ordinance 1970 shall provide and continue to provide insurance as specified in subsection (A) above.

C. User shall maintain on file with the City proof of the coverage required in this section.

13.36.130 Financial Assurance.

A. Unless otherwise provided in a franchise agreement, before work is commenced within a right of way, the user shall provide a performance bond or other form of surety acceptable to the City in an amount equal to at least 100% of the estimated cost of all the work within the right of way. The amount of the estimated cost is subject to approval by the City Engineer. In lieu of providing surety each time a user applies for a Right of Way Permit, the City Engineer may require an annual or rotating bond in an amount not less than \$100,000 to cover all or specified work in the right of way. The surety shall remain in force until released by the City following final acceptance and upon compliance with Chapter 16.12, unless otherwise provided in a franchise agreement. In the case of an annual or rotating bond, the surety shall remain in force until released by the City.

B. 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 and liens for labor, material and services provided in connection with the work.

C. In lieu of a surety bond, the user may file as security cash or certified check in an amount no less than 100% of the estimated cost of all the work within the right of way, to be held by the City and returned subject to the same conditions as set forth in the case of surety bonds.

D. In the case of unimproved rights of way, no security is required unless, in the opinion of the City Engineer, security is necessary for the protection of the public interest.

13.36.140 Liability and Indemnification.

A. User shall indemnify, defend, and hold the City, its officers, agents, and employees harmless from any claims for injury, damage, loss, liability, cost or expense,

including court and appeal costs and attorney fees or expenses, arising from any wrongful or negligent act or omission of user related to user's use of the rights of way, but not if arising out of or by reason of any negligence or willful misconduct by the City, its officers, agents or employees. The City shall provide user with prompt notice of any such claim, which user shall defend. No settlement or compromise of any such claim will be done by the City or the user without the prior written approval of the other party. User and its agents, contractors and others shall consult and cooperate with the City while conducting its defense.

B. User shall also indemnify the City for any third party damages, claims or expenses incurred, by the City arising out of or resulting, directly or indirectly, from user's wrongful or negligent failure to remove or relocate any of its equipment in the right of way in accordance with a reasonable schedule furnished to user by the City, unless user's failure arises directly from the City's negligence or willful misconduct or that of a third party.

13.36.150 Revocation of Permits.

A. Any permit issued under this Chapter may be revoked by the City Engineer if after notice to the user for the following, the user fails to comply with subsection (C) of this section within the time specified in the notice:

1. Violation of any condition of the permit or any provision of this Chapter.
2. Violation of any provision of any other applicable ordinance or law relating to the work.
3. Existence of any condition or the performance of any act constituting or creating a nuisance or endangering life or property.

B. The notice may be oral when the City Engineer determines that circumstances warrant immediate attention in 24 hours or less. All other notices must be in writing.

C. Upon receipt of notice from the City Engineer, the user shall immediately cease to perform any additional work in the permitted area except to remedy the violation and restore the area to a safe condition.

D. Written notice shall be served upon the user or their agent engaged in the work. The notice shall contain a brief statement of the reasons for issuing notice. Notice shall be given by certified or registered U.S. mail addressed to the user at the address shown on the permit application.

E. When any permit is revoked and the work authorized by the permit has not been completed, the user is required to re-apply for the permit and re-pay all fees with the exception of the degradation fee. If, in the opinion of the City Engineer, delays in the completion of work will create a hazard or nuisance to the public, the City may perform such work as may be necessary to restore the street. All expenses incurred by the City for such work shall be reimbursed by the user. Upon receipt of a detailed invoice from the City, user shall reimburse the City for the costs the City incurred within 60 days, including all labor and material costs and an administrative overhead fee of 20% plus interest after 30 days.

13.36.160 Application to Existing Agreements. To the extent that this chapter is not in conflict and can be implemented consistent with existing franchise agreements, this chapter shall apply to all existing franchise agreements granted to users by the City.

13.36.170 Notice of Amendment. The City shall provide not less than 30 days prior

written notice of any amendments to this chapter to all utilities paying a privilege tax pursuant to Chapter 3.32. Failure to provide the notice required by this section does not affect the validity of any proceeding or amendment to this chapter.

13.36.180 Preemption and Severability.

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

B. If anything in this chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal law, rule, regulation or decision, the remainder of this chapter shall not be affected thereby but shall be deemed as a separate and distinct and independent provision, and such holding shall not affect the validity of the remaining parts of this chapter and each remaining part shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state law, rule or regulation, the provision shall be preempted only to the extent required by law and any portion not preempted shall survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, the provision shall immediately return to full force and effect and be binding without further action by the City.

13.36.190 Violation - Penalty.

A. Any person found guilty of violating any of the provision of this chapter, shall be fined not more than \$100. Every day that a violation continues shall constitute a separate offense.

B. Nothing in this chapter shall be construed as limiting any judicial or other remedies the City may have at law or in equity, for enforcement of this chapter.