



**Work Session**

**WS**

**Milwaukie City Council**



**MILWAUKIE CITY COUNCIL  
WORK SESSION**

City Hall Conference Room  
10722 SE Main Street  
[www.milwaukieoregon.gov](http://www.milwaukieoregon.gov)

**AGENDA  
JULY 5, 2016**

A light dinner will be served.

**Page #**

**4:00 p.m. EXECUTIVE SESSION**

The City Council will meet in Executive Session pursuant to Oregon Revised Statute (ORS) 192.660(2) (e) to deliberate with persons designated by the governing body to negotiate real property transactions and ORS 192.660(2)(f) to consider exempt records.

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|--|-----------|
| <b>1. 4:15 p.m. Utility Provider Code Update</b><br>Staff: Reba Crocker, Right-of-Way and Contract Coordinator   | <b>1</b>  |
| <b>2. 4:30 p.m. Agreements with Public, Education, and Government (PEG) Access Centers</b><br>Staff: Reba Crocker, Right-of-Way and Contract Coordinator | <b>39</b> |
| <b>3. 4:45 p.m. Web Refresh Status Update</b><br>Staff: Mitch Nieman, Assistant to the City Manager  |           |
| <b>4. 5:00 p.m. Kronberg Park Path Report by North Clackamas Parks and Recreation District (NCPRD)</b>   |           |
| <b>5. 5:20 p.m. Composition of Library Construction Committee</b>  |           |
| <b>6. 5:45 p.m. Adjourn</b>  |           |

**Meeting Information**

- The time listed for each item is approximate; the actual time each item is considered may change due to the length of time devoted to the previous item. The Council may vote in Work Session on non-legislative issues.
- Executive Sessions: The Milwaukie City Council may meet in executive session immediately following adjournment pursuant to ORS 192.660(2).
  - All Executive Session discussions are confidential and those present may disclose nothing.
  - Representatives of the news media are allowed to attend Executive Sessions as provided by ORS 192.660(3) but must not disclose any information discussed.
  - Executive Sessions may not be held for the purpose of taking final actions or making final decisions.
  - Executive Sessions are closed to the public.
- For assistance/service per the Americans with Disabilities Act (ADA), please dial TDD 503-786-7555. During meetings the Council asks that all pagers and cell phones be set on silent mode or turned off.



**MILWAUKIE CITY COUNCIL  
STAFF REPORT**

Agenda Item: **WS 1.**  
Meeting Date: **July 5, 2016**

To: Mayor and City Council

Through: Bill Monahan, City Manager

Subject: **Ordinance amending the Municipal Code, for Utility providers in the Rights-of-Way**

From: Reba Crocker, Right of Way & Contract Coordinator

Date: July 5, 2016

### **ACTION REQUESTED**

Council direction to move forward with Municipal Code amendments for utility providers in the City rights-of-way.

### **HISTORY OF PRIOR ACTIONS AND DISCUSSIONS**

**May 3, 2016** – Staff proposed the Municipal Code amendment for utility providers in the City rights-of-way (ROW) to Council and received direction to continue developing the Code language.

### **BACKGROUND**

The City of Milwaukie does not currently have a designated Municipal Code section for utility providers using the City's ROW. The Code does have a small section on telecommunications companies but over the years, the City has negotiated individual agreements with each utility provider. Although this has historically worked for the City, the industry is moving toward licensing under a more robust and consistent method involving the implementation of a specific Municipal Code section, with utility providers being bound to the equal requirements. Individual franchise agreements will phase out over time.

An update to the Code will allow the City to remain resilient and adaptive to future changes in the industry. In addition, the update will make the City's regulation of its ROW, similar to its neighboring jurisdictions (Gladstone, Oregon City, Happy Valley, Beaverton, Gresham and Tigard).

The new Code will allow the City to maintain its Home Rule authority over utility providers that are using the ROW by and through leased facilities without fair and reasonable compensation for use of the ROW. These wholesale providers do not own facilities in the ROW, but lease space on the facilities in the ROW to generate revenue within the City.

Another benefit to updating the Code is a reduction in staff and legal time negotiating individual franchises. Each franchise tweaks the standards terms and creates enforcement challenges. The updated code will simplify the enforcement as the new code will apply the same terms and conditions for all providers, making a level playing field.

In addition the new section provides incentive for the provider compensate the City in a timely fashion and all providers will be compensating the City on the same scheduled, further reducing staff time in tracking payments.

Also the updated Code will allow the City to correctly identify the utility providers using the ROW and receive reasonable and fair compensation for the use of the ROW.

Chapter 21 will replace the current code, Chapter 3.13 (Telecommunications Facilities) and 3.30 (Electric Utility Privilege Tax). Elements contained in chapter 3.13 and 3.30 are included in Chapter 21. However, Chapter 21 expands on the City's rights to manage the ROW.

In addition Chapter 5.08.110 (Exclusions to Business Taxes Generally) will have to be amended to include wholesale utility providers. Currently Chapter 5.08.110 could be interpreted to exclude the wholesale utility providers. Adding language to include wholesale utility providers is needed to effectively manage the City's ROW.

Staff and legal counsel collaborated in drafting Title 21. Staff and legal counsel based the new code, Title 21, on the model ordinance published by the League of Oregon Cities.

Given that some of the existing utility providers have franchise agreements that include franchise fees, the Utility Service Code (Title 21) will only be applied to those providers after their existing franchise expires.

Next steps will include introducing the new code section to the utility providers. Staff would like to address any concerns and potentially make modification based on the feedback from the utility providers. Staff will then present a final draft to City Council for adoption.

### **CONCURRENCE**

Finance Director, City Attorney, Engineering Director, and Public Works Director support the requested action.

### **FISCAL IMPACTS**

Additional revenue is expected from utility providers that have not been compensating the City for the use of the ROW. Additional savings are expected from decreased negotiation of new franchises.

### **WORK LOAD IMPACTS**

The change to the City's code will reduce the labor costs by reducing staff time and the need for outside professional services.

### **ALTERNATIVES**

1. Adopt changes in code without gaining input from utility providers.
2. Continue with current franchise negotiation process.

### **ATTACHMENTS**

1. Draft Title 21 (Proposed New Code)
2. Current Code, Section 3.13 & 3.30
3. Draft Ordinance modifying 5.08.110
4. Redline of Chapter 5.08.110 showing the purposed change in language

**Proposed New Code**

**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.

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.

“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 utilities 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 any easement granted to the City.

“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.

“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.

“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.

“Utility provider” or “Provider” means any person who provides utility service to customers within the corporate boundaries of the City, 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 corporate boundaries of the City, 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 12:00 noon 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 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 further 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 and twenty-five percent (125%) 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 affect 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 1<sup>st</sup> 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 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 ensure 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 1<sup>st</sup> 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.



### Current Code

#### 3.13.010 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. Words not defined herein shall be given the meaning set forth in the Communications Policy Act of 1934, as amended, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996. If not defined there, the words shall be given their common and ordinary meaning.

Aboveground Facilities. See “overhead facilities.”

“Affiliated interest” shall have the same meaning as ORS 759.010.

“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 video programming, or other programming service; and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

“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.

“Control” or “controlling interest” means actual working control in whatever manner exercised.

“City property” means and includes all real property owned by the City, other than public rights-of-way and utility easements as those are defined herein, and all property held in a proprietary capacity by the City, which are not subject to right-of-way franchising as provided in this chapter.

“Conduit” means any structure, or portion thereof, containing one (1) or more ducts, conduits, manholes, handholes, bolts, or other facilities used for any telegraph, telephone, cable television, electrical, or communications conductors, or cable right-of-way, owned or controlled, in whole or in part, by one (1) or more public utilities.

“Construction” means any activity in the public rights-of-way resulting in physical change thereto, including excavation or placement of structures, but excluding routine maintenance or repair of existing facilities.

“Days” means calendar days unless otherwise specified.

“Duct” means a single enclosed raceway for conductors or cable.

“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 national level.

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

“Grantee” means the person to which a franchise is granted by the City.

“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 telecommunications carriers as set forth in Oregon law, or its lawful successor.

“Overhead” or “aboveground facilities” means utility poles, utility facilities, and telecommunications facilities above the surface of the ground, including the underground supports and foundations for such facilities.

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

“Private telecommunications network” means a system, including the construction, maintenance, or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a person for their use and not for resale, directly or indirectly. “Private telecommunications network” includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.

“Public rights-of-way” include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and all other public ways or areas, including the subsurface under and air space over these areas. This definition applies only to the extent of the City’s right, title, interest, or authority to grant a franchise to occupy and use such areas for telecommunications facilities. “Public rights-of-way” shall also include utility easements as defined below.

“State” means the State of Oregon.

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

“Telecommunications Act” means the Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunications 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 telecommunications facilities within the City.

“Telecommunications facilities” means the plant and equipment, other than customer premises equipment, used by a telecommunications carrier to provide telecommunications services.

“Telecommunications service” means two-way switched access and transport of voice communications but does not include:

1. Services provided by radio common carrier;
2. One-way transmission of television signals;

3. Surveying;
4. Private telecommunications networks; or
5. Communications of the customer which take place on the customer side of on-premises equipment.

Telecommunications System. See “telecommunications facilities” above.

“Telecommunications utility” has the same meaning as ORS 759.005(1).

“Underground facilities” means utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for “overhead facilities.”

“Usable space” means all the space on a pole, except the portion below ground level, the twenty (20) feet of safety clearance space above ground level, and the safety clearance space between communications and power circuits. There is a rebuttable presumption that six (6) feet of a pole is buried below ground level.

“Utility easement” means any easement granted to or owned by the City and acquired, established, dedicated, or devoted for public utility purposes.

“Utility facilities” means the plant, equipment, and property, including but not limited to the poles, pipes, mains, conduits, ducts, cable, wires, plant, and equipment located under, on, or above the surface of the ground within the public right-of-way of the City and used or to be used for the purpose of providing utility or telecommunications services. (Ord. 1866 § 3, 2000)

### **3.13.020 REGISTRATION OF TELECOMMUNICATIONS CARRIERS**

#### **A. Purpose**

The purpose of registration is:

1. To assure that all telecommunications carriers who have facilities and/or provide services within the City comply with the ordinances, rules and regulations of the City.
2. To provide the City with accurate and current information concerning the telecommunications carriers who offer to provide telecommunications services within the City, or that own or operate telecommunications facilities within the City.
3. To assist the City in the enforcement of this code and the collection of any City franchise fees or charges that may be due the City.

#### **B. Registration Required**

Except as provided in subsection D hereof, all telecommunications carriers having telecommunications facilities within the corporate limits of the City, and all telecommunications carriers that offer or provide telecommunications service to customer premises within the City, shall register. The appropriate application and license from: the Oregon Public Utility Commission (PUC); or the Federal Communications Commission (FCC) qualify as necessary registration information. Applicants also have the option of providing the following information:

1. The identity and legal status of the registrant, including the name, address, and telephone number of the duly authorized officer, agent, or employee responsible for the accuracy of the registration information;
2. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an emergency;
3. A description of the registrant's existing or proposed telecommunications facilities within the City, a description of the telecommunications facilities that the registrant intends to construct, and a description of the telecommunications service that the registrant intends to offer or provide to persons, firms, businesses, or institutions within the City;
4. Information sufficient to determine whether the transmission, origination, or receipt of the telecommunications services provided, or to be provided, by the registrant constitutes an occupation or privilege subject to any business license or tax requirements. A copy of the business registration, tax receipt, or the license number must be provided.

C. Registration Fee

Each application for registration as a telecommunications carrier shall be accompanied by a nonrefundable registration fee as established by resolution of the City Council.

D. Exceptions to Registration

The following telecommunications carriers are excepted from registration:

1. Telecommunications carriers that are owned and operated exclusively for its own use by the state or a political subdivision of this state.
2. A private telecommunications network, provided that such network does not occupy any public rights-of-way of the City. (Ord. 1866 § 3, 2000)

### **3.13.030 REGULATORY FEES AND COMPENSATION NOT A TAX**

A. The fees and costs provided for in this chapter or by resolution of the City Council authorized under this chapter, and any compensation charged and paid for use of the public rights-of-way 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 telecommunications carrier, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of telecommunications services.

B. The City has determined that any fee 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 are not imposed on property or property owners, and these fees are not new or increased fees.

C. The fees and costs provided for in this chapter are subject to applicable federal and state laws. (Ord. 1866 § 3, 2000)

### **3.13.040 CONSTRUCTION STANDARDS**

A. General

No person shall commence or continue with the construction, installation, or operation of telecommunications facilities within a public right-of-way except as provided in this code and in compliance with all applicable codes, rules, and regulations.

B. Construction Codes

Telecommunications facilities shall be constructed, installed, operated, and maintained in accordance with all applicable federal, state, and local codes, rules and regulations including the National Electrical Code and the National Electrical Safety Code.

C. Construction Permits

No person shall construct or install any telecommunications facilities within a public right-of-way without first obtaining a construction permit, and paying the construction permit fee established by resolution of the City Council. No permit shall be issued for the construction or installation of telecommunications facilities within a public right-of-way:

1. Unless the telecommunications carrier has first filed a registration statement with the City pursuant to Subsection 3.13.020.B of this code; and if applicable,
2. Unless the telecommunications carrier has first applied for and been granted a franchise pursuant to Section 3.13.060 of this code. (Ord. 1866 § 3, 2000)

**3.13.050 LOCATION OF TELECOMMUNICATIONS FACILITIES**

A. Location of Facilities

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

1. Whenever all existing electric utilities, cable facilities, or telecommunications facilities are located underground within a public right-of-way of the City, a grantee with permission to occupy the same public right-of-way must also locate its telecommunications facilities underground.
2. Whenever all new or existing electric utilities, cable facilities, or telecommunications facilities are located or relocated underground within a public right-of-way of the City, a grantee that currently occupies the same public right-of-way shall relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the public right-of-way, absent extraordinary circumstances or undue hardship as determined by the City and consistent with applicable state and federal law.

B. Interference with the Public Rights-of-Way

No grantee may locate or maintain its telecommunications facilities so as to unreasonably interfere with the use of the public rights-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the public rights-of-way. All use of public rights-of-way shall be consistent with City codes, ordinances, and regulations.

C. Relocation or Removal of Facilities

Except in the case of an emergency, within ninety (90) days following written notice from the City, a grantee shall, at no expense to grantor, temporarily or permanently remove, relocate, change, or alter the position of any telecommunications facilities within the public rights-of-way whenever the City shall have determined that such removal, relocation, change, or alteration is reasonably necessary for:

1. The construction, repairs, maintenance, or installation of any City or other public improvement in or upon the public rights-of-way;
2. The operations of the City or other governmental entity in or upon the public rights-of-way;
3. The public interest.

#### D. Removal of Unauthorized Facilities

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

1. One (1) year after the expiration or termination of the grantee's telecommunications franchise.
2. Upon abandonment of a facility within the public rights-of-way of the City. A facility will be considered abandoned when it is deactivated, out of service, or not used for its intended and authorized purpose for a period of ninety (90) days or longer. A facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the facility is being replaced.
3. If the system or facility was constructed or installed without the appropriate prior authority at the time of installation.
4. If the system or facility was constructed or installed at a location not permitted by the grantee's telecommunications franchise or other legally sufficient permit.

#### E. Coordination of Construction Activities

All grantees are required to make a good faith effort to cooperate with the City.

1. By January 1st of each year, grantees shall provide the City with a schedule of their proposed construction activities in, around, or that may affect the public rights-of-way.
2. If requested by the City, each grantee shall meet with the City annually or as determined by the City, to schedule and coordinate construction in the public rights-of-way. At that time, the City will provide available information on plans for local, State, and/or federal construction projects.
3. All construction locations, activities, and schedules shall be coordinated, as ordered by the Engineering Director or designee, to minimize public inconvenience, disruption, or damages. (Ord. 1866 § 3, 2000)

### 3.13.060 TELECOMMUNICATIONS FRANCHISE

#### A. Telecommunications Franchise

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

#### B. Application

Any person that desires a telecommunications franchise must register as a telecommunications carrier and shall file an application with the City which includes the following information:

1. The identity of the applicant;
2. A description of the telecommunications services that are to be offered or provided by the applicant over its telecommunications facilities;
3. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the facilities located or to be located within the public rights-of-way in the City, including the location and route requested for applicant's proposed telecommunications facilities;
4. The area or areas of the City the applicant desires to serve and a preliminary construction schedule for buildout to the entire franchise area;
5. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the facilities and to offer or provide the telecommunications services proposed;
6. An accurate map showing the location of any existing telecommunications facilities in the City that applicant intends to use or lease.

#### C. Application and Review Fee

1. Subject to applicable state law, applicant shall reimburse the City for such reasonable costs as the City incurs in entering into the franchise agreement.
2. An application and review fee as determined by resolution of the City Council shall be deposited with the City as part of the application filed pursuant to subsection B of this section. Expenses exceeding the deposit will be billed to the applicant or the unused portion of the deposit will be returned to the applicant following the determination granting or denying the franchise.

#### D. Determination by the City

The City shall issue a written determination granting or denying the application in whole or in part. If the application is denied, the written determination shall include the reasons for denial.

#### E. Rights Granted

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

#### F. Term of Grant

Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be in effect for a term of five (5) years.

#### G. Franchise Territory

Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be limited to a specific geographic area of the City to be served by the franchise grantee, and the public rights-of-way necessary to serve such areas, and may include the entire City.

#### H. Franchise Fee

Each franchise granted by the City is subject to the City's right, which is expressly reserved, to fix a fair and reasonable compensation to be paid for the privileges granted; provided, nothing in this code shall prohibit the City and a grantee from agreeing to the compensation to be paid. The compensation shall be subject to the specific payment terms and conditions contained in the franchise agreement and applicable State and federal laws.

#### I. Amendment of Grant

Conditions for amending a franchise:

1. A new application and grant shall be required of any telecommunications carrier that desires to extend or locate its telecommunications facilities in public rights-of-way of the City which are not included in a franchise previously granted under this chapter.
2. If ordered by the City to locate or relocate its telecommunications facilities in public rights-of-way not included in a previously granted franchise, the City shall grant an amendment without further application.
3. A new application and grant shall be required of any telecommunications carrier that desires to provide a service which was not included in a franchise previously granted under this chapter.

#### J. Renewal Applications

A grantee that desires to renew its franchise under this chapter shall, not less than one hundred eighty (180) days before expiration of the current agreement, file an application with the City for renewal of its franchise which shall include the following information:

1. The information required pursuant to Subsection 3.13.060.B of this code.
2. Any information required pursuant to the franchise agreement between the City and the grantee.

#### K. Renewal Determinations

Within ninety (90) days after receiving a complete application, the City shall issue a written determination granting or denying the renewal application in whole or in part, applying the following standards. If the renewal application is denied, the written determination shall include the reasons for nonrenewal.

1. The financial and technical ability of the applicant.
2. The legal ability of the applicant.
3. The continuing capacity of the public rights-of-way to accommodate the applicant's existing and proposed facilities.



4. The applicant's compliance with the requirements of this code and the franchise agreement.
5. Applicable federal, State, and local telecommunications laws, rules, and policies.
6. Such other factors as may demonstrate that the continued grant to use the public rights-of-way will serve the community interest.

L. Obligation to Cure As a Condition of Renewal

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

M. Assignments or Transfers of System or Franchise

Ownership or control of a majority interest in a telecommunications system or franchise may not, directly or indirectly, be transferred, assigned, or disposed of by sale, lease, merger, consolidation, or other act of the grantee, by operation of law or otherwise, without the prior consent of the City, which consent shall not be unreasonably withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

1. Grantee and the proposed assignee or transferee of the franchise or system shall agree, in writing, to assume and abide by all of the provisions of the franchise.
2. No transfer shall be approved unless the assignee or transferee has the legal, technical, financial, and other requisite qualifications to own, hold, and operate the telecommunications system pursuant to this code.
3. Unless otherwise provided in a franchise agreement, the grantee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a telecommunications franchise.
4. Any transfer or assignment of a telecommunications franchise, system, or integral part of a system without prior approval of the City under this code or pursuant to a franchise agreement shall be void and is cause for revocation of the franchise.

N. Revocation or Termination of Franchise

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

1. Construction or operation in the City or in the public rights-of-way of the City without a construction permit;
2. Construction or operation at an unauthorized location;
3. Failure to comply with subsection M above with respect to sale, transfer, or assignment of a telecommunications system or franchise;
4. Misrepresentation by or on behalf of a grantee in any application to the City;
5. Abandonment of telecommunications facilities in the public rights-of-way;
6. Failure to relocate or remove facilities as required in this code;
7. Failure to pay taxes, compensation, fees, or costs when and as due the City under this code;

8. Insolvency or bankruptcy of the grantee;
9. Violation of material provisions of this code;
10. Violation of the material terms of a franchise agreement.

O. Notice and Duty to Cure

In the event that the City believes that grounds exist for revocation of a franchise, the City shall give the grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time, not exceeding thirty (30) days, to furnish evidence that:

1. Corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;
2. Rebuts the alleged violation or noncompliance; and/or
3. It would be in the public interest to impose some penalty or sanction less than revocation.

P. Public Hearing

In the event that a grantee fails to provide evidence reasonably satisfactory to the City of its compliance with the franchise or with this code, the City staff shall refer the apparent violation or noncompliance to the City Council. The Council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

Q. Standards for Revocation or Lesser Sanctions

If persuaded that the grantee has violated or failed to comply with material provisions of this code, or of a franchise agreement, the City Council shall determine whether to revoke the franchise, or to establish some lesser sanction and cure, considering the nature, circumstances, extent, and gravity of the violation as reflected by one (1) or more of the following factors. Whether:

1. The misconduct was egregious;
2. Substantial harm resulted;
3. The violation was intentional;
4. There is a history of prior violations of the same or other requirements;
5. There is a history of overall compliance;
6. The violation was voluntarily disclosed, admitted or cured.

R. Other City Costs

All grantees shall, within thirty (30) days after written demand therefor, reimburse the City for all reasonable direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal, or transfer of the franchise or any franchise agreement consistent with applicable State and federal laws. (Ord. 1866 § 3, 2000)

### 3.13.070 GENERAL FRANCHISE TERMS

A. Facilities

Upon request, each grantee shall provide the City with an accurate map or maps certifying the location of all of its telecommunications facilities within the public rights-of-way. Each grantee shall provide updated maps annually.

**B. Damage to Grantee's Facilities**

Unless directly and proximately caused by wilful, intentional, or malicious acts by the City, the City shall not be liable for any damage to or loss of any telecommunications facility within the public rights-of-way of the City as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the public rights-of-way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom.

**C. Duty to Provide Information.** Within ten (10) business days of a written request from the City, each grantee shall furnish the City with information sufficient to demonstrate:

1. That grantee has complied with all requirements of this code.
2. All books, records, maps, and other documents, maintained by the grantee with respect to its facilities within the public rights-of-way shall be made available for inspection by the City at reasonable times and intervals.

**D. Service to the City**

If the City contracts for the use of telecommunication facilities, telecommunication services, installation, or maintenance from the grantee, the grantee shall charge the City the grantee's most favorable rate offered at the time of the request charged to similar users within Oregon for a similar volume of service, subject to any of grantee's tariffs or price lists on file with the OPUC. With the City's permission, the grantee may deduct the applicable charges from fee payments. Other terms and conditions of such services may be specified in a separate agreement between the City and grantee.

**E. Compensation for City Property**

If any right is granted, by lease, franchise, or other manner, to use and occupy City property for the installation of telecommunications facilities, the compensation to be paid for such right and use shall be fixed by the City.

**F. Cable Franchise**

Telecommunication carriers providing cable service shall be subject to the separate cable franchise requirements of the City and other applicable authority.

**G. Leased Capacity**

A grantee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers; provided that the grantee shall notify the City that such lease or agreement has been granted to a customer or lessee.

**H. Grantee Insurance**

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

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

- a. Three million dollars (\$3,000,000.00) for bodily injury or death to each person;
  - b. Three million dollars (\$3,000,000.00) for property damage resulting from any one accident; and
  - c. Three million dollars (\$3,000,000.00) for all other types of liability.
2. Automobile liability for owned, nonowned, and hired vehicles with a limit of one million dollars (\$1,000,000.00) for each person and three million dollars (\$3,000,000.00) for each accident.
  3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars (\$1,000,000.00).
  4. Comprehensive form-premises, operations, explosions and collapse hazard, underground hazard, and products completed hazard with limits of not less than three million dollars (\$3,000,000.00).
  5. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the telecommunications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its telecommunications facilities. Each such insurance policy shall contain the following endorsement:

It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until ninety (90) days after receipt by the City, by registered mail, of a written notice addressed to the City of such intent to cancel or not to renew.
  6. Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation, the grantee shall obtain and furnish to the City evidence that the grantee otherwise meets the requirements of this section.
  7. As an alternative to the insurance requirements contained herein, a grantee may provide evidence of self-insurance subject to review and acceptance by the City.

#### I. General Indemnification

Each franchise agreement shall include, to the extent permitted by law, grantee's express undertaking to defend, indemnify, and hold the City and its officers, employees, agents, and representatives harmless from and against any and all damages, losses, and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors, or subcontractors in the construction, operation, maintenance, repair, or removal of its telecommunications facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed, or prohibited by this code or by a franchise agreement made or entered into pursuant to this code.

#### J. Performance Surety

Before a franchise granted pursuant to this code is effective, and as necessary thereafter, the grantee shall provide a performance bond, in form and substance acceptable to the

City, as security for the full and complete performance of a franchise granted under this code, including any costs, expenses, damages, or loss the City pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations, or permits of the City. This obligation is in addition to the performance surety required for construction of facilities. (Ord. 1866 § 3, 2000)

### **3.13.080 GENERAL PROVISIONS**

#### **A. Governing Law**

Any franchise granted under this code is subject to the provisions of the Constitution and laws of the United States and the State of Oregon and the ordinances and Charter of the City.

#### **B. Written Agreement**

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

#### **C. Nonexclusive Grant**

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

#### **D. Severability and Preemption**

If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant, or portion of this code is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, or superseded by State or federal legislation, rules, regulations, or decision, the remainder of the code 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, sentence, clause, phrase, provision, condition, covenant, and portion of this code 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 code, then the provision shall be read to be preempted to the extent and/or the time required by law. In the event such federal or State law, rules, or regulation is subsequently repealed, rescinded, amended, or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the City, and any amendments hereto.

#### **E. Penalties**

Any person found guilty of violating, disobeying, omitting, neglecting, or refusing to comply with any of the provisions of this chapter shall be fined not less than one hundred dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs. The enforcement of this provision shall be consistent with the provisions of this code regulating code enforcement.

#### **F. Other Remedies**

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

#### G. Captions

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

#### H. Compliance with Laws

Any grantee under this code shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all ordinances, resolutions, rules, and regulations of the City heretofore or hereafter adopted or established during the entire term any franchise granted under this code, which are relevant and relate to the construction, maintenance, and operation of a telecommunications system.

#### I. Consent

Wherever the consent of either the City or of the grantee is specifically required by this code or in a franchise granted, such consent will not be unreasonably withheld.

#### J. Application to Existing Agreements

To the extent that this code is not in conflict with and can be implemented with existing franchise agreements, this code shall apply to all existing franchise agreements for use of the public right-of-way for telecommunications.

#### K. Confidentiality

The City agrees to use its best efforts to preserve the confidentiality of information as requested by a grantee, to the extent permitted by the Oregon Public Records Law. (Ord. 1866 § 3, 2000)

### **3.30.010 ELECTRIC UTILITY PRIVILEGE TAX**

A. An electric utility privilege tax is imposed on all electric utilities having or required to have a franchise in the City. The privilege tax is one and one-half percent (1.5 ) of the electric utility's adjusted gross revenues, as defined by the ordinance granting the franchise to the utility. The City Manager shall notify its current franchisee in writing of the adoption and terms of the electric utility privilege tax. Payment of all privilege tax proceeds collected by an electric utility shall be paid to the City on the same schedule as the utility's franchise fee payments.

B. All proceeds of the electric utility privilege tax shall be used for the street surface maintenance program established under Chapter 3.25. (Ord. 1967 § 1, 2007)



**CITY OF MILWAUKIE**  
*"Dogwood City of the West"*

**Ordinance No.**

**AN ORDINANCE OF THE CITY OF MILWAUKIE, OREGON, AMENDING CODE TITLE 5.08.110 (EXCLUSIONS TO BUSINESS TAXES GENERALLY).**

**WHEREAS**, the City of Milwaukie has adopted an ordinance (No. \_\_\_\_\_) enacting Title 21 to the City's Municipal Code; and

**WHEREAS**, the City has determined that Utility Operators and Utility Providers are not exempt from business taxes.

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

Section 1. Milwaukie Code Chapter 5.08.110.A is hereby amended by adding (ii) and shall read as follows:

- A. Wholesalers selling or delivering goods to merchants of the City for the purpose of resale. This exclusion pertains only (i) if the wholesaler does not maintain a place of business within the City and also does not engage in retail trade within the City, and (ii) the wholesaler is not a utility service provider or operator as defined in Chapter 21.

Read the first time on \_\_\_\_\_, and moved to second reading by \_\_\_\_\_ vote of the City Council.

Read the second time and adopted by the City Council on \_\_\_\_\_.

Signed by the Mayor on \_\_\_\_\_.

\_\_\_\_\_  
Mark Gamba, Mayor

APPROVED AS TO FORM:  
Jordan Ramis PC

ATTEST:

\_\_\_\_\_  
Pat DuVal, City Recorder

\_\_\_\_\_  
City Attorney

Redline of changes to current code

5.08.110 EXCLUSIONS

The following situations are specifically excluded from the requirement of paying a business tax:

- A. Wholesalers selling or delivering goods to merchants of the city for the purpose of resale. This exclusion pertains only (i) if the wholesaler does not maintain a place of business within the city and also does not engage in retail trade within the city and (ii) the wholesaler is not a utility service provider or operator as defined in Chapter 21;
- B. Nonprofit organizations;
- C. Persons engaged in delivery of goods or services from points outside the city, providing sales contacts and actual sales take place outside the city;
- D. Newspaper carriers;
- E. Representatives of public utilities;
- F. Garage sales, yard sales, and other similar activities. Such exclusion shall not apply, however, if either of the following conditions is met:
  - 1. More than two (2) such sales take place within any one calendar year at the same location;
  - 2. The sale has a duration of more than seventy-two (72) consecutive hours.
- G. The sale of personal assets such as a personal automobile, residence, appliance, or other articles. Such exclusion shall not apply when such sales are conducted on a regular and continuing basis. That will be assumed to be the case if an individual or family sells its personal residence more than twice or personal automobile more than four (4) times in any given calendar year. Other items shall be determined by the City Manager on the basis of reasonableness on a case-by-case basis.
- H. Licensed real estate salespeople or associate real estate brokers who engage in professional real estate activity only as an agent of a real estate broker or real estate organization.
- I. Construction contractors or landscape contractors when their principal place of business is outside of the City and they have proof that they have obtained a business license from the Metropolitan Service District.
- J. Ownership of one unit of rental property. (Ord. 2048 § 3, 2012; Ord. 1989 § 5, 2008; Ord. 1924 § 1, 2003; Ord. 1863 § 7, 1999; Ord. 1349 § 11, 1976)





MILWAUKIE CITY COUNCIL  
STAFF REPORT

Agenda Item: **WS 2.**  
Meeting Date: **July 5, 2016**

To: Mayor and City Council

Through: Bill Monahan, City Manager

Subject: **Agreements with Public, Educational and Governmental (PEG) access centers.**

From: Reba Crocker, Right of Way & Contract Coordinator

Date: July 5, 2016

### **ACTION REQUESTED**

Discussion of IGAs (Intergovernmental Agreements) and Memorandum of Understanding (MOU) with PEG (Public, Education and Governmental) Access centers to provide funding.

### **HISTORY OF PRIOR ACTIONS AND DISCUSSIONS**

**1983** - Ordinance 1543 established the Cable Communications Commission to oversee a PEG Grant program. Members were appointment by the City Council.

**1987** - Ordinance 1618 repealed ordinance 1543 disbanded the Commission and directed staff to assume the duties of the commission.

### **BACKGROUND**

PEG funds are collected by the City from cable companies as a pass-through fee. The funds collected are restricted by federal law and can only be used for capital facilities and equipment of PEG access centers.

Under the prior system, IGAs were created yearly after the Commission reviewed, approved and funded yearly requests. As of 1983, the City utilized a grant system where staff would collect and review applications prepared by PEG Access Centers (such as Clackamas Community College, Sabin Schellenberg, and Willamette Falls Media Center), prioritize the applications, and grant funding for capital facilities and equipment for the applicable organizations. In 2013, the City's program was put on hiatus due to staffing changes. Additionally, the old granting system was inefficient and required significant staffing time to perform.

Staff is recommending changing the system to a contractual one. If the agreements are implemented, the City would be able to allocate the funding according to the highest use without doing new agreements each year, thus saving the City and the PEG Access Centers staff time. In addition, the City will be better able to track all PEG expenses ensuring that all federal, state and local laws are followed. Under the proposed system, the City will be able to quickly comply with its responsibilities under the Cable franchises, if requested.

Specific amounts are not listed the agreements due fluctuations in the PEG funds received. Each year staff will determine, based on the amount of funds received, how much funding is available for use. Staff will weigh funding requests with the need for, age of current equipment

and facilities to determine where the funds would be of highest use and benefit to Milwaukie residents. In addition, if an access center doesn't use or need all allocated funding for the year, the City will have the flexibility to move funding to another access center with minimal staff time.

### **CONCURRENCE**

Finance Director supports the approval of IGAs/MOU with PEG access centers.

### **FISCAL IMPACTS**

There is no fiscal impact to the City. The funds are restricted and can only be used to support these PEG access centers and City PEG equipment.

### **WORK LOAD IMPACTS**

Executing the agreements will reduce work load to City staff and add formal documentation procedures to the program.

### **ALTERNATIVES**

Revitalize the prior system of grants, create and appoint a grant committee. This alternative would add considerable cost to the City in staff time and increased regulatory requirements.

### **ATTACHMENTS**

1. Resolution authorizing the Mayor to sign agreements with PEG access centers.
2. IGA with Clackamas Community College.
3. IGA with Sabin Schellenberg Center (North Clackamas School District).
4. MOU with Willamette Falls Media Center (WFMC).



**CITY OF MILWAUKIE**  
*"Dogwood City of the West"*

**Resolution No.**

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF MILWAUKIE, OREGON, AUTHORIZING THE MAYOR TO SIGN AGREEMENTS (INTERGOVERNMENTAL AND MEMORANDUM OF UNDERSTANDING) WITH PUBLIC, EDUCATIONAL AND GOVERNMENTAL (PEG) ACCESS CENTERS FOR USE OF PEG FUNDS.**

**WHEREAS**, ORS Chapter 190 allows for units of local government to enter into agreements for the performance of any or all functions and activities which such units have the authority to perform; and

**WHEREAS**, the City collects funds, as a pass-through, from cable operators in the City; and

**WHEREAS**, the City desires to fund PEG access centers for the benefit of the residents; and

**Now, Therefore, be it Resolved** that the City Council of the City of Milwaukie authorizes the Mayor to sign Intergovernmental Agreements and a Memorandum of Understanding with PEG access centers.

Introduced and adopted by the City Council on \_\_\_\_\_.

This resolution is effective on \_\_\_\_\_.

\_\_\_\_\_  
Mark Gamba, Mayor

APPROVED AS TO FORM:  
Jordan Ramis PC

ATTEST:

\_\_\_\_\_  
Pat DuVal, City Recorder

\_\_\_\_\_  
City Attorney

**AGREEMENT BETWEEN  
CITY OF MILWAUKIE  
AND  
CLACKAMAS COMMUNITY COLLEGE**

**I. Purpose**

- A. This Agreement is entered into between The City of Milwaukie (“City”), a municipal corporation, and Clackamas Community College (“CCC”), an institution of higher learning formed and existing under the authority of ORS Chapter 341.
- B. This Agreement provides for the reimbursement by the City to CCC for capital for facilities and equipment related to Public, Educational and Government (“PEG”) access costs. These reimbursements will assist CCC with the production and cablecasting of the community college educational access television channel(s).

**II. Responsibilities**

- A. CCC agrees to the following responsibilities under this Agreement:
  - 1. CCC will cablecast programs on educational access channel(s), using CCC’s facilities, subject to the usual operating rules of CCC.
  - 2. The funds provided by this Agreement shall be used only for reimbursement of CCC’s capital facility and equipment costs related to CCC’s production and cablecasting on CCC’s educational access channel(s).
  - 3. CCC shall maintain discrete accounting records of all activities associated with expenditures for which reimbursement is sought under this Agreement. CCC shall use and maintain accounting policies, practices, and procedures which are consistent with generally accepted accounting principles, and in accordance with applicable regulations. On request, CCC shall permit the City to inspect its accounting records and facilities as part of the activities.
  - 4. CCC warrants funds shall not be used to retire any debt or reimburse any person, entity, or municipality for expenditures not related to, or approved by this Agreement.
  - 5. CCC shall be responsible for producing, scheduling and administering the school’s educational access channel(s).

6. CCC shall submit requests for funds to the City's Finance Department, including detailed, paid receipts showing items purchased and prices paid by CCC. CCC further agrees to provide additional information as requested by the City to verify or understand requests for funds.
    - a. CCC may have the City invoiced directly for purchases, given prior approval is received from the City.
    - b. CCC is encouraged to obtain the City's approval prior to making purchases to verify reimbursement requirements and availability of funds.
  7. CCC shall send all its normal communications to the City's Finance Department, consisting of, but not limited to:
    - a. Quarterly usage reports showing number of programs broadcast;
    - b. Equipment and usage reports;
    - c. Final approved budget; and
    - d. Annual financial report or audit.
- B. City agrees to the following responsibilities under this Agreement:
1. City shall approve or reject requests for funds by CCC. City shall respond with payment or notice of rejection no more than 45 days from its receipt of requests for funds.
  2. City shall reimburse CCC for capital costs with funds obtained as PEG funds from City's agreements with cable television franchisees annually, subject to City's approval of each request for reimbursement submitted by CCC.
  3. Availability of funds for reimbursement under this Agreement shall be subject to the City receiving PEG funding from cable franchise agreements. If the City does not receive sufficient PEG funds to pay CCC's request, City shall promptly notify CCC and may reduce or eliminate funding in accordance with PEG funds available.
  4. City may require CCC to take corrective action to remedy problems with implementation, evaluation, reporting, or administration of activities, to meet compliance standards. CCC shall submit documentation to prove satisfactory correction action has been taken in the time frame set forth by the City. City shall give 30 days written notice to correct non-compliance.

### **III. Liaison**

City liaison:

Reba Crocker, Right-of-way & Contracts Coordinator  
Finance Department  
10722 SE Main Street  
Milwaukie, Oregon 97222  
503-786-7519  
crocker@milwaukieoregon.gov

CCC liaison:

Sue Goff, Dean of Arts & Sciences  
Oregon City Campus  
19600 Molalla Ave  
Oregon City, OR 97045  
503-594-3100  
sue.goff@clackamas.edu

### **IV. Other Terms and Conditions**

- A. The City and CCC agree to comply with all applicable local, state, and federal ordinances, statutes, laws and regulations, including those on non-discrimination in employment because of race, color, ancestry, national origin, religion, sex, age or disability.
- B. To the extent applicable, the provisions of Oregon public contracting law are incorporated herein by this reference.
- C. Each party is an independent contractor with regard to the other party and agrees that the nonperforming party has no control over the work and manner in which it is performed. No party is an agent or employee of any other.
- D. Subject to the limits of the Oregon Tort Claims Act and the Oregon Constitution, each of the parties agrees to hold harmless and indemnify the other, and their elected and appointed officials, agents, and employees, from and against all claims, demands, and causes of action of any kind or character, including the cost of defense thereof, arising on account of personal injuries, death or damage to property caused by or resulting from their own acts or omissions or those of their officials, agents and employees. It is agreed between the parties that, as between them, CCC exercises control over the operations of its public access studio and cablecasting facilities, and will defend and indemnify City under this paragraph for claims arising therefrom.

- E. Each party agrees to maintain insurance levels, or self-insurance in accordance with ORS 30.282, for the duration of this Agreement at levels necessary to protect against public body liability as specified in ORS 30.272 and 30.273.
- F. No party or its employees is entitled to participate in a pension plan, insurance, bonus or similar benefits provided by any other party.
- G. Record and Fiscal Control System. All payroll and financial records pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible. Such records and documents shall be retained for a period of six (6) years after receipt of final payment under this Agreement, provided that any records and documents that are the subject of audit findings shall be retained for a longer time until such audit findings are resolved.
- H. Access to Records. The City and its duly authorized representatives shall have access to the books, documents, papers, and records of CCC which are directly pertinent to the Agreement for the purpose of making audit, examination, excerpts, and transcripts.
- I. This contract supersedes and cancels any prior contracts and/or agreements between the parties hereto for similar services.

## **V. Amendment**

This Agreement may be amended at any time with the concurrence of both parties. Amendments become a part of this Agreement only after the written amendment has been signed by both parties.

## **VI. Term of Agreement**

- A. This Agreement becomes effect when it is signed by both parties.
- B. The initial term of the Agreement extends to June 30, 2017.
- C. This Agreement will be automatically renewed for successive terms of one year on each July 1, unless terminated as provided in this Agreement.

## **VII. Termination of Agreement**

- A. This Agreement may be suspended or terminated prior to the expiration of any term by:

- 1. Written notice provided, with or without cause, by either party no less than 30 days prior to the date of termination;
- 2. Written notice, in the case of a default under the terms of this agreement, giving no less than 21 days notice of the alleged default, with opportunity to cure within the 21-day period;
- 3. Mutual written agreement by the City and CCC, or;
- 4. Written notice shall be provided by the City if PEG funds become insufficient, or if there has been a change in federal, state or local laws or regulations causing the activities funded by this Agreement to no longer being eligible for funding. Termination under this paragraph shall be effective immediately.

B. Termination of this Agreement shall not discharge the obligations of CCC accrued prior to termination, including but not limited to, the obligation to allow audit or inspection.

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**IN WITNESS WHEREOF**, City has caused this Agreement to be executed by its duly authorized undersigned officer and CCC has executed this Agreement on the date herein above first written.

**CITY OF MILWAUKIE**

**CLACKAMAS COMMUNITY COLLEGE**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name & Title

\_\_\_\_\_  
Printed Name & Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date



**AGREEMENT BETWEEN  
CITY OF MILWAUKIE  
AND  
NORTH CLACKAMAS SCHOOL DISTRICT  
(SABIN-SHELLENBERG CENTER)**

**I. Purpose**

- A. This Agreement is entered into between The City of Milwaukie (“City”), a municipal corporation, and North Clackamas School District (“NCSD”) acting on behalf of the Sabin-Schellenberg Center (“SSC”), a school district formed and existing under the authority of ORS Chapter 332.
- B. This Agreement provides for the reimbursement by the City to SSC for capital for facilities and equipment related to Public, Educational and Government (“PEG”) access costs. These reimbursements will assist SSC with the production and cablecasting of the school’s educational access television channel(s).

**II. Responsibilities**

- A. SSC agrees to the following responsibilities under this Agreement:
1. SSC will cablecast programs on educational access channel(s), using SSC’s or NCSD’s facilities, subject to the usual operating rules of NCSD and SSC.
  2. The funds provided by this Agreement shall be used only for reimbursement of SSC’s capital facility and equipment costs related to SSC’s production and cablecasting on SSC’s educational access channel(s).
  3. SSC shall maintain discrete accounting records of all activities associated with expenditures for which reimbursement is sought under this Agreement. SSC shall use and maintain accounting policies, practices, and procedures which are consistent with generally accepted accounting principles, and in accordance with applicable regulations. On request, SSC shall permit the City to inspect its accounting records and facilities as part of the activities.
  4. SSC warrants funds shall not be used to retire any debt or reimburse any person, entity, or municipality for expenditures not related to, or approved by this Agreement.
  5. SSC shall be responsible for producing, scheduling and administering the school’s educational access channel(s).

6. SSC shall submit requests for funds to the City's Finance Department, including detailed, paid receipts showing items purchased and prices paid by SSC. SSC further agrees to provide additional information as requested by the City to verify or understand requests for funds.
    - a. SSC may have the City invoiced directly for purchases, given prior approval is received from the City.
    - b. SSC is encouraged to obtain the City's approval prior to making purchases to verify reimbursement requirements and availability of funds.
  7. SSC shall send all its normal communications to the City's Finance Department, consisting of, but not limited to:
    - a. Quarterly usage reports showing number of programs broadcast;
    - b. Equipment and usage reports;
    - c. Final approved budget; and
    - d. Annual financial report or audit.
- B. City agrees to the following responsibilities under this Agreement:
1. City shall approve or reject requests for funds by SSC. City shall respond with payment or notice of rejection no more than 45 days from its receipt of requests for funds.
  2. City shall reimburse SSC for capital costs with funds obtained as PEG funds from City's agreements with cable television franchisees annually, subject to City's approval of each request for reimbursement submitted by SSC.
  3. Availability of funds for reimbursement under this Agreement shall be subject to the City receiving PEG funding from cable franchise agreements. If the City does not receive sufficient PEG funds to pay SSC's request, City shall promptly notify SSC and may reduce or eliminate funding in accordance with PEG funds available.
  4. City may require SSC to take corrective action to remedy problems with implementation, evaluation, reporting, or administration of activities, to meet compliance standards. SSC shall submit documentation to prove satisfactory correction action has been taken in the time frame set forth by the City. City shall give 30 days written notice to correct non-compliance.

### **III. Liaison**

City liaison:

Reba Crocker, Right-of-way & Contracts Coordinator  
Finance Department  
10722 SE Main Street  
Milwaukie, Oregon 97222  
503-786-7519  
crockerr@milwaukieoregon.gov

SSC liaison:

Deborah Barnes  
14450 SE Johnson Road  
Milwaukie, Oregon 97267  
503-353-5910 x 37640  
barnesd@nclack.k12.or.us

### **IV. Other Terms and Conditions**

- A. The City and SSC agree to comply with all applicable local, state, and federal ordinances, statutes, laws and regulations, including those on non-discrimination in employment because of race, color, ancestry, national origin, religion, sex, age or disability.
- B. To the extent applicable, the provisions of Oregon public contracting law are incorporated herein by this reference.
- C. Each party is an independent contractor with regard to the other party and agrees that the nonperforming party has no control over the work and manner in which it is performed. No party is an agent or employee of any other.
- D. Subject to the limits of the Oregon Tort Claims Act and the Oregon Constitution, each of the parties agrees to hold harmless and indemnify the other, and their elected and appointed officials, agents, and employees, from and against all claims, demands, and causes of action of any kind or character, including the cost of defense thereof, arising on account of personal injuries, death or damage to property caused by or resulting from their own acts or omissions or those of their officials, agents and employees. It is agreed between the parties that, as between them, SSC exercises control over the operations of its public access studio and cablecasting facilities, and will defend and indemnify City under this paragraph for claims arising therefrom.
- E. Each party agrees to maintain insurance levels, or self-insurance in accordance with ORS 30.282, for the duration of this Agreement at levels necessary to protect against public body liability as specified in ORS 30.727 and 30.273.

- F. No party or its employees is entitled to participate in a pension plan, insurance, bonus or similar benefits provided by any other party.
- G. Record and Fiscal Control System. All payroll and financial records pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible. Such records and documents shall be retained for a period of six (6) years after receipt of final payment under this Agreement; provided that any records and documents that are the subject of audit findings shall be retained for a longer time until such audit findings are resolved.
- H. Access to Records. The City and its duly authorized representatives shall have access to the books, documents, papers, and records of SSC which are directly pertinent to the Agreement for the purpose of making audit, examination, excerpts, and transcripts.
- I. This contract supersedes and cancels any prior contracts and/or agreements between the parties hereto for similar services.

## **V. Amendment**

This Agreement may be amended at any time with the concurrence of both parties. Amendments become a part of this Agreement only after the written amendment has been signed by both parties.

## **VI. Term of Agreement**

- A. This Agreement becomes effect when it is signed by both parties.
- B. The initial term of the Agreement extends to June 30, 2017.
- C. This Agreement will be automatically renewed for successive terms of one year on each July 1, unless terminated as provided in this Agreement.

## **VII. Termination of Agreement**

- A. This Agreement may be suspended or terminated prior to the expiration of any term by:
  - 1. Written notice provided, with or without cause, by either party no less than 30 days prior to the date of termination;

- 2. Written notice, in the case of a default under the terms of this agreement, giving no less than 21 days notice of the alleged default, with opportunity to cure within the 21-day period;
- 3. Mutual written agreement by the City and SSC, or:
- 4. Written notice shall be provided by the City if PEG funds become insufficient, or if there has been a change in federal, state or local laws or regulations causing the activities funded by this Agreement to no longer being eligible for funding. Termination under this paragraph shall be effective immediately.

C. Termination of this Agreement shall not discharge the obligations of SSC accrued prior to termination, including but not limited to, the obligation to allow audit or inspection.

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**IN WITNESS WHEREOF**, City has caused this Agreement to be executed by its duly authorized undersigned officer and SSC has executed this Agreement on the date herein above first written.

**CITY OF MILWAUKIE**

**SABIN SCHELLENBERG  
CENTER**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name & Title

Kerensa Mauck, Director, Business Operations  
Printed Name & Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date

**MEMORANDUM OF UNDERSTANDING BETWEEN  
CITY OF MILWAUKIE  
AND  
FRIENDS OF WILLAMETTE FALLS MEDIA CENTER**

**I. Purpose**

- A. This Agreement is entered into between The City of Milwaukie (“City”), a municipal corporation, and Friends of Willamette Falls Media Center (“FoWFMC”), a 501(c)(3) corporation, established on October 17, 2011.
- B. This Agreement provides for the reimbursement by the City to FoWFMC for capital for facilities and equipment related to Public, Educational and Government (“PEG”) access costs. These reimbursements will assist FoWFMC with the production and cablecasting of the Public access television channel(s).

**II. Responsibilities**

- A. FoWFMC agrees to the following responsibilities under this Agreement:
  - 1. Residents of the City shall be allowed full access to the FoWFMC studio to produce and edit TV programs for airing on the public access channel(s), subject to the usual operating rules and procedures of FoWFMC.
  - 2. Residents of the City shall be allowed to cablecast programs on access channel(s) using FoWFMC’s facilities. In addition, residents shall be allowed to submit readerboard notices for cablecasting subject to the usual operating rules of FoWFMC.
  - 3. FoWFMC shall cablecast programs on access channel(s), using FoWFMC’s facilities, subject to the usual operating rules of FoWFMC.
  - 4. The funds provided by this Agreement shall be used only for reimbursement of FoWFMC’s capital facility and equipment costs related to FoWFMC’s production and cablecasting on FoWFMC’s access channel(s).
  - 5. FoWFMC shall maintain discrete accounting records of all activities associated with expenditures for which reimbursement is sought under this Agreement. FoWFMC shall use and maintain accounting policies, practices, and procedures which are consistent with generally accepted accounting principles, and in accordance with applicable regulations. On request, FoWFMC shall permit the City to inspect its accounting records and facilities as part of the activities.

6. FoWFMC warrants funds shall not be used to retire any debt or reimburse any person, entity, or municipality for expenditures not related to, or approved by this Agreement.
7. FoWFMC shall be responsible for producing, scheduling and administering the public access channel(s).
8. FoWFMC shall submit requests for funds to the City's Finance Department, including detailed, paid receipts showing items purchased and prices paid by FoWFMC. FoWFMC further agrees to provide additional information as requested by the City to verify or understand requests for funds.
  - a. FoWFMC may have the City invoiced directly for purchases, given prior approval is received from the City.
  - b. FoWFMC is encouraged to obtain the City's approval prior to making purchases to verify reimbursement requirements and availability of funds.
9. FoWFMC shall send all its normal communications to the City's Finance Department, consisting of, but not limited to:
  - a. Quarterly usage reports showing number of programs broadcast;
  - b. Equipment and usage reports;
  - c. Final approved budget; and
  - d. Annual financial report or audit.

B. City agrees to the following responsibilities under this Agreement:

1. City shall approve or reject requests for funds by FoWFMC. City shall respond with payment or notice of rejection no more than 45 days from its receipt of requests for funds.
2. City shall reimburse FoWFMC for capital costs with funds obtained as PEG funds from City's agreements with cable television franchisees annually, subject to City's approval of each request for reimbursement submitted by FoWFMC.
3. Availability of funds for reimbursement under this Agreement shall be subject to the City receiving PEG funding from cable franchise agreements. If the City does not receive sufficient PEG funds to pay FoWFMC's request, City shall promptly notify FoWFMC and may be reduce or eliminate funding in accordance with PEG funds available.
4. City may require FoWFMC to take corrective action to remedy problems with implementation, evaluation, reporting, or administration of activities, to meet compliance standards. FoWFMC shall submit documentation to

prove satisfactory correction action has been taken in the time frame set forth by the City. City shall give 30 days written notice to correct non-compliance.

### **III. Liaison**

City liaison:

Reba Crocker, Right-of-way & Contracts Coordinator  
Finance Department  
10722 SE Main Street  
Milwaukie, Oregon 97222  
503-786-7519  
crocker@milwaukieoregon.gov

FoWFMC liaison:

Melody Ashford, Director  
1101 Jackson Street  
Oregon City, OR 97045  
(503) 650-0275  
melody@wfmstudios.org

### **IV. Other Terms and Conditions**

- A. The City and FoWFMC agree to comply with all applicable local, state, and federal ordinances, statutes, laws and regulations, including those on non-discrimination in employment because of race, color, ancestry, national origin, religion, sex, age or disability.
- B. To the extent applicable, the provisions of Oregon public contracting law are incorporated herein by this reference.
- C. Each party is an independent contractor with regard to the other party and agrees that the nonperforming party has no control over the work and manner in which it is performed. No party is an agent or employee of any other.
- D. Subject to the limits of the Oregon Tort Claims Act and the Oregon Constitution, each of the parties agrees to hold harmless and indemnify the other, and their elected and appointed officials, agents, and employees, from and against all claims, demands, and causes of action of any kind or character, including the cost of defense thereof, arising on account of personal injuries, death or damage to property caused by or resulting from their own acts or omissions or those of their officials, agents and employees. It is agreed between the parties that, as between them, FoWFMC exercises control over the operations of its public access studio and cablecasting facilities, and will defend and indemnify City under this paragraph for claims arising therefrom.



- E. Each party agrees to maintain insurance levels, or self-insurance in accordance with ORS 30.282, for the duration of this Agreement at levels necessary to protect against public body liability as specified in ORS 30.272 and 30.273.
- F. No party or its employees is entitled to participate in a pension plan, insurance, bonus or similar benefits provided by any other party.
- G. Record and Fiscal Control System. All payroll and financial records pertaining in whole or in part to this Agreement shall be clearly identified and readily accessible. Such records and documents shall be retained for a period of six (6) years after receipt of final payment under this Agreement; provided that any records and documents that are the subject of audit findings shall be retained for a longer time until such audit findings are resolved.
- H. Access to Records. The City and its duly authorized representatives shall have access to the books, documents, papers, and records of FoWFMC which are directly pertinent to the Agreement for the purpose of making audit, examination, excerpts, and transcripts.
- I. This contract supersedes and cancels any prior contracts and/or agreements between the parties hereto for similar services.

## **V. Amendment**

This Agreement may be amended at any time with the concurrence of both parties. Amendments become a part of this Agreement only after the written amendment has been signed by both parties.

## **VI. Term of Agreement**

This Agreement shall become effective upon final signature and shall expire, unless otherwise terminated or extended, on June 30, 2018. The City shall also retain the right to renew for five (5) two-year extensions to the Agreement.

## **VII. Termination of Agreement**

- A. This Agreement may be suspended or terminated prior to the expiration of any term by:
  - 1. Written notice provided, with or without cause, by either party no less than 30 days prior to the date of termination;

- 2. Written notice, in the case of a default under the terms of this agreement, giving no less than 21 days notice of the alleged default, with opportunity to cure within the 21-day period;
- 3. Mutual written agreement by the City and FoWFMC, or:
- 4. Written notice shall be provided by the City if PEG funds become insufficient, or if there has been a change in federal, state or local laws or regulations causing the activities funded by this Agreement to no longer being eligible for funding. Termination under this paragraph shall be effective immediately.

C. Termination of this Agreement shall not discharge the obligations of FoWFMC accrued prior to termination, including but not limited to, the obligation to allow audit or inspection.

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**IN WITNESS WHEREOF**, City has caused this Agreement to be executed by its duly authorized undersigned officer and FoWFMC has executed this Agreement on the date herein above first written.

**CITY OF MILWAUKIE**

**FRIENDS OF WILLAMETTE FALLS MEDIA CENTER**

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Printed Name & Title

Melody Ashford, Manager  
\_\_\_\_\_  
Printed Name & Title

\_\_\_\_\_  
Date

\_\_\_\_\_  
Date