CITY OF MILWAUKIE
"Dogwood City of the West"

Ordinance No. 2131

AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, AMENDING CODE TITLE 3 BY REPEALING CHAPTER 3.13 (TELECOMMUNICATION FACILITIES) AND CHAPTER 3.30 (ELECTRIC UTILITY PRIVILEGE TAX) AND ADOPTING TITLE 21 (UTILITY SERVICE).

WHEREAS, the City of Milwaukie has constitutional and charter authority to manage its right-of-way and receive compensation for use of the right-of-way consistent with applicable federal and state law; and

WHEREAS, the City has typically granted individually negotiated franchises to each utility using the City's right-of-way to provide utility service, each franchise agreement setting forth the terms of use and compensation to be paid for such use; and

WHEREAS, the City has determined that it can more effectively, efficiently, fairly, and uniformly manage the City's right-of-way and provide consistent standards for utility use of the right-of-way through licenses rather than franchises; and

WHEREAS, Title 21 is intended to replace the Telecommunications Facilities of Chapter 3.13 and the Electric Utility Privilege Tax of Chapter 3.30; and

WHEREAS, the City finds it is in the public interest to enact the changes to the City of Milwaukie Code as set forth in this Ordinance.

Now, Therefore, the City of Milwaukie does ordain as follows:

Section 1. Milwaukie Code Chapter 3.13 is hereby repealed.

Section 2. Milwaukie Code Chapter 3.30 is hereby repealed.

Section 3. Milwaukie Code Chapter 21 is hereby added to read as follows:

Title 21 Utility Service

21.000. Title.

The ordinance codified in this Chapter shall be known and may be referenced as the utility service ordinance.

21.100. Purpose and Intent.

The purpose and intent of this Chapter is to:

A. For the purpose of this Chapter, utility services owned or operated by the City of Milwaukie are excluded. Utility Services provided by other municipalities are also excluded. However the City reserves the right to include these services upon resolution of the City Council;

B. Permit and manage reasonable access to the City's rights-of-way for utility

purposes, and conserve the limited physical capacity of those rights-of-way held in trust by the City consistent with applicable state and federal law;

C. Assure that the City's current and ongoing costs of granting and regulating access to and the use of the rights-of-way are fully compensated by the persons seeking such access and causing such costs;

D. Secure fair and reasonable compensation to the City and its residents for permitting use of the rights-of-way by persons who generate revenue by placing, owning or operating facilities therein or charging residents for services delivered;

E. Assure that all utility companies, persons and other entities owning or operating facilities or providing services within the City comply with the ordinances, rules and regulations of the City;

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

G. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City; and

H. Comply with applicable provisions of state and federal law.

21.110. Jurisdiction and Management of the Public Right-of-way.

A. The City has jurisdiction and exercises regulatory management over all rights-of-way within the City under authority of the City Charter and Oregon law.

B. The City has jurisdiction and exercises regulatory management over each rights-of-way whether the City has a fee, easement, or other legal interest in the rights-of-way, and whether the legal interest in the rights-of-way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.

C. The exercise of jurisdiction and regulatory management of a right-of-way by the City is not official acceptance of the rights-of-way, and does not obligate the City to maintain or repair any part of the rights-of-way.

D. The provisions of this Chapter are subject to and will be applied consistent with applicable state and federal laws, rules and regulations, and to the extent possible, shall be interpreted to be consistent with such laws, rules and regulations.

21.120. Regulatory Fees and Compensation Not a Tax.

A. The fees and costs provided for in this Chapter, and any compensation charged and paid for use of the rights-of-way provided for in this Chapter, are separate from, and in addition to, any and all other federal, state, local, and City charges, including any permit fee, or any other generally applicable fee, tax, or charge on the business, occupation, property, or income as may be levied, imposed, or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.

"Emergency" has the meaning provided for in ORS 401.025.

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

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

"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 telecommunication carriers as set forth in Oregon law, or its lawful successor.

"Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, municipality, special district, government entity or other organization, including any natural person or any other legal entity.

"Private communications system" means a system, including the construction, maintenance or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a person for their use and not for sale or resale, including trade, barter or other exchange of value, directly or indirectly, to any person.

"Public communications system" means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the state of Oregon pursuant to ORS 283.140. "Public communications system" does not include any system used for sale or resale, including trade, barter or other exchange of value, of communications services or capacity on the system, directly or indirectly, to any person.

"Public utility easement" means the space in, upon, above, along, across, over or under an easement for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of utility facilities. "Public utility easement" does not include an easement (i) that has been privately acquired by a utility operator, (ii) solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of City facilities, or (iii) where the proposed use by the utility operator is inconsistent with the terms of another easement granted to the City that applies to the same location.

"Right-of-way", "Rights-of-way", "Public right-of-way", or "ROW" means and includes, but is not limited to, the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, boulevards, bridges, trails, paths, sidewalks, bicycle lanes, public utility easements and all other public ways or areas, including the subsurface under and air space over these areas, but does not include parks, parkland, or other City property not generally open to the public for travel. This definition applies only to the extent of the City's right, title, interest and authority to grant a license to occupy and use such areas for utility facilities.

"Right-of-Way License" or "License" means the authorization granted by the City to a utility provider pursuant to this Chapter.

B. The City has determined that any fee or tax provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees or taxes are not imposed on property or property owners.

C. The fees and costs provided for in this Chapter are subject to applicable federal and state laws.

21.130. Definitions.

For the purpose of this Chapter the following terms, phrases, words and their derivations shall have the meaning given herein. 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.

"Cable Act" means the Cable Communications Policy Act of 1984, 47 U.S.C., Section 521, et seq., as now and hereafter amended.

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

"City" means the City of Milwaukie, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.

"City Council" means the elected governing body of the City of Milwaukie, Oregon.

"City standards" means the Milwaukie Public Works Standards.

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

"City property" means and includes all real property owned by the City, other than public right-of-way and utility easement as those are defined herein, all property held in proprietary capacity by the City.

"Communications services" means any service provided for the purpose of transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications service includes all forms of telephone services and voice, video, data, or information transport, but does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) private communications system services provided without using the public right-of-way; (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; (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act and (6) public communications systems.

"Construction" means any activity in the public right-of-way resulting in physical change thereto, including excavation or placement of structures.

"Days" means calendar days unless otherwise specified.

"State" means the State of Oregon.

"Structure" means any facility a Utility Provider or Utility Operator places in the ROW, including but not limited to poles, vaults or manholes, hand holds or junction boxes, conduit, direct bury cable, wires, pedestals, aerial cables or wires and transformers.

"Telecommunications Act" means the Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunication Act of 1996 (47 U.S.C., 151 et seq.) and as hereafter amended.

"Telecommunications carrier" means any provider of telecommunications services and includes every person that directly or indirectly owns, controls, operates, or manages telecommunication facilities within the City limits.

"Utility facility" or "Facility" means any physical component of a system, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plant, equipment and other facilities, located within, under or above the ROW, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service.

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

"Utility provider" or "Provider" means any person who provides utility service to customers within the City limits, whether or not any facilities in the ROW are owned by such provider.

"Utility service" means the provision, by means of utility facilities permanently located within, under or above the ROW, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer, or storm sewer to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions.

"Work" means the construction, demolition, installation, replacement, repair, maintenance or relocation of any utility facility, including but not limited to any excavation and restoration required in association with such construction, demolition, installation, replacement, repair, maintenance or relocation.

21.140. Business Registration.

A. Registration Required. Every person that desires to provide utility services to customers within the City shall register with the City prior to providing any utility services to any customer, person, entity, or business in the City, in compliance with Municipal Code section 5.08. Every person providing utility services within the City as of the effective date of this Chapter shall register within thirty (30) days of the effective date of this Chapter or within thirty (30) days of a person providing utility services within the City, whichever is longer.

B. Annual Registration. After registering with the City pursuant to subsection A of this section, the registrant shall, by December 31 of each year, file with the City a new registration form if it intends to provide utility service at any time in the following

calendar year.

C. Registration Application. The registration shall be on a form provided by the City, and shall be accompanied by any additional documents required by the City, at no cost to the City, to identify the registrant and its legal status, describe the type of utility services provided or to be provided by the registrant and a description of the facilities over which the utility services will be provided.

D. Registration Fee. Each application for registration shall be accompanied by a nonrefundable registration fee in an amount to be determined annually by resolution of the City Council.

E. Exception. A person with a valid franchise agreement from the City shall not be required to register to provide the utility services expressly permitted by the franchise agreement, until the expiration of the franchise.

21.145 Electric Utility Privilege Tax

A. For electric utilities with an existing franchise with the City as of the time of adoption of this Code, a privilege tax of one and one-half (1.5) percent of the electric utility's gross revenue is imposed. Payment of all privilege taxes shall be paid to the City on the same schedule as the utility's franchise fee payment or ROW of way usage fee payment.

21.150. Right-of-way Licenses.

A. License Required.

1. Except those utility operators with a valid franchise agreement from the City, every person shall obtain a license from the City prior to conducting any work in the ROW.

2. Every person that owns, controls, or uses utility facilities in the ROW as of the effective date of this Chapter shall apply for a license from the City within thirty (30) days of the later of: (1) the effective date of this Chapter, (2) the expiration of a valid franchise from the City, unless a new franchise is granted by the City pursuant to subsection E of this Chapter or (3) a person providing utility services within the City.

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

C. License Application Fee. The application shall be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council.

D. Determination by City. The City shall issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is

denied, the written determination shall include the reasons for denial. The license shall be evaluated based upon the provisions of this Chapter, the continuing capacity of the ROW to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.

E. Franchise Agreements. If the public interest warrants, as determined by the City, the City and utility provider must 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 with the review and approval of the City Council. The franchise shall be subject to the provisions of this Chapter to the extent such provisions are not in conflict with the franchise. In the event of a conflict between the express provisions of a franchise and this Chapter, the franchise shall control.

F. Rights Granted.

1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the City code and other applicable provisions of state or federal law, in effect and as may be subsequently amended, to construct, place, maintain, upgrade, repair and operate utility facilities in the ROW for the term of the license.

2. Any license granted pursuant to this Chapter shall not convey equitable or legal title in the ROW, and may not be assigned or transferred except as permitted in subsection K of this section.

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

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

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

I. Reservation of City Rights. Nothing in the license shall be construed to prevent the City from grading, paving, repairing or altering any ROW, constructing, laying down, repairing, relocating or removing City facilities or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any City facilities. If any of licensee's utility facilities interfere with the construction, repair, replacement, alteration or removal of any ROW, public work, City utility, City improvement or City facility, except those providing utility services in competition with a

licensee, licensee's facilities shall be removed or relocated as provided in subsections C, D and E of Section 21.170, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

J. Multiple Services.

1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and ROW usage fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this subsection J (1) requires a utility operator to pay the ROW usage fee, if any, owed to the City by a third party using the utility operator's facilities.

2. A utility operator that provides or transmits more than one utility service over its facilities may not be required to obtain a separate license or franchise for each utility service, but is required to pay to the City separate ROW usage fees for each service.

K. Transfer or Assignment. To the extent permitted by applicable state and federal laws, the licensee shall obtain the written consent of the City prior to the transfer or assignment of the license. The license shall not be transferred or assigned unless;

1. The proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system; and

2. The transfer or assignment is approved by all agencies or organizations required or authorized under federal and state laws to approve such transfer or assignment.

The provider requesting the transfer or assignment must cooperate with the City and provide requested documentation, as the City deems necessary, at no cost to the City, to sufficiently understand the transferees' ability to perform under the license.
If the City approves such transfer or assignment, the transferee or assignee shall become responsible for fulfilling all obligations under the license with respect to all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license.

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

M. Termination.

1. Revocation or Termination of a License. The City may terminate or revoke the license granted pursuant to this Chapter for any of the following reasons:

a. Violation of any of the provisions of this Chapter;

b. Violation of any provision of the license;

c. Misrepresentation in a license application;

d. Failure to pay taxes, compensation, fees or costs due to the City after final determination of the taxes, compensation, fees or costs;

e. Failure to restore the ROW as required by this Chapter or other applicable state and local laws, ordinances, rules and regulations;

f. Failure to comply with technical, safety and engineering standards related to work in the ROW; or

g. Failure to obtain or maintain any and all licenses, permits, certifications and other authorizations required by state or federal law for the placement, maintenance or operation of the utility facilities.

2. Standards for Revocation or Termination. In determining whether termination, revocation or some other sanction is appropriate, the following factors shall be considered:

a. The egregiousness of the violation;

b. The harm that resulted;

c. Whether the violation was intentional;

d. The utility operator's history of compliance; and

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

3. Notice and Cure. The City shall give the utility operator written notice of any apparent violations before terminating a license. The notice shall include a short and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time (no less than twenty (20) and no more than forty (40) days) for the utility operator to demonstrate that the utility operator has remained in compliance, or that the utility operator has cured, or is in the process of curing any violation or noncompliance, or that it would be in the public interest to impose a penalty or sanction less than termination or revocation. If the utility operator is in the process of curing a violation or noncompliance, the utility operator must demonstrate that it acted promptly and continues to actively work on compliance. If the utility operator does not respond or if the City determines that the utility operator's response is inadequate, the City shall refer the matter to the City Council, which shall provide a duly noticed public hearing to determine whether the license shall be terminated or revoked and if any fines or damages will be imposed.

21.160. Construction and Restoration.

A. Construction Codes. Utility facilities shall be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including the City standards, the National Electrical Code, the National Electrical Safety Code, and the City's pavement cut standards, in effect and as may be subsequently amended. When a utility operator, or any person acting on its behalf, does any work in or affecting the ROW, the utility operator shall, at its own expense, promptly restore the ROW as directed by the City consistent with applicable

City codes, rules and regulations, and the City standards. A utility provider or other person acting on its behalf must use suitable barricades, flags, flagging attendants, lights, flares or other measure as required for the safety of the general public and to prevent injury or damage to any person(s), vehicle or property by reason of such work in or affecting the ROW or property.

B. Construction Permits.

1. No person shall perform any work on utility facilities within the ROW without first obtaining all required permits. The City shall not issue a permit for the construction, installation, maintenance or repair of utility facilities unless the utility operator of the facilities has applied for and received a valid license, registration, and franchise agreement (if applicable), required by this Chapter, and all applicable fees have been paid. No permit is required for service drops to customer premises or routine maintenance or repairs where such drops, repairs or maintenance do not require cutting, digging, breaking, or damage to, the ROW and do not result in closing or blocking any portion of the travel lanes for vehicular traffic, bicycle lanes, or sidewalks.

2. In the event of an emergency, a utility operator with a license pursuant to this Chapter or its contractor may perform work on its utility facilities without first obtaining a permit from the City, provided that, to the extent reasonably feasible, it attempts to notify the City prior to commencing the emergency work and in any event applies for a permit from the City as soon as reasonably practicable, but not later than 5:00pm PST of the next business day after commencing the emergency work. As used in this subsection, "emergency" means a circumstance in which immediate work is necessary to restore lost service or prevent immediate harm to persons or property.

3. Applications for permits to construct utility facilities shall be submitted upon forms to be provided by the City and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

a. That the facilities will be constructed in accordance with all applicable codes, rules, and regulations.

b. The location and route of all utility facilities to be installed above ground or on existing utility poles.

c. The location and route of all the applicant's utility facilities on or in the ROW to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route that are within the ROW. Applicant's existing utility facilities shall be differentiated on the plans from new construction. The City may require additional information necessary to demonstrate that the purposed location can accommodate the utility facilities, as reasonably determined by the City. A cross section shall be provided showing applicant's new or existing utility facilities in relation to the street, curb, sidewalk, or ROW.

d. The construction methods to be employed for work within or adjacent to the ROW, description of any improvements that applicant proposes to temporarily or permanently remove or relocate, and if deemed necessary by the City, methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the ROW.

e. The permittee has an adequate traffic control plan.

4. All permit applications shall be accompanied by the verification of a qualified and duly authorized representative of the applicant that the drawings, plans, and specifications submitted with the application comply with applicable technical codes, rules, and regulations. The City may, in its sole discretion, require the verification of a registered professional engineer or other licensed professional, at no cost to the City.

5. All permit applications shall be accompanied by a written construction schedule, which shall include an estimated start date and a deadline for completion of construction. The construction schedule is subject to approval by the City.

6. In addition to the requirements of this Chapter, the applicant shall, at all times, comply with all other City requirements.

7. If satisfied that the applications, plans, and documents submitted comply with all requirements of this Chapter, the City shall issue a permit authorizing construction of the utility facilities, subject to such additional conditions, restrictions, or regulations affecting the time, place, and manner of performing the work as the City may deem necessary or appropriate.

8. Except in the case of an emergency, the permittee shall notify the City not less than two (2) working days in advance of any excavation or construction in the ROW.

9. All construction practices and activities shall be in accordance with the permit final plans and specifications for the utility facilities that have been "Approved for Construction" by the City. The City and their representatives shall be provided access to the work site and such further information as they may require or deem appropriate to ensure compliance with such requirements.

10. All work which does not comply with the permit, the approved or corrected plans, and specifications for the work, or the requirements of this Chapter, shall be removed or corrected at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provision of this Chapter. If the permittee fails to remove or correct work as required in this subsection, the City may remove or correct the work at the expense of the permittee, after notice and opportunity to cure, using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations.

11. The permittee shall be responsible for providing correct and complete information. If the City believes the permittee misrepresented, misstated, or omitted any material fact(s) in its permit application, the City may deny or revoke the permit. The City may at any time require the permit holder to take additional measures to protect the health, safety, and welfare of the public. The permit holder shall be responsible for and pay all costs for such measures.

12. The permittee shall promptly complete all construction activities so as to minimize disruption of the City's ROW and other public and private property. All construction work within the ROW, including restoration, must be completed within

one-hundred eighty (180) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the City.

13. Traffic Control Plan. The permittee shall protect the work area with sufficient traffic controls reviewed and accepted by the City before work begins. The permittee shall at all times ensure the presence of such workers, tools and materials, flaggers, barricades, and other safety devices as may be necessary to properly protect bicyclists, pedestrians, construction personnel, and vehicular traffic upon the roadway, and to warn and safeguard the public against injury or damage resulting from the work.

14. Any supervision or control exercised by the City shall not relieve the permittee or utility operator of any duty to the general public nor shall such supervision or control relieve the permittee or utility operator from any liability for loss, damage, or injury to persons or property.

C. Performance Surety.

1. The City may require a performance bond or other form of surety acceptable to the City equal to at least one hundred percent (100%) of the estimated cost of the work within the City's ROW, which bond shall be provided before construction is commenced.

2. If required, the performance bond or other form of surety acceptable to the City shall remain in force until sixty (60) days after substantial completion of the work, as determined in writing by the City, including restoration of ROW and other property affected by the construction.

3. If required, the performance bond or other form of surety acceptable to the City shall guarantee, to the satisfaction of the City:

a. Timely completion of the work;

b. That the work is performed in compliance with applicable plans, permits, technical codes, and standards;

c. Proper location of the facilities as specified by the City;

d. Restoration of the City's ROW and other property affected by the work; and

e. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

4. The release of the performance bond or other surety pursuant to subsection C (1) of this section does not relieve the utility operator from its obligation to restore the ROW or other property as required in subsection E of this section regardless of when the failure to restore the City's ROW or other property as required by this chapter occurs or is discovered.

D. Injury to Persons or Property. A utility operator, or any person acting on its behalf, shall preserve and protect from injury or damage other utility operators' facilities in the ROW, the public using the ROW and any adjoining property, and take other necessary measures to protect life and property, including but not limited to buildings, walls, fences, trees or facilities that may be subject to damage from the permitted work. A utility operator shall be responsible for all injury to persons or damage to public or

private property resulting from its failure to properly protect people and property and to carry out the work in the City's ROW.

E. Restoration.

1. When a utility operator, or any person acting on its behalf, does any work in or affecting any ROW, it shall, at its own expense, promptly restore such ROW to the same or better condition as existed before the work was undertaken, in accordance with applicable federal, state and local laws, codes, ordinances, rules, and regulations, unless otherwise directed by the City.

2. If weather or other conditions beyond the utility operator's control do not permit the complete restoration required to the affected ROW, the utility operator shall temporarily restore the affected area. Such temporary restoration shall be at the utility operator's sole expense and the utility operator shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule is subject to approval by the City.

3. If the utility operator fails to restore the City's ROW as required in this Chapter, the City shall give the utility operator written notice and provide the utility operator a reasonable period of time of not less than ten (10) days, unless an emergency or threat to public safety is deemed to exist, and not exceeding thirty (30) days to restore the ROW. If, after said notice, the utility operator fails to restore the ROW as required in this Chapter, or the City's express written permission for a time extension, the City shall cause such restoration to be made at the expense of the utility operator. If the City determines a threat to public safety exists, the City shall provide necessary temporary safeguards, at the utility providers' sole expense. If such threat exists the utility provider shall have twenty four (24) hours to commence restoration. If work is not commenced in twenty four (24) hours, the City, at its sole option, may commence restoration at the utility provider's sole expense.

F. Inspection. Every utility operator's facilities shall be subject to the right of periodic inspection by the City to determine compliance with the provisions of this Chapter and all other applicable state and City codes, ordinances, rules and regulations, in effect and as may be subsequently amended. Every utility operator shall cooperate with the City in permitting the inspection of utility facilities upon request of the City. The utility operator shall perform all testing, or permit the City to perform any testing at the utility operator's expense, required by the City to determine that the installation of the utility operator's facilities and the restoration of the ROW comply with the terms of this Chapter and applicable state and City codes, ordinances, rules and regulations.

G. Coordination of Construction. All utility operators are required to make a good faith effort to both cooperate with and coordinate their construction schedules with those of the City and other users of the ROW.

1. Prior to January 1st of each year, utility providers shall provide the City with a schedule of known proposed construction activities for that the upcoming year in and around, or that may affect the ROW.

2. All construction locations, activities, and schedules within the ROW shall be

coordinated as ordered by the City, to minimize public inconvenience, disruption, or damages.

H. Contractors. A utility operator may authorize a qualified contractor to perform any of the work authorized or required in this Chapter on the utility operator's behalf. Any contractor performing work on behalf of a utility operator shall be subject to the provisions of this Chapter. In the event a utility operator authorizes a contractor to perform work on its behalf, the utility operator shall remain responsible and liable for compliance with the provisions of this Chapter.

21.170. Location of Facilities.

A. Location of Facilities. Unless otherwise agreed to in writing by the City, whenever any existing electric utilities, cable facilities or communications facilities are located underground within a ROW of the City, the utility operator with permission to occupy the same ROW shall install all new facilities underground at no cost to the City. This requirement shall not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts or to pedestals, cabinets, or other above-ground equipment of any utility operator. The City reserves the right to require written approval of the location of any such above-ground equipment in the ROW.

B. Interference with the ROW. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the ROW by the City, by the general public, or by other persons authorized to use or be present in or upon the ROW. Utility facilities shall not be located in areas of restricted sight distance nor interfere with the proper function of traffic control signs, signals, lighting, or other devices that affect traffic operation. All use of the ROW shall be consistent with City codes, ordinances, rules, and regulations in effect and as may be subsequently amended.

C. Relocation of Utility Facilities.

1. A utility operator shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any utility facility within a ROW, including relocation of aerial facilities underground, when requested to do so in writing by the City.

2. Nothing herein shall be deemed to preclude the utility operator from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements, provided that the utility operator shall timely comply with the requirements of this section regardless of whether or not it has requested or received such reimbursement or compensation.

3. The City shall coordinate the schedule for relocation of utility facilities and based on such effort shall provide written notice of the time by which the utility operator must remove, relocate, change, alter or underground its facilities. If a utility operator fails to remove, relocate, alter or underground any utility facility as requested by the City and by the date reasonably established by the City, the utility operator shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays, and the City may cause, using qualified personnel or contractors consistent with applicable state and federal safety laws

and regulations, the utility facility to be removed, relocated, altered, or undergrounded at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

4. The City will cooperate with the utility provider in securing alternate locations within the City's ROW. The City shall bear no responsibility to obtain, compensate, or otherwise assist the utility operator to relocation to locations not in the control of the City.

D. Removal of Unauthorized Facilities.

1. Unless otherwise agreed to in writing by the City, within thirty (30) days following written notice from the City or such other time agreed to in writing by the City, a utility operator and any other person that owns, controls, or maintains any unauthorized utility facility within the ROW shall, at its own expense, remove the facility and restore the ROW to City Standards.

2. A utility system or facility is unauthorized under any of the following circumstances:

a. The utility facility is outside the scope of authority granted by the City under the license, franchise or other written agreement. This includes facilities that were never licensed or franchised and facilities that were once licensed or franchised but for which the license or franchise has expired or been terminated. This does not include any facility for which the City has provided written authorization for abandonment in place.

b. The facility has been abandoned and the City has not provided written authorization for abandonment in place. A facility is abandoned if it is not in use and is not planned for further use. A facility will be presumed abandoned if it is not used for a period of one (1) year. A utility operator may overcome this presumption by presenting plans for future use of the facility.

c. The utility facility is improperly constructed or installed or is in a location not permitted by the construction permit, license, franchise, or this Chapter.

d. The utility operator is in violation of a material provision of this Chapter and fails to cure such violation within thirty (30) days of the City sending written notice of such violation, unless the City extends such time period in writing.

E. Removal by City.

1. The City retains the right and privilege to cut or move the facilities of any utility operator or similar entity located within the City's ROW, without notice, as the City may determine to be necessary, appropriate, or useful in response to a public health or safety emergency. The City will use qualified personnel or contractors consistent with applicable state and federal safety laws and regulations to the extent reasonably practical without impeding the City's response to the emergency. The City will notify the utility operator of any cutting or moving of facilities as soon as reasonably practical after resolution of the emergency.

2. If the utility operator fails to remove any facility when required to do so under this Chapter, the City may remove the facility using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, and the utility operator shall be responsible for paying the full cost of the removal and any administrative costs incurred by the City in removing the facility and obtaining reimbursement. Upon receipt of an invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days. The obligation to remove shall survive the termination of the license or franchise.

3. The City shall not be liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly therefrom, by the City or its contractor in removing, relocating or altering the facilities pursuant to subsections B, C or D of this section or undergrounding its facilities as required by subsection A of this section, or resulting from the utility operator's failure to remove, relocate, alter, or underground its facilities as required by those subsections, unless such damage arises directly from the City's negligence or willful misconduct.

F. Engineering Designs and Plans. The utility operator shall provide the City with two complete sets of engineered plans in a form acceptable to the City showing the location of all its utility facilities in the ROW after initial construction if such plans changed during construction. The utility operator shall provide two updated complete sets of 'as built' plans upon request of the City, but not more than once per year.

G. Utility provider shall provide, at no cost to the City, a comprehensive map showing the location of any facilities in the City. Such map shall be provided in a format acceptable to the City, with accompanying data sufficient enough for the City to determine the exact location of facilities, currently in Shapefile or geodatabase format. The City may not request such information more than once per year.

21.180. Leased Capacity.

A utility operator may lease capacity on or in its system to others, provided that, upon request, the utility operator provides the City with the name and business address of any lessee. A utility operator is not required to provide such information if disclosure is prohibited by applicable law. A utility operator shall require that all lessees have obtained proper authority, in the form of a permit, license, or franchise from the City before leasing capacity on its system.

21.190. Maintenance.

A. Every utility operator shall install and maintain all facilities in a manner that complies with applicable federal, state and local laws, rules, regulations, and policies. The utility operator shall, at its own expense, repair and maintain facilities from time to time as may be necessary to accomplish this purpose.

B. If, after written notice from the City of the need for repair or maintenance as required in subsection A of this section, a utility operator fails to repair and maintain facilities as requested by the City and by the date reasonably established by the City, the City may perform such repair or maintenance using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30)

days.

21.200. Vacation.
If the City vacates any ROW, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the ROW unless the City reserves a public utility easement, which the City shall make a reasonable effort to do, provided that there is no expense to the City, or the utility operator obtains an easement for its facilities from the controlling jurisdiction. If the utility operator fails to remove its facilities within thirty (30) days after a ROW is vacated, or as otherwise directed or agreed to in writing by the City, the City may remove the facilities using qualified personnel or contractors consistent with applicable federal, state and local laws, rules, regulations, and policies, at the utility operator's sole expense. Upon receipt of an invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

21.210. Right-of-Way Usage Fee.
A. Every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, shall pay the right-of-way usage fee for every utility service provided using the City's ROW in the amount determined by resolution of the City Council.

B. A utility operator whose only facilities in the ROW are facilities mounted on structures within the ROW, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the ROW, shall pay an attachment fee set by City Council resolution for each attachment, or such other fee set forth in the license granted by the City. Unless otherwise agreed to in writing by the City, the fee shall be effective as of January 1, 2017, and shall be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter, and shall be accompanied by information sufficient to illustrate the calculation of the amount payable.

C. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the City may have for further or additional sums payable.

D. Unless otherwise agreed to in writing by the City, the right-of-way usage fee set forth in subsection A of this section shall be effective as of January 1, 2017, and shall be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The City may request, and will be provided at no cost to the City, any additional reports or information it deems necessary to ensure compliance by the utility provider.

E. In the event that a right-of-way usage fee is not received by the City on or before the due date, or is underpaid, the utility provider shall pay in addition to the payment, or sum due, interest from the due date at a rate equal to nine percent (9%) per annum, compounded daily, or current maximum rate allowed by state law, computed based on the actual number of days elapsed from the due date until payment is received by the City.

F. The calculation of the right-of-way usage fee required by this section shall be subject to all applicable limitations imposed by federal or state law in effect and as may be subsequently amended.

G. The City reserves the right to enact other fees and taxes applicable to the utility providers subject to this Chapter. Unless expressly permitted by the City in enacting such fee or tax, or required by applicable state or federal law, no utility operator may deduct, offset or otherwise reduce or avoid the obligation to pay any lawfully enacted fees or taxes based on the payment of the right-of-way usage fee or any other fees required by this Chapter.

21.220 Consumer Protection Standards

A. The City reserves the right to enforce customer service and consumer protection standards as established by state or federal law or regulation and applicable to utility operators. In addition, the City reserves the right to establish additional specific customer service and consumer protection standards and procedures to the extent permitted by applicable law.

B. Upon initiating service and at least annually, utility operators shall provide to all customers, at the sole cost of the utility operator, the following information:

1. The equipment and service currently available and the rates and charges which apply;
2. The utility operator's policies and procedures by which complaints or inquiries of any nature will be addressed;
3. The utility operator's breach of agreement policy; and
4. The phone number and address of Milwaukie City Hall.

C. In the 1st quarter of each calendar year, the utility provider shall provide the City, at no cost to the City, a copy of at least one invoice as presented to a consumer within the City, but with account numbers and other information likely to be considered by the consumer to be confidential, redacted.

21.230. Audits.

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

1. Every provider of utility service shall furnish the City, at no cost to the City, information sufficient to demonstrate that the provider is in compliance with all the requirements of this Chapter or its franchise agreement, if any, including but not limited to payment of any applicable business registration fee, license fee, right-of-way usage fee, attachment fee, or franchise fee.

2. Every utility operator shall make available for inspection by the City at reasonable times and intervals all maps, records, books, diagrams, plans, and other documents, maintained by the utility operator with respect to its facilities within the City's ROW. Access shall be provided within the City unless prior arrangement for access elsewhere has been made with the City.

B. If the City's audit of the books, records and other documents or information of the utility operator or utility service provider demonstrate that the utility operator or provider

has underpaid the right-of-way usage fee, license fee, attachment fee, franchise fee, or any other fee or payment by three percent (3%) or more in any one (1) year, the utility operator shall reimburse the City for the cost of the audit, in addition to any interest owed pursuant to subsection B or subsection D of Section 21.210 or as specified in a other agreements or franchises with the City.

C. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) days of the City's notice to the utility service provider of such underpayment.

D. The Utility Provider is not required to maintain records for more than six (6) years. The City is not required to maintain records beyond the State retention schedules.

21.240. Insurance and Indemnification.

A. Insurance.

1. All utility operators shall maintain in full force and effect the following liability insurance policies that protect the utility operator and the City, as well as the City's officers, agents, and employees:

a. Comprehensive general liability insurance with limits not less than:

i. Three million dollars ($3,000,000.00) for bodily injury or death to each person;

ii. Three million dollars ($3,000,000) aggregate including collapse, explosions, underground hazards and products completed operations.

b. Commercial automobile liability insurance for owned, non-owned and hired vehicles with a limit of two million dollars ($2,000,000) combined single limit.

c. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars ($1,000,000).

d. Liability insurance shall name as additional insured the City and its officers, agents, and employees. Additional insured coverage shall be for both on-going operations and products and completed operations, on forms acceptable to the City. Coverage shall be Primary and Non-Contributory. Waiver of Subrogation endorsement, in a form acceptable to the City, shall be provided for general liability and worker's compensation.

2. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon. The insurance shall be without prejudice to coverage otherwise existing. The coverage must apply as to claims between insureds on the policy. The insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the City. If the insurance is canceled or materially altered, the utility operator shall obtain a replacement policy that complies with the terms of this section and provide the City with a replacement certificate of insurance. The utility operator shall maintain continuous uninterrupted coverage, in the terms and amounts required. The utility operator may self-insure, or keep in force a self-insured retention plus insurance, for any or all of the above coverage.

3. The utility operator shall maintain on file with the City a certificate of insurance or proof of self-insurance acceptable to the City, certifying the coverage required above.

B. Financial Assurance. Unless otherwise agreed to in writing by the City, before a franchise is granted or license issued pursuant to this Chapter is effective, and as necessary thereafter, the utility operator shall provide a performance bond or other financial security or assurance, in a form acceptable to the City, as security for the full and complete performance of the franchise or license, if applicable, and compliance with the terms of this Chapter, including any costs, expenses, damages or loss the City pays or incurs because of any failure that is attributable to the utility operator to comply with the codes, ordinances, rules, regulations or permits of the City. This obligation is in addition to the performance surety required by subsection C of Section. 21.160.

C. Indemnification.

1. To the fullest extent permitted by law, each utility operator shall defend, indemnify, and hold the City and its officers, employees, agents and representatives harmless from and against any and all liability, causes of action, claims, damages, losses, judgments, and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during, or in connection with, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, or removal of its facilities, and in providing or offering utility services over the facilities, whether such acts or omissions are authorized, allowed, or prohibited by this Chapter or by a franchise agreement. The acceptance of a license under Section 21.310 of this Chapter shall constitute such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the City shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

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

21.250. Compliance

Every utility operator shall comply with all applicable federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all applicable ordinances, resolutions, rules, and regulations of the City, heretofore or hereafter adopted or established during the entire term of any license, registration, franchise, or agreement granted under this Chapter.

21.260. Confidential/Proprietary Information.

If any person is required by this Chapter to provide books, records, maps, or information to the City that the person reasonably believes to be confidential or proprietary, and such books, records, maps, or information are clearly marked as confidential at the time

of disclosure to the City ("confidential information"), the City shall take reasonable steps to protect the confidential information to the extent permitted by Oregon Public Records Laws. In the event the City receives a public records request to inspect any confidential information and the City determines that it will be necessary to reveal the confidential information, to the extent reasonably possible the City will notify the person that submitted the confidential information of the records request prior to releasing the confidential information. The City shall not be required to incur any costs to protect any confidential information, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

21.270. Penalties.

A. Any person found in violation of any of the provisions of this Chapter or the license shall be subject to a penalty of not less than one hundred fifty dollars ($150) nor more than twenty-five hundred dollars ($2,500) for each offense. A violation shall be deemed to exist separately for each and every day during which a violation exists.

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.

21.280. Severability and Preemption.

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 any article, section, subsection, sentence, clause, phrase, term, provision, condition, or portion of this Chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations, or decision, the remainder of this Chapter shall not be affected thereby but shall be deemed as a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, clause, phrase, term, provision, condition, covenant, and portion of this Chapter shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state laws, rules, or regulations, 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, such provision shall thereupon return to full force and effect and shall thereafter be binding without further action by the City.

21.290. Application to Existing Agreements.

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

Section 4. The effective date of this ordinance shall be January 1, 2017.

Read the first time on 9/6/16, and moved to second reading by 5:0 vote

of the City Council.

Read the second time and adopted by the City Council on 9/6/16.

Signed by the Mayor on 9/6/16.

Mark Gamba, Mayor

ATTEST:

Pat DuVal, City Recorder

APPROVED AS TO FORM:
Jordan Ramis PC

City Attorney