



# Agenda Item

August 31, 2020

TO: Honorable Mayor and City Council through City Administrator  
FROM: Jim Row, Assistant City Administrator  
McKenzie Granum, Assistant City Attorney  
SUBJECT: **Workshop Regarding Utility Services Ordinance**

## **RECOMMENDATION:**

The City Council will be having a workshop to discuss the upcoming adoption of a utility services ordinance that will implement a new licensing program to regulate utility service providers that utilize the City right-of-way ("ROW") and that do not otherwise have a franchise agreement with the City. No action is suggested to be taken at this work session regarding this item.

## **BACKGROUND:**

At the July 13th City Council Meeting, Consultant Reba Crocker of ROW Consultants LLC, introduced what is to be a new utility licensing program in the City. At that a meeting a general introduction to the topic was presented and an initial draft ordinance and associated fee resolution was presented for the Council's review. Following that meeting, the proposed draft was sent to numerous providers of telecommunications, gas, and electric services in Oregon.

The City has received written feedback regarding its ordinance proposal from four companies (AT&T, Verizon, Fatbeam, and PGE). The providers' feedback and written comments are attached and included with this staff report.

After receiving the provider feedback and completing further review of the draft ordinance and resolution, some edits and updates were incorporated into both documents (also attached).

## **DISCUSSION:**

Reba Crocker will again be presenting and providing the framework for the Council's discussion regarding the proposed utility licensing program, with the

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Agenda Item Review: City Administrator \_\_\_x\_\_\_ City Attorney \_\_\_x\_\_\_ Finance \_\_\_x\_\_\_

intention of having an interacting and productive conversation with the Council that tackles technical questions, policy concerns, industry dealings, and general impacts that may result from adopting this new program.

Planned talking points will include:

- Understanding the difference between franchised utilities and those regulated under a licensing program.
- Discussing how providers will be identified and compelled to comply with new licensing requirements.
- Addressing concerns and objections raised by telecommunication providers.
- Recognizing and understanding how recent FCC Orders impact the regulation of telecommunication systems and services within the municipal right of way and why having a utility services ordinances will allow the City to make more adaptive and responsive changes in response to federal law.
- Examining how this update will provide the structure and regulation for possible future 5G/Small Cell Wireless facility deployments in Woodburn.

If upon review of the proposed ordinance, resolution, or provider correspondence, any Councilor has an immediate question or concern they would like addressed, then please feel free to submit questions ahead of the workshop to staff so that Ms. Crocker or City staff can be sure to cover the subject in full detail during the work session.

As provided previously, the pertinent provisions of the enclosed draft Utility Services Ordinance includes:

- Utilities operated by the City and other municipalities are exempted from the requirements of the ordinance
- Providers are required to maintain a City of Woodburn Business Registration
- Providers with existing franchises agreements are exempted until their agreements expire
- Preserves the City's right to enter into franchise agreements with individual providers in situations where the public interest warrants
- Wire line cable television providers will continue to operate under franchise agreements due to protections under FCC law
- Each license with utility providers will be for a term of five (5) years
- Licenses are transferrable upon the written consent of the City, provided the transfers are consistent with state and federal law

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- Providers seeking license renewals shall submit license applications at least thirty (30) days, but not more than ninety (90) days prior to expiration
  - Includes provisions under which the City may terminate licenses
  - Includes requirements that providers must comply with related to the location, construction, maintenance and removal of facilities in the ROW
  - Provides for ROW license and usage fees to be established by resolution

Staff expects implementation of the program to occur according to the following timeline:

- June 2020: contracted with ROW Consultants LLC
- June - July: ordinance drafted
- July 13: draft ordinance presented to City Council
- July - August: outreach to providers
- August: discussions with providers
- September 14: public hearing & ordinance adoption
- October 1: ordinance effective
- Ongoing: revisions, housekeeping, and edits

**FINANCIAL IMPACT:**

The development of a uniform utility service provider licensing program is anticipated to result in an increase in ROW usage fees, formally referred to as franchise fees. The amount of the increase is unknown at this time and will depend on the number of utility service providers the City is able to determine are utilizing the ROW.

Enclosures:

Draft Utility Services Ordinance (updated w/ redline edits)

Draft Utility Licensing Fee Resolution (updated w/ redline edits)

August 3rd Letter from Fatbeam LLC

August 7th Ordinance Comments received from PGE

August 10th Letter from Wireless Policy Group LLC on behalf of Verizon Wireless

August 11th Letter from Wireless Policy Group LLC on behalf of New Cingular Wireless PCS, LLC ("AT&T")

## **UTILITY SERVICES ORDINANCE**

### **Section 1. Title.**

The ordinance will be known and may be referenced as the Utility Service Ordinance.

### **Section 2. Purpose and Intent.**

The purpose and intent of this Ordinance is to:

A. Permit and manage reasonable access to and use of 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;

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

C. 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, controlling, using or operating facilities therein or generate revenue for utility services;

D. Assure that all utility companies, persons and other entities owning, operating facilities, using facilities, or providing services within the City comply with the ordinances, rules and all regulations of the City heretofore or hereafter amended or adopted;

1. For the purposes of this Ordinance, all utility services owned or operated by the City are excluded.
2. For the purposes of this Ordinance, all utility services owned or operated by other municipalities are excluded.

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

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

1. Allow the City to enter into other or additional agreements with Utility Providers and Operators, if the public's interest is served, and to amend the requirement of this Ordinance and the City regulations, as new technology is developed;
2. Allow the City to be resilient and adaptive to changes in technology; and

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

### **Section 3. Jurisdiction and Management of the Public Rights-of-way.**

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

B. The City has jurisdiction and exercises regulatory management over each right-of-way whether the City has a fee, easement, or other legal interest in the right-of-way, and whether the legal interest in the right-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 right-of-way and does not obligate the City to maintain or repair any part of the right-of-way.

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

**Section 4. Regulatory Fees and Compensation Not a Tax.**

A. The fees and costs provided for in this Ordinance, and any compensation charged and paid for use of the rights-of-way and the provision of services provided for in this Ordinance, are separate from, and in addition to, any and all other federal, state, local, and City charges, including but not limited to: any permit fee, or any other generally applicable fees, tax, or charge on business, occupations, property, or income as may be levied, imposed, or due from a utility operator, utility provider, franchisee or licensee, 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 Ordinance 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 Ordinance are subject to applicable federal and state laws.

**Section 5. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words and their derivations will have the meaning given herein. When not inconsistent with the context, words not defined herein will be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, and the Telecommunications Act. If not defined in those statutes, the words will be given their common and ordinary meaning. 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 1987, 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.

“Calendar year” means January 1 to December 31, unless otherwise noted.

“City” means the city of Woodburn, 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 Woodburn, Oregon.

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

“City standards” means the all ordinances, codes, regulations and rules of the City of Woodburn, in effect at the time of any work.

“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, and 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 rights-of-way; (4) public communications systems; (5) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (6) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

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

“Control” or “Use of Facilities” means actual working control over utility facilities in whatever manner exercised, whether or not the facility is owned. For example, but not limitation, Control means and includes leased capacity, transport, or any other use.

“Days” mean calendar days unless otherwise specified.

“Emergency” means a circumstance in which immediate work to repair damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.

“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.

“Gross Revenue” means any and all amounts, of any kind, nature or form, without deduction for expense, less net uncollectable, derived from the operation (including revenue derived from a leases or other agreements allowing use of facilities to other utility operators or providers), or use of utility facilities in the City, operation of a Communications Services or the provision of utility service(s) in the City, subject to all applicable limitations in federal or state law.

“License” or “Utility License” means the authorization granted by the City to a utility operator or utility provider pursuant to this Ordinance.

“Licensee” or “Utility Licensee” means any person that has a valid Utility license issued by the City.

“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.

“Small Cell Wireless Facility” means Facilities owned or operated for the provision of communications that are shorter ranged, wireless systems affixed to a structure with generally smaller components than traditional Macro Wireless Facilities and are deployed where suitable in flexible configurations to provide capacity and coverage. Small Cell Wireless Facilities means a facility that meets each of the following conditions per 47 C.F.R § 1.6002(l), as may be amended or superseded:

- (1) The facilities (i) are mounted on structures 50 feet or less in height including the antennas, or (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and,
- (2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and,
- (3) All other wireless equipment associated with the structure, including wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and,
- (4) The facilities do not result in human exposure to radio frequency in excess of the applicable safety standards specified in 47 C.F.R. § 1.1307(b).

“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 Telecommunications Act of 1996 (47 U.S.C., 151 et seq.) and as hereafter amended.

“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 rights-of-way, 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, controls, operates or maintains a utility facility within the City.

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

“Utility service” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, or cable services, to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions and whether or not the facilities used for transmission are owned by the service provider.

“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.

#### **Section 6. Business Registration**

**Business Registration Required.** Every person that desires to use, operate or control utility facilities, or provide utility services to customers within the City will register with the City prior to use, operation, control of utility facilities, or providing any utility services to any customer in the City, in compliance with Ordinance No. 2399. Every person using, operating, controlling, or providing utility services to customers within the City as of the effective date of this Ordinance will obtain a Business Registration within thirty (30) days of the effective date of this Ordinance. Every person subject to this Ordinance will renew and maintain a Business Registration as required in Woodburn’s Ordinances that are heretofore or hereafter amended, at all times that the person, uses, operates, controls, provides or operates a utility services, to customers within the City.

#### **Section 7. Utility License.**

##### **A. License Required.**

Except those utility operators and utility providers with a valid franchise or other valid agreement from the City, every person will obtain a Utility License from the City prior to conducting any work in or use of the ROW, or providing utility services or communication services to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions and whether or not the facilities used for transmission are owned by the service provider.

1. Every person that owns, or controls, provides utility services, or uses utility facilities in the rights-of-way as of the effective date of this Ordinance will apply for a Utility License from the City within thirty (30) days of the later of: (1) the effective date of this Ordinance, or (2) the expiration of a valid agreement granted by the City, unless a new agreement is

granted by the City (3) for a person that is not a utility operator, providing utility services within the City.

2. The provisions of this section do not apply to any person subject to and in compliance with the cable television franchise requirement, except that subsection K will apply to the extent such person provides multiple services, subject to applicable law.

B. Utility License Application. The license application will be on a form provided by the City, and will be accompanied by any additional documents required by the application or the City, in the City's sole discretion, 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 provisioned, and other information necessary to determine the applicant's ability to comply with the terms of this Ordinance.

C. Utility License Application & Renewal Fee. The application and renewal application will be accompanied by a nonrefundable fee or deposit set by resolution of the City Council.

D. Determination by City. The City will issue, within a reasonable period of time, a written determination granting or denying the Utility License in whole or in part. If the Utility License is denied, the written determination will include the reasons for denial. The Utility License will be evaluated based upon the provisions of this Ordinance, the information contained on the Utility License application, the continuing capacity of the rights-of-way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.

E. Changes to information contained on the Utility License application. Within thirty (30) days of a change to the information contained in the license application, the Licensee will notify the City in writing of such change(s).

F. Franchise and other Agreements. If the public interest warrants, as determined by the City in its sole discretion, the City and any communications provider – including cable providers, utility operator or utility provider, ~~including~~ Small Cell wireless providers, may enter into a written franchise or other agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this Ordinance, consistent with applicable state and federal law. The agreement may conflict with the terms of this Ordinance with the review and approval of City Council. The franchisee will be subject to the provisions of this Ordinance to the extent such provisions are not in conflict with the express provisions of any such franchise or agreement. In the event of a conflict between the express provisions of a franchise or other agreement and this Ordinance, the franchise or other agreement will control.

Commented [RC1]: Allows the City to be flexible.

Commented [RC2]: Typo

1. The provider requesting a franchise agreement will deposit a non-refundable fee, as set by resolution of the City Council before negotiations occur.

G. Rights Granted.

1. The Utility License granted hereunder will authorize and permit the licensee, subject to the provisions of the City regulations and ordinance and other applicable provisions of the

City, state or federal law, in effect and as may be subsequently amended, to construct, place, maintain, upgrade, repair and operate, control or use utility facilities in the rights-of-way for the term of the license for the provision of utility service(s) authorized in the license. In the event the licensee offers different service(s) than those authorized in the license, the licensee will inform the City of such changes no later than thirty (30) days after the change.

2. Any Utility License granted pursuant to this Ordinance will not convey equitable or legal title in the rights-of-way and may not be assigned or transferred except as permitted in subsection L of this section.

Neither the issuance of the Utility License nor any provisions contained therein will 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.

H. Term. Subject to the termination provisions in subsection N of this section, the Utility License granted pursuant to this Ordinance will be effective as of the date it is issued by the City or the date services began, whichever comes first, and will have a term of five (5) calendar years beginning: (1) January 1<sup>st</sup> of the year in which the license took effect for licenses that took effect between January 1<sup>st</sup> and June 30<sup>th</sup>; or (2) January 1<sup>st</sup> of the year after the license took effect for licenses that become effective between July 1<sup>st</sup> and December 31<sup>st</sup>.

I. Utility License Nonexclusive. No license granted pursuant to this section will confer any exclusive right, privilege, license or franchise to occupy or use the rights-of-way 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 rights-of-way, 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 rights-of-way. Nothing in the license will be deemed to grant, convey, create, or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.

J. Reservation of City Rights. Nothing in the Utility License will be construed to prevent the City from grading, paving, repairing and/or altering any rights-of-way, 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 rights-of-way, public work, city utility, city improvement or city facility, except those providing utility services in competition with a licensee, licensee's facilities will be removed or relocated as provided in subsections C, D and E of Section 9, in a manner acceptable to the City and consistent with City standards, industry standard engineering and safety codes in effect at the time the work is required.

K. 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 Usage fee

requirements of this Ordinance 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 Usage use fee, if any, owed to the City by another person using the utility operator's facilities.

2. A utility operator that provides or transmits more than one utility service to customers in the City may not be required to obtain a separate Utility License or franchise for each utility service, but is required to file separate reports, remittances and submit any Usage fees due for each service provided.

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

1. The proposed transferee or assignee is authorized under all applicable laws to own or operate the utility facilities and/or provide the utility service authorized under the license; 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 Utility Licensee requesting the transfer or assignment will fully cooperate with the City and provide requested documentation, as the City deems necessary, in the City's sole discretion, 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 will become responsible for fulfilling all obligations under the Utility License. A transfer or assignment of a license does not extend the term of the license.

M. Renewal. At least thirty (30) days, but no more than ninety (90) days prior to the expiration of a Utility License granted pursuant to this section, a licensee seeking renewal of its license will submit a license application to the City, including all information required in subsection B of this section and applicable fees required in subsection C of this section. The City will review the application as required by subsection D of this section and grant or deny the license. If the City determines that the licensee is in violation of the terms of this Ordinance, or other City Ordinances, rules or regulations, 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 and/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.

N. Termination.

1. Revocation or Termination of a Utility License. The City may terminate or revoke the license granted pursuant to this Ordinance for any of the following reasons:
  - a. Violation of any of the provisions of this Ordinance;

- b. Violation of any provision of the license;
  - c. Misrepresentation in a license application;
  - d. Failure to pay taxes, compensation, fees or costs due the City after final determination by the City, of the taxes, compensation, fees or costs;
  - e. Failure to restore the rights-of-way after construction as required by this Ordinance 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 rights-of-way; 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 and/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 will be considered:
- a. The egregiousness of the misconduct;
  - b. The harm that resulted;
  - c. Whether the violation was intentional;
  - d. The Licensee's history of compliance; and/or
  - e. The Licensee's cooperation in discovering, admitting and/or curing the violation.
3. Notice and Cure. The City will give the Utility Licensee written notice of any apparent violations before terminating a Utility License. The notice will 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 Licensee to demonstrate that the Licensee has remained in compliance, that the Licensee 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 Licensee is in the process of curing a violation or noncompliance, the Licensee must demonstrate that it acted promptly and continues to actively work on compliance. If the Licensee does not respond or if the City determines that the Licensee's response is inadequate, the City may revoke and/or terminate the Utility License.
4. Termination by Utility Licensee. If a licensee ceases to be required to have a Utility License, as defined under this Ordinance, the licensee may terminate or surrender its license, with a thirty (30) day notice to the City. Licensee may reapply for a Utility License at any time. No refunds or credits will be given for licenses terminated by the licensee or the City.
- a. Within thirty (30) days of surrendering a Utility License, the licensee will file a final remittance form with the City stating, "final remittance" and will remit any funds due.
  - b. Upon surrendering a Utility License, the licensee will file a written statement that it has removed, or will remove within 60 days, any and all facilities from the City and no longer provides Utility Services, as defined in this ordinance.

**Section 8. Construction and Restoration.**

- A. Construction Codes. Utility facilities will be constructed, installed, operated, repaired and

maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the City Standards, in effect at the time of the work. When a utility operator, utility provider or licensee, or any person acting on its behalf, does any work in or affecting the rights-of-way, the utility operator will, at its own expense, promptly restore the rights-of-way as directed by the City consistent with applicable city codes, rules and regulations, in effect at the time of the work. A utility operator, utility provider, licensee or other person acting on its behalf will use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person(s), vehicle or property by reason of such work in or affecting the rights of way or property.

**B. Construction Permits.**

1. No person will perform any work on utility facilities within the rights-of-way without first obtaining all required permits. The City will 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, franchise agreement or other valid agreement (if applicable), required by this Ordinance, and all applicable fees have been paid. No permit is required for routine maintenance or repairs to customer service drops where such, repairs or maintenance do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.

2. In the event of an Emergency, a utility operator or provider with a license pursuant to this Ordinance or its contractor may perform work on its utility facilities without first obtaining a permit from the City, provided that, to the extent reasonably feasible, it attempts to notify the City prior to commencing the emergency work and in any event applies for a permit from the City as soon as reasonably practicable, but not later than 5:00pm PST of the next business day after commencing the emergency work.

Commented [RC3]: To allow for emergency work as needed.

**Section 9. Location of Facilities.**

- A. Location of Facilities. Unless otherwise agreed to in writing by the City:
1. All utility operators are required to make good faith effort to both cooperate with and coordinate their construction schedule with those of the City and other users.
  2. Utility facilities will be installed underground in all areas of the City where there are no existing poles in the ROW, there is no space on existing poles in the ROW, or where the only poles in the ROW are used only for high voltage lines (as defined below). This requirement will not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts or to antennas, pedestals, cabinets or other above-ground equipment of any utility operator for which the utility operator has written authorization to place above-ground.

32. Whenever any existing electric utilities, cable facilities or communications facilities are located underground within the ROW of the City, the utility operator with permission to occupy the same ROW will install all new facilities underground at no cost to the City. This requirement will not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts (“high voltage lines”) or to antennas, 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 Rights-of-Way. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the rights-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the rights-of-way. Utility facilities will not be located in area 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 rights-of-way will be consistent with City codes, ordinances, rules and regulations in effect and as may be subsequently amended.

C. Relocation of Utility Facilities. Unless otherwise agreed to in writing by the City:

Commented [RC4]: Allows flexibility.

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

a. If relocation is required by the City, the City will bear no responsibility or incur any costs, to provide or in any way secure alternate locations.

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

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Commented [RC5]: Edits per PGE request.

3. The City may coordinate the schedule for relocation of utility facilities and based on such effort will 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, change, alter or underground any utility facility as requested by the City by the date reasonably established by the City, the utility operator will 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 an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

4. The City will cooperate with the utility operator in securing alternate locations. However, the City will bear no responsibility or costs for securing alternate locations. The City will bear no responsibility to obtain, compensate, or otherwise assist the utility operator in relocation of its facilities to location 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 abandoned or unauthorized utility facility within the rights-of-way will, at its own expense, remove the facility and restore the affected area.
2. A utility system or facility is unauthorized under any of the following circumstances:
  - a. The utility facility, or any portion of the facility, is outside the scope of authority granted by the City under the Utility 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 twelve (12) consecutive months. 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 Ordinance.
  - d. The utility operator is in violation of a material provision of this Ordinance 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 any utility, without notice, as the City determines, at its sole discretion 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 practicable without impeding the City's response to the emergency. The City will use best efforts to provide the utility operator with notice prior to cutting or moving facilities. If prior notice is not possible, the City will provide such notice as soon as reasonably practicable after resolution of the emergency.
2. If the utility operator fails to remove any facility when required to do so under this Ordinance, 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 will 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 will reimburse the City for the costs the City incurred within thirty (30) days. The obligation to remove will survive the termination of the license or franchise.

3. The City will not be liable to any utility operator for any damage to utility facilities, or for any incidental or consequential losses resulting directly or indirectly therefrom, by the City or its contractor in removing, relocating or altering the facilities pursuant to this Section 9 subsections B, C or D of Section 9 or undergrounding its facilities as required by subsection A of Section 9, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by ~~those subsections~~ this Section 9, unless such damage arises directly from the City's or it's contractor's negligence or willful misconduct.

Commented [RC6]: Edits made per PGE request

F. Engineering Record Drawings. The utility operator will provide the City with two complete sets of record drawings in a form acceptable to the City showing the location of all its utility facilities after initial construction if such plan changed during construction. The utility operator will provide updated complete sets of as built plans upon request of the City, but not more than once per year.

G. Utility operator, Utility provider and Utility Licensee will provide, at no cost to the City, a comprehensive map showing the location of any facility in the City. Such map will 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 Utility Operator, Utility Provider and Utility Licensee will provide such map yearly by February 1 if any changes occurred during the prior year. The City may also request and will be provide the map, at no cost to the City, upon request, no more than once per year.

Commented [RC7]: Amended with consultation of GIS/CAD City staff

#### **Section 10. Leased Capacity.**

A utility operator may lease capacity on or in its facilities to others, provided that the utility operator requires and has verified with the City, that the proposed lessor has obtained proper authority from the City prior to leasing capacity or allowing use of its facilities. Upon request, at no cost to the City, the utility operator will provide a complete list with the name, business address and contact information of any lessee. If requested by the City, the utility operator will also provide exact details of any attachment by lessee. A utility operator is not required to provide such information if disclosure is expressly prohibited by applicable law.

#### **Section 11. Maintenance.**

A. Every utility operator will install and maintain all facilities in a manner that complies with applicable federal, state and local laws, rules, regulations and policies. The utility operator will, 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 an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

**Section 12. Vacation.**

If the City vacates any ROW, or portion thereof, that a utility operator uses, the utility operator will, at its own expense, remove its facilities from the ROW unless the City reserves a public utility easement, which the City will 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. 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 state and federal safety laws and regulations at the utility operator's sole expense. Upon receipt of an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

**Section 13. Usage Fee.**

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the City's rights-of-way and every person that uses or controls utility facilities in the City's rights-of-way to provide utility service, whether or not the person owns the utility facilities used to provision the utility services and every person that provides utility services within the City, will pay the usage fee for every utility service provided in the amount determined by resolution of the City Council.

B. A utility operator whose only facilities in the ROW are facilities mounted on above-ground 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 (other than equipment necessary to operate the mounted facilities that has been expressly approved by the City to be placed in the ROW), will pay the 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 will be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter and will be accompanied by information sufficient to illustrate the calculation of the amount payable.

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

D. Usage fee payments required by this section will be reduced by any franchise fees or privilege taxes, due to the City, but in no case will be less than zero dollars (\$0).

E. Unless otherwise agreed to in writing by the City, the Usage fee set forth in subsection A of this section will be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter. Each payment will be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable (a remittance form will be provided by the City). The City may request and will be provided at no cost to the City, any additional reports or information it deems necessary, in its sole discretion, to ensure compliance by the utility provider, utility operator or licensee. Such information may include, but is not limited to: chart of accounts, total revenues by categories and dates, list of products and services, narrative documenting calculation, details on number of customers within the City limits, or any other information needed for the City to easily verify compliance.

F. The calculation of the Usage fee required by this section will 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, utility operators and licensee subject to this Ordinance. 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 Usage fees or any other fees required by this Ordinance

**Section 14. Penalties and Interest on Usage Fee**

Penalties and interest imposed by this section are in addition to any penalties that may be assessed under other ordinances or regulations of the City.

1. Any person who has not submitted the required remittance forms or remitted the correct fees when due as provided in Section 13 will pay a penalty listed below in addition to the amount due:
  - a. First occurrence during any one calendar year; Ten percent (10%) of the amount owed, or Twenty-five dollars (\$25.00), whichever is greater.
  - b. Second occurrence during any one calendar year; Fifteen percent (15%) of the amount owed, or Fifty dollars (\$50.00), whichever is greater.
  - c. Third occurrence during any one calendar year; Twenty percent (20%) of the amount owed, or Seventy-five dollars (\$75.00), whichever is greater.
  - d. Fourth occurrence during any one calendar year; Twenty-five percent (25%) of the amount owed, or One hundred dollars (\$100.00), whichever is greater.
2. If the City determines that the nonpayment of any remittance due under this section is due to fraud or intent to evade the provisions hereof, an additional penalty of twenty-five percent (25%) of the amount owed, or Five hundred dollars (\$500.00), whichever is greater, will be added thereto in addition to other penalties stated in section 14.
3. In addition to the penalties imposed, any person who fails to remit any fee when due as provided in Section 13 will pay interest at the rate of 1.5% per month or fractions thereof, without proration for portions of a month, on the total amount due (including penalties), from the date on which the remittance first became delinquent, until received by the City.
4. Every penalty imposed, and such interest as accrues under the provision of this section, will be merged with, and become part of, the fee required to be paid.

The City or its designee, in their sole discretion, will have the authority to reduce or waive the penalties and interest due under Section 14.

**Section 15. Audits and Records Requests.**

- A. Within thirty (30) days of a written request from the City, or as otherwise agreed to in writing by the City:
  1. Every Utility Licensee, Utility Operator and Utility Provider will furnish the City, at no cost to the City, with information sufficient to demonstrate compliance with all the

requirements of this Ordinance, any franchise agreements or other agreements, if any, including but not limited to payment of any applicable Business Registration fee, licensing fee, usage fee, attachment fee, franchise fee or privilege taxes.

2. Every Utility Operator, Utility Provider and Utility Licensee will 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 or use of facilities, within the rights-of-way. Access will be provided within the City unless prior arrangement for access elsewhere has been made and approved by the City.

B. If the City's audit of the books, records and other documents or information of the Utility Licensee, Utility Operator or Utility Provider demonstrate that there has been underpaid the usage fee, licensing fee, attachment fee or franchise fee or any other fee or payment by two percent (2%) or more in any one (1) year, the licensee, utility operator, or utility provider will reimburse the City for the cost of the audit, in addition to any interest owed pursuant to Section 14 or as specified in other agreements or franchises with the City.

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

D. The Licensee, Utility Provider or Utility Operator 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.

#### **Section 16. Insurance and Indemnification.**

##### **A. Insurance.**

1. All utility operators will 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 (\$3,000,000.00) for property damage resulting from any one accident; and
    - iii. Three million dollars (\$3,000,000.00) for all other types of liability.
  - b. Commercial Automobile liability insurance for owned, non-owned 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.
  - c. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars (\$1,000,000.00).
  - d. If not otherwise included in the policies required by subsection a. above, maintain 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).
  - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.

2. The limits of the insurance will be subject to statutory changes as to maximum limits of liability imposed on municipalities of the state of Oregon. The insurance will be without prejudice to coverage otherwise existing and will name, or the certificate of insurance will name, with the exception of worker's compensation, as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The insurance will not be canceled or materially altered without thirty (30) days prior written notice first being given to the City, and the certificate of insurance will include such an endorsement. If the insurance is canceled or materially altered, the utility operator will 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 will 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 will 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 Ordinance is effective, and as necessary thereafter, the utility operator will 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 Ordinance, including any costs, expenses, damages or loss the City pays or incurs because of any failure 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 under this Ordinance.
- C. Indemnification.
1. Each utility licensee will 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 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 licensee 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 Ordinance or by a franchise agreement. The acceptance of a Utility license, or of a franchise granted by the City, will constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. Upon notification of any such claim the City will notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

2. Every utility licensee will 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 licensee's failure to remove or relocate any of its facilities in a timely manner, unless the utility licensee's failure arises directly from the City's negligence or willful misconduct.

**Section 17. Compliance.**

Every Utility licensee, utility operator and utility provider will 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 Utility License granted under this Ordinance.

**Section 18. Confidential/Proprietary Information.**

If any person is required by this Ordinance 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 will 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 will 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.

**Section 19. Penalties and Violations.**

A. Any person found in violation of any of the provision of this Ordinance or the Utility License will 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 will be deemed to exist separately for every section violated and be assessed each and every day during which a violation exists.

B. Nothing in this Ordinance will be construed as limiting any judicial or other remedies the City may have at law or in equity, for enforcement of this Ordinance, including those Civil Infractions that may be imposed under Ordinance 1998.

C. The City or its designee, in their sole discretion, will have the authority to reduce or waive the penalties and interest due under this subsection 19.

**Section 20. Severability and Preemption.**

A. The provisions of this Ordinance will be interpreted to be consistent with applicable federal and state law, and will 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 Ordinance 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 Ordinance will not be affected thereby but will be deemed as a separate, distinct and independent provision, and such holding will not affect the validity of the remaining portions hereof, and each remaining section, subsection, clause, phrase, term, provision, condition, covenant and portion of this Ordinance will 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 will be preempted only to the extent required by law and any portion not preempted will survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision will thereupon return to full force and effect and will thereafter be binding without further action by the City.

**Section 21. Application to Existing Agreements.**

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

**WHEREAS**, the City of Woodburn has constitutional and charter authority to manage its rights-of-way and utility usage within the City; and

**WHEREAS**, the Woodburn City Council adopted an ordinance regulating utilities operating within the City and exercising the City’s authority to secure compensation to the City and its residents for utility use;

**WHEREAS**, per the ordinance the Woodburn Council shall by resolution establish Utility Licensing fees;

**WHEREAS**, per the ordinance the Woodburn Council shall by resolution establish a Franchise negotiations fee; and

**WHEREAS**, per ordinance the Woodburn City Council shall by resolution establish Usage fees.

**Now, Therefore, be it Resolved** by the City of Woodburn, Oregon:

**Section 1:** The Utility License application fee shall be \$300.00 (excluding Small Cell Wireless Facilities) and shall include an initial five-year license (if approved);

**Section 2:** Utility License application fee for Small Cell Wireless Facilities, as they involve both access to rights-of-way and vertical infrastructure shall be \$500.00 for up to 5 sites and \$100.00 for each additional site, plus any additional reasonable fees the City must incur for outside expertise to evaluate such applications, including compliance with the Federal Communication Commission “RF” standards;

**Section 3:** The Utility License renewal fee (excluding Small Cell Wireless Facilities) shall be \$250.00 for a five-year license;

**Section 4:** The refundable franchise negotiation deposit shall be \$5,000.00;

**Section 5:** The usage fee shall be as follows, to the extent permitted under applicable law;

<i>Service</i>	<i>Usage Fee Rate</i>
Electric <u>Provides services to customer within Woodburn via owned or non-owned facilities located within the City’s ROW</u>	5% of gross revenue
Natural Gas <u>Providing services to customer within Woodburn via owned or non-owned facilities located within the City’s ROW.</u>	5% of gross revenue
Cable Television	5% of gross revenue
Communications* (other than Small Cell Wireless** Facilities) <u>Providing services to customer within Woodburn via owned or non-owned facilities located within the City’s ROW</u>	7% of gross revenue
Attachment fee (other than Small Cell Wireless** Facilities)	\$5,000 per attachment per year
Small Cell Wireless** Communications Facilities	\$270.00 per attachment per year

Usage of owned or non-owned facilities the rights-of-way for purposes other than generating revenue or providing services to customers within the City.

\$3.00 per linear foot of Utility Facilities in the rights-of-way or a minimum annual fee of \$5,000.00, whichever is greater. The per-linear-foot fee and the minimum fee shall increase 3% annually on July 1<sup>st</sup> of each year, beginning July 1, 2022

“Gross Revenue” shall have the meaning defined in the Utility Services Ordinance.

**Section 6:** The annual attachment fee (excluding Small Cell Wireless Facilities) shall be \$5,000.00 per attachment. The attachment fee shall increase 3% annual on July 1<sup>st</sup> of each year, beginning on July 1, 2022 and

**Section 7:** The annual attachment fee for Small Cell Wireless Facilities shall be the fair market value of such attachments, but until the Federal Communications Commission September 26, 2018 small cell order is overturned, City staff are directed to establish what the reasonable approximation of costs for such attachment are, but it no case less than \$270.00 per attachment, per year.

\*Communications shall have the meaning defined in Woodburn’s Utility Service Ordinance and shall include telecommunication utilities, long distance providers, private networks, wireless, wireline, VoIP, ILEC, CLEC, inter and intrastate.

\*\*Small Cell Wireless Facilities shall have the meaning defined in Woodburn’s Utility Service Ordinance.

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

This resolution is effective on October 1, 2020.

ATTEST:

\_\_\_\_\_  
Mayor

APPROVED AS TO FORM:

\_\_\_\_\_  
City Recorder

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



2065 w. Riverstone drive ste. 105  
Coeur d'Alene, id 83814

o 509 344 1008  
f 509 344 1009

August 3, 2020

VIA USPS and ELECTRONIC MAIL

City Hall  
ATTN: Mayor Eric Swenson  
270 Montgomery Street  
Woodburn, Oregon 97071

With a copy to:  
ROW Consultants LLC  
ATTN: Reba Crocker  
E-Mail: [reba@rowmanagers.com](mailto:reba@rowmanagers.com)

RE: Proposed Adoption of Right-of-Way Ordinance

Dear Mayor Swenson:

As an attorney for Fatbeam, LLC ("Fatbeam"), it is my duty to protect Fatbeam's interest. It has come to my attention that the City of Woodburn (the "City") has decided to move forward with the adoption of a new Right-of-Way ("ROW") ordinance which will create a "substantial barrier to entry" for Fatbeam of the sell of its telecommunication services within the City, treat Fatbeam in a discriminatory manner, and create a fee that is not "fair and reasonable compensation . . . for use of public rights-of-way" under the Telecommunications Act, specifically 47 U.S.C. § 253.

As I am sure you are aware, in 1996 Congress made sweeping amendments to the Communications Act of 1934 ("Telecommunications Act"), 47 U.S.C. §§ 151 et seq., "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunication consumers and encourage the rapid deployment of new telecommunication technologies." Pub. L. No. 104-104 pmbl., 110 Stat. 56, 56; accord S. Rep. No. 104-230, at 1 (1996) (Conf. Rep.). Access to high speed fiber optic based services has been deemed an essential and critical service which has only become even more critical during this COVID pandemic.

Although the City has the absolute right to move to a ROW license instead of a franchise agreement, the City still has an obligation to treat all telecommunication providers in a competitively neutral and nondiscriminatory way. Under the Telecommunications Act, specifically 47 U.S.C. § 253(c), "a State or local government" may "manage the public rights-of-way" or "require fair and reasonable

compensation from telecommunications providers . . . for use of public rights-of-way” if the requirements operate “on a competitively neutral and nondiscriminatory basis” Id. § 253(c).

My understanding of the City's ordinance, and proposed use of the ROW license, is that a new telecommunications provider who is seeking entry into the City has to pay a large linear foot fee (\$3.00/foot) for its installation of conduit/facilities into the ROW, something no other telecommunications provider under an existing franchise agreement had to pay when it entered the Woodburn market.

A linear foot fee required for only new providers who wish to enter into the City is not competitively neutral and provides a barrier of entry into the City as every other competitor was able to build their network without paying a linear foot fee. All other telecommunications providers in the City received a Franchise Agreement which does not contain a linear foot fee on the construction of the network and instead provides a 7% fee on gross revenue (likely less than 7%, or a 0% for an ILEC/RBOC). Gross revenue only occurs after installation and is a fee Fatbeam also must pay, making the linear foot fee an additional fee only required for new providers in the City.

Section 253 entitled “Removal of Barriers to Entry,” provides: “No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any . . . telecommunications service.” 47 U.S.C. § 253(a). The Supreme Court has described this provision as “prohibit[ing] state and local regulation that impedes the provision of telecommunications service.” *Verizon Commc’ns, Inc. v. FCC*, 535 U.S. 467, 491 (2002) (internal quotation marks omitted). If “a State or local government . . . permit[s] or impose[s] any statute, regulation, or legal requirement that violates” this provision, Section 253(d) directs that “the Commission shall preempt the enforcement of” the offending requirement. 47 U.S.C. § 253(d).

Additionally, it is well-settled case law, 23-year-old decision known as California Payphone, that has been reaffirmed multiple times by the Federal Communication Commission (“FCC”), that a state or local measure has “the effect of prohibiting” service, in violation of Section 253, if it “materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.” [Small Cell Order](#) ¶¶ 16, 37– 42 (Chairman William Kennard, stated that, in determining whether a state or local law has the effect of prohibiting the provision of telecommunications services, it “consider[s] whether the ordinance materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.”<sup>17</sup> *California Payphone Ass’n*, 12 FCC Rcd 14191, 14206, para. 31 (1997) (*California Payphone*). The FCC specifically stated that this standard applies even when telecommunications providers are first deploying services. [Id.](#) ¶ 37.

The City's ROW license requirement of a linear foot fee is not competitively neutral and is a direct barrier to entry being imposed on Fatbeam. Additionally, multiple courts and the FCC have found that state or locality ordinances have the effect of prohibiting service when it demands fees for telecommunications deployments that exceed any reasonable approximation of the actual costs it must incur due to the ROW use.

Fatbeam's ROW License Linear Foot Fee owed to the City could be hundreds of thousands of dollars. It is hard for me to see how the City could assert that such a large sum, in addition to the gross revenue fee Fatbeam would pay once it started collecting revenue, is a fee related to the City's actual costs and therefore is "fair and reasonable compensation . . . for use of public rights-of-way" under Section 253(c), when no other existing telecommunications provider under a City Franchise Agreement has paid such a fee for installation of its facilities in the ROW. If paying a large linear foot fee for installation of facilities into the City's ROW represents the direct and actual cost the City will suffer, wouldn't every telecommunications provider who has ever installed facilities in the City's ROW have paid a linear foot fee?

Please feel free to contact me if you should have any questions.

Sincerely,

A handwritten signature in black ink that reads "Danielle Maves". The signature is written in a cursive style with a large initial "D".

Danielle Maves, Esq.

Attorney

720-374-2030

Danielle@MavesLaw.com

cc:

COMMENTS FROM PGE  
Received Aug. 7, 2020

## **UTILITY SERVICES ORDINANCE**

### **Section 1. Title.**

The ordinance will be known and may be referenced as the Utility Service Ordinance.

### **Section 2. Purpose and Intent.**

The purpose and intent of this Ordinance is to:

A. Permit and manage reasonable access to and use of 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;

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

C. 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, controlling, using or operating facilities therein or generate revenue for utility services;

D. Assure that all utility companies, persons and other entities owning, operating facilities, using facilities, or providing services within the City comply with the ordinances, rules and all regulations of the City heretofore or hereafter amended or adopted;

1. For the purposes of this Ordinance, all utility services owned or operated by the City are excluded.

2. For the purposes of this Ordinance, all utility services owned or operated by other municipalities are excluded.

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

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

1. Allow the City to enter into other or additional agreements with Utility Providers and Operators, if the public's interest is served, and to amend the requirement of this Ordinance and the City regulations, as new technology is developed;

2. Allow the City to be resilient and adaptive to changes in technology; and

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

### **Section 3. Jurisdiction and Management of the Public Rights-of-way.**

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

B. The City has jurisdiction and exercises regulatory management over each right-of-way whether the City has a fee, easement, or other legal interest in the right-of-way, and whether the legal interest in the right-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 right-of-way and does not obligate the City to maintain or repair any part of the right-of-way.

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

**Section 4. Regulatory Fees and Compensation Not a Tax.**

A. The fees and costs provided for in this Ordinance, and any compensation charged and paid for use of the rights-of-way and the provision of services provided for in this Ordinance, are separate from, and in addition to, any and all other federal, state, local, and City charges, including but not limited to: any permit fee, or any other generally applicable fees, tax, or charge on business, occupations, property, or income as may be levied, imposed, or due from a utility operator, utility provider, franchisee or licensee, 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 Ordinance 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 Ordinance are subject to applicable federal and state laws.

**Section 5. Definitions.**

For the purpose of this Ordinance the following terms, phrases, words and their derivations will have the meaning given herein. When not inconsistent with the context, words not defined herein will be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, and the Telecommunications Act. If not defined in those statutes, the words will be given their common and ordinary meaning. 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 1987, 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.

“Calendar year” means January 1 to December 31, unless otherwise noted.

“City” means the city of Woodburn, 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 Woodburn, Oregon.

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

“City standards” means the all ordinances, codes, regulations and rules of the City of Woodburn, in effect at the time of any work.

“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, and 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 rights-of-way or private communication system services that utilize the public rights-of-way only for the purposes of providing other utility services that are covered by this ordinance or franchise agreement; (4) public communications systems; (5) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (6) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

**Commented [CL1]:** PGE’s electric system requires the transmission of information since our metering system is wireless and many of our substations are remotely operated. We are not generating any gross revenue from these private communication systems/services though.

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

“Control” or “Use of Facilities” means actual working control over utility facilities in whatever manner exercised, whether or not the facility is owned. For example, but not limitation, Control means and includes leased capacity, transport, or any other use.

“Days” mean calendar days unless otherwise specified.

“Emergency” means a circumstance in which immediate work to repair damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.

“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.

“Gross Revenue” means any and all amounts, of any kind, nature or form, without deduction for expense, less net uncollectable, derived from the operation (including revenue derived from a leases or other agreements allowing use of facilities to other utility operators or providers), or use of utility facilities in the City, operation of a Communications Services or the provision of utility service(s) in the City, subject to all applicable limitations in federal or state law. Gross Revenues do not include proceeds from the sale of bonds, mortgages or other evidence of indebtedness, securities or stocks, any amounts collected from utility customers that are subsequently passed through to one or more third party entities pursuant to law or a tariff, or sales at wholesale by one public utility to another of electrical energy when the utility purchasing such electrical energy is not the ultimate customer. Gross Revenue also does not include revenue from joint pole use. For purposes of this Ordinance, revenue from joint pole use includes any revenue collected by a utility from other franchisees, permittees, or licensees of the City for the right to attach wires or cable to utility’s poles or places them in utility’s conduits. For purposes of this Ordinance, revenue from joint pole use does not include rental or other similar revenue collected by utility from other franchisees, permittees, or licensees of the City for the right to pole attachments for Small Cell Wireless Facilities.

**Commented [CL2]:** As we discussed on our call, we find that adding more specificity around the definition of Gross Revenue significantly reduces the cost both parties of administration and auditing the fees owed/paid to the City. This proposed language is borrowed from the recently passed Franchise in Tualatin.

“License” or “Utility License” means the authorization granted by the City to a utility operator or utility provider pursuant to this Ordinance.

“Licensee” or “Utility Licensee” means any person that has a valid Utility license issued by the City.

“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.

“Small Cell Wireless Facility” means Facilities owned or operated for the provision of communications that are shorter ranged, wireless systems affixed to a structure with generally smaller components than traditional Macro Wireless Facilities and are deployed where suitable in flexible configurations to provide capacity and coverage. Small Cell Wireless Facilities means a facility that meets each of the following conditions per 47 C.F.R § 1.6002(l), as may be amended or superseded:

- (1) The facilities (i) are mounted on structures 50 feet or less in height including the antennas, or (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or (iii) do not extend existing structures on which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and,
- (2) Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and,
- (3) All other wireless equipment associated with the structure, including wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and,
- (4) The facilities do not result in human exposure to radio frequency in excess of the applicable safety standards specified in 47 C.F.R. § 1.1307(b).

“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 Telecommunications Act of 1996 (47 U.S.C., 151 et seq.) and as hereafter amended.

“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 rights-of-way, 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, controls, operates or maintains a utility facility within the City.

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

“Utility service” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, or cable services, to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions and whether or not the facilities used for transmission are owned by the service provider.

“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.

**Section 6. Business Registration**

Business Registration Required. Every person that desires to use, operate or control utility facilities, or provide utility services to customers within the City will register with the City prior to use, operation, control of utility facilities, or providing any utility services to any customer in the City, in compliance with Ordinance No. 2399. Every person using, operating, controlling, or providing utility services to customers within the City as of the effective date of this Ordinance will obtain a Business Registration within thirty (30) days of the effective date of this Ordinance. Every person subject to this Ordinance will renew and maintain a Business Registration as required in Woodburn’s Ordinances that are heretofore or hereafter amended, at all times that the person, uses, operates, controls, provides or operates a utility services, to customers within the City.

**Section 7. Utility License.**

A. License Required.

Except those utility operators and utility providers with a valid franchise or other valid agreement from the City, every person will obtain a Utility License from the City prior to conducting any work in or use of the ROW, or providing utility services or communication services to or from customers within the City limits, or the transmission or provision of any of these services through the City whether or not customers within the City are served by those transmissions and whether or not the facilities used for transmission are owned by the service provider.

1. Every person that owns, or controls, provides utility services, or uses utility facilities in the rights-of-way as of the effective date of this Ordinance will apply for a Utility License from the City within thirty (30) days of the later of: (1) the effective date of this Ordinance, or (2) the expiration of a valid agreement granted by the City, unless a new agreement is granted by the City (3) for a person that is not a utility operator, providing utility services within the City.
2. The provisions of this section do not apply to any person subject to and in compliance with the cable television franchise requirement, except that subsection K will apply to the extent such person provides multiple services, subject to applicable law.

B. Utility License Application. The license application will be on a form provided by the City, and will be accompanied by any additional documents required by the application or the City, in the City's sole discretion, 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 provisioned, and other information necessary to determine the applicant's ability to comply with the terms of this Ordinance.

C. Utility License Application & Renewal Fee. The application and renewal application will be accompanied by a nonrefundable fee or deposit set by resolution of the City Council.

D. Determination by City. The City will issue, within a reasonable period of time, a written determination granting or denying the Utility License in whole or in part. If the Utility License is denied, the written determination will include the reasons for denial. The Utility License will be evaluated based upon the provisions of this Ordinance, the information contained on the Utility License application, the continuing capacity of the rights-of-way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.

E. Changes to information contained on the Utility License application. Within thirty (30) days of a change to the information contained in the license application, the Licensee will notify the City in writing of such change(s).

F. Franchise Agreements. If the public interest warrants, as determined by the City in its sole discretion, the City and any ~~communications~~ provider – including cable providers, utility operator or utility provider, excluding Small Cell wireless providers, may enter into a written franchise or

other agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this Ordinance, consistent with applicable state and federal law. The agreement may conflict with the terms of this Ordinance with the review and approval of City Council. The franchisee will be subject to the provisions of this Ordinance to the extent such provisions are not in conflict with the express provisions of any such franchise or agreement. In the event of a conflict between the express provisions of a franchise or other agreement and this Ordinance, the franchise or other agreement will control.

- ~~1. The provider requesting a franchise agreement will deposit a non-refundable fee, as set by resolution of the City Council before negotiations occur.~~

**Commented [CL3]:** This is a highly unusual requirement, something that no other City in our service territory has ever required. We view franchise agreements no different than any other commercial contact that we negotiate and enter into, whereby each party bears its own costs (usually just internal costs) associated with such negotiations. Our experience has been that the costs associated with negotiating our franchise agreements with Woodburn historically have been negligible and result in only minimal internal costs (for both parties). Perhaps a compromise would be to say "Unless otherwise agreed to in writing by the City, the provider requesting a franchise agreement will deposit..."

**G. Rights Granted.**

1. The Utility License granted hereunder will authorize and permit the licensee, subject to the provisions of the City regulations and ordinance and other applicable provisions of the City, state or federal law, in effect and as may be subsequently amended, to construct, place, maintain, upgrade, repair and operate, control or use utility facilities in the rights-of-way for the term of the license for the provision of utility service(s) authorized in the license. In the event the licensee offers different service(s) than those authorized in the license, the licensee will inform the City of such changes no later than thirty (30) days after the change.
2. Any Utility License granted pursuant to this Ordinance will not convey equitable or legal title in the rights-of-way and may not be assigned or transferred except as permitted in subsection L of this section.

Neither the issuance of the Utility License nor any provisions contained therein will 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.

**H. Term.** Subject to the termination provisions in subsection N of this section, the Utility License granted pursuant to this Ordinance will be effective as of the date it is issued by the City or the date services began, whichever comes first, and will have a term of five (5) calendar years beginning: (1) January 1<sup>st</sup> of the year in which the license took effect for licenses that took effect between January 1<sup>st</sup> and June 30<sup>th</sup>; or (2) January 1<sup>st</sup> of the year after the license took effect for licenses that become effective between July 1<sup>st</sup> and December 31<sup>st</sup>.

**I. Utility License Nonexclusive.** No license granted pursuant to this section will confer any exclusive right, privilege, license or franchise to occupy or use the rights-of-way 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 rights-of-way, 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 rights-of-way. Nothing in the license will be deemed to grant, convey, create, or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.

J. Reservation of City Rights. Nothing in the Utility License will be construed to prevent the City from grading, paving, repairing and/or altering any rights-of-way, 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 rights-of-way, public work, city utility, city improvement or city facility, except those providing utility services in competition with a licensee, licensee's facilities will be removed or relocated as provided in subsections C, D and E of Section 9, in a manner acceptable to the City and consistent with City standards, industry standard engineering and safety codes in effect at the time the work is required.

K. 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 Usage fee requirements of this Ordinance 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 Usage use fee, if any, owed to the City by another person using the utility operator's facilities.
2. A utility operator that provides or transmits more than one utility service to customers in the City may not be required to obtain a separate Utility License or franchise for each utility service, but is required to file separate reports, remittances and submit any Usage fees due for each service provided.

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

1. The proposed transferee or assignee is authorized under all applicable laws to own or operate the utility facilities and/or provide the utility service authorized under the license; 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 Utility Licensee requesting the transfer or assignment will fully cooperate with the City and provide requested documentation, as the City deems necessary, in the City's sole discretion, 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 will become responsible for fulfilling all obligations under the Utility License. A transfer or assignment of a license does not extend the term of the license.

M. Renewal. At least thirty (30) days, but no more than ninety (90) days prior to the expiration of a Utility License granted pursuant to this section, a licensee seeking renewal of its license will submit a license application to the City, including all information required in subsection B of this

section and applicable fees fee required in subsection C of this section. The City will review the application as required by subsection D of this section and grant or deny the license. If the City determines that the licensee is in violation of the terms of this Ordinance, or other City Ordinances, rules or regulations, 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 and/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.

N. Termination.

1. Revocation or Termination of a Utility License. The City may terminate or revoke the license granted pursuant to this Ordinance for any of the following reasons:
  - a. Violation of any of the provisions of this Ordinance;
  - b. Violation of any provision of the license;
  - c. Misrepresentation in a license application;
  - d. Failure to pay taxes, compensation, fees or costs due the City after final determination by the City, of the taxes, compensation, fees or costs;
  - e. Failure to restore the rights-of-way after construction as required by this Ordinance 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 rights-of-way; 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 and/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 will be considered:
  - a. The egregiousness of the misconduct;
  - b. The harm that resulted;
  - c. Whether the violation was intentional;
  - d. The Licensee's history of compliance; and/or
  - e. The Licensee's cooperation in discovering, admitting and/or curing the violation.
3. Notice and Cure. The City will give the Utility Licensee written notice of any apparent violations before terminating a Utility License. The notice will 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 Licensee to demonstrate that the Licensee has remained in compliance, that the Licensee 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 Licensee is in the process of curing a violation or noncompliance, the Licensee must demonstrate that it acted promptly and continues to actively work on compliance. If the Licensee does not respond or if the City determines that the Licensee's response is inadequate, the City may revoke and/or terminate the Utility License.

4. Termination by Utility Licensee. If a licensee ceases to be required to have a Utility License, as defined under this Ordinance, the licensee may terminate or surrender its license, with a thirty (30) day notice to the City. Licensee may reapply for a Utility License at any time. No refunds or credits will be given for licenses terminated by the licensee or the City.
  - a. Within thirty (30) days of surrendering a Utility License, the licensee will file a final remittance form with the City stating, “final remittance” and will remit any funds due.
  - b. Upon surrendering a Utility License, the licensee will file a written statement that it has removed, or will commence and diligently pursue removale within 60 days, any and all facilities from the City and no longer provides Utility Services, as defined in this ordinance.

**Commented [CL4]:** It would be technically impossible to remove our entire electric infrastructure in the entire City within 60 days. We also have a regulatory mandate to provide electric power to the residents and businesses in the City. Perhaps there is a process by which the parties could agree to a different schedule in this very remote circumstance.

### Section 8. Construction and Restoration.

A. Construction Codes. Utility facilities will be constructed, installed, operated, repaired and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including but not limited to the National Electrical Code and the National Electrical Safety Code and the City Standards, in effect at the time of the work. When a utility operator, utility provider or licensee, or any person acting on its behalf, does any work in or affecting the rights-of-way, the utility operator will, at its own expense, promptly restore the rights-of-way as directed by the City consistent with applicable city codes, rules and regulations, in effect at the time of the work. A utility operator, utility provider, licensee or other person acting on its behalf will use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person(s), vehicle or property by reason of such work in or affecting the rights of way or property.

#### B. Construction Permits.

1. Except in cases of emergency when obtaining a permit prior to commencing the work in the rights-of-way is impracticable, No person will perform any work on utility facilities within the rights-of-way without first obtaining all required permits. In cases of an emergency when obtaining a permit prior to commencing the work in the rights-of-way is impracticable, such person shall promptly obtain all requisite permits as soon as practicable. The City will 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, franchise agreement or other valid agreement (if applicable), required by this Ordinance, and all applicable fees have been paid. No permit is required for routine maintenance or repairs to customer service drops where such, repairs or maintenance do not require cutting, digging, or breaking of, or damage to, the right of way and do not result in closing or blocking any portion of the travel lane for vehicular traffic, bicycle lanes or sidewalks.

**Commented [CL5]:** There are emergency circumstances that require us to take immediate action prior to obtaining a permit to either prevent injury to people or property or to restore power (e.g., car accident that knocks over a pole, leaving a live wire laying across the street or an outage during an ice storm that leaves City offices closed).

### Section 9. Location of Facilities.

A. Location of Facilities. Unless otherwise agreed to in writing by the City:

1. All utility operators are required to make good faith effort to both cooperate with and coordinate their construction schedule with those of the City and other users.

2. Utility facilities will be installed underground in all areas of the City where there are no existing poles in the ROW, there is no space on existing poles in the ROW, or where the only poles in the ROW are used only for high voltage lines (as defined below). This requirement will not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts or to antennas, pedestals, cabinets or other above-ground equipment of any utility operator for which the utility operator had written authorization to place above-ground when such facilities were installed.

**Commented [CL6]:** Much of our authority to place these types of facilities above ground was granted through the past franchises. If the franchise expires, we would like assurances that those facilities are still in the proper location since they were authorized at the time of installation.

2. Whenever any existing electric utilities, cable facilities or communications facilities are located underground within the ROW of the City, the utility operator with permission to occupy the same ROW will install all new facilities underground at no cost to the City, unless otherwise agreed to in writing by the City. This requirement will not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts (“high voltage lines”) or to antennas, 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 at the time such equipment is installed.

**Commented [CL7]:** Other cities have wanted the discretion to help subsidize the costs of undergrounding in order to keep the costs to residents lower.

B. Interference with the Rights-of-Way. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the rights-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the rights-of-way. Utility facilities will not be located in area 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 rights-of-way will 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 will, at no cost to the City unless otherwise agreed to in writing by the City, temporarily or permanently remove, relocate, change or alter the position of any utility facility within the ROW, including relocation of aerial facilities underground, when requested to do so in writing by the City for a City project.

**Commented [CL8]:** Other cities have wanted to reserve the flexibility to agree to pay for certain relocation costs, in particular for forced undergrounding situations.

a. If relocation is required by the City, the City will bear no responsibility or incur any costs, to provide or in any way secure alternate locations.

2. Nothing herein will be deemed to preclude the utility operator from ~~requesting-seeking~~ reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements, provided that the utility operator will 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 may coordinate the schedule for relocation of utility facilities and based on such effort will 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, change, alter or underground any utility facility as requested by the City by the date reasonably established by the City, the utility operator will 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 an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

4. The City will cooperate with the utility operator in securing alternate locations. However, the City will bear no responsibility or costs for securing alternate locations. ~~The City will bear no responsibility to obtain, compensate, or otherwise assist the utility operator in relocation of its facilities to location not in the control of the City.~~

**Commented [CL9]:** "Otherwise assist" could be read to be in conflict with the cooperation obligation in the first sentence.

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 abandoned or unauthorized utility facility within the rights-of-way will, at its own expense, remove the facility and restore the affected area.
2. A utility system or facility is unauthorized under any of the following circumstances:
  - a. The utility facility, or any portion of the facility, is outside the scope of authority granted by the City under the Utility 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 twelve (12) consecutive months. 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 Ordinance.
  - d. The utility operator is in violation of a material provision of this Ordinance and fails to cure such violation within thirty (30) days of the City sending written notice of such violation ~~(or in the event the cure cannot be completed within thirty (30) days, the utility operator shall have commenced to cure and be diligently pursuing completion of such cure)~~, unless the City extends such time period in writing.

**Commented [CL10]:** Certain scopes of work may take longer than 30 days to complete.

E. Removal by City.

1. The City retains the right and privilege to cut or move any utility, without notice, as the City determines, at its sole discretion 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 practicable without impeding the City's response to the emergency. The City will use best efforts to provide the utility operator with notice prior to cutting or moving

facilities. If prior notice is not possible, the City will provide such notice as soon as reasonably practicable after resolution of the emergency.

2. If the utility operator fails to remove any facility when required to do so under this Ordinance and after receiving notice from the City, 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 will 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 will reimburse the City for the costs the City incurred within thirty (30) days. The obligation to remove will survive the termination of the license or franchise.
3. The City will not be liable to any utility operator for any damage to utility facilities, or for any incidental or 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 9 ~~or undergrounding its facilities as required by subsection A of Section 9, or~~ resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by ~~those subsections~~ this Section 9, unless such damage arises directly from the City's or its contractor's negligence or willful misconduct.

F. Engineering Record Drawings. The utility operator will provide the City with ~~two~~ a complete sets of record drawings in a form acceptable to the City showing the location of all its utility facilities after initial construction if such plan changed during construction. The utility operator will provide updated complete sets of as built plans upon request of the City, but not more than once per year.

G. Utility operator, Utility provider and Utility Licensee will provide, at no cost to the City, a comprehensive map showing the location of any facility in the City. Such map will 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 Utility Operator, Utility Provider and Utility Licensee will provide such map yearly by February 1.

#### Section 10. Leased Capacity.

A utility operator may lease capacity on or in its facilities to others, provided that the utility operator requires, through contract or otherwise, and has verified with the City, that the proposed lessor has obtained proper authority from the City prior to leasing capacity or allowing use of its facilities. Upon request, at no cost to the City, the utility operator will provide a complete list with the name, business address and contact information of any lessee. ~~If requested by the City, the utility operator will also provide exact details of any attachment by lessee.~~ A utility operator is not required to provide such information if disclosure is expressly prohibited by applicable law.

#### Section 11. Maintenance.

A. Every utility operator will install and maintain all facilities in a manner that complies with applicable federal, state and local laws, rules, regulations and policies. The utility operator will, at

**Commented [CL11]:** As more information, including drawings, move toward digital mediums, it seems redundant to require two copies and will likely bog down your systems to have duplicative digital copies.

**Commented [CL12]:** We require all of our pole attachees to make a legal representation to us in their contract with us that they have all required legal authority to operate. We also provide a list of all attachees on poles located in the City. We believe enforcement of this legal requirement should be the responsibility of the City.

**Commented [CL13]:** Just as PGE has an obligation under our franchise and under this ordinance to provide information about our facilities, we believe it is more appropriate for the City to seek this information from the owner/operator of each specific attachment (which they too are obligated under franchise or this ordinance to provide that information). Our information about attachments is often in flux and can be stale since the owner/operator is often the entity who is doing the work on that attachment itself rather than us.

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 an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

**Section 12. Vacation.**

If the City vacates any ROW, or portion thereof, that a utility operator uses, the utility operator will, at its own expense, remove its facilities from the ROW unless the City reserves a public utility easement, which the City will 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. If the utility operator fails to remove its facilities within thirty (30) days after a ROW is vacated (or if removal cannot be completed within thirty (30) days, utility operator fails to commence and diligently pursue completion of such removal), 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 state and federal safety laws and regulations at the utility operator's sole expense. Upon receipt of an invoice from the City, the utility operator will reimburse the City for the costs the City incurred within thirty (30) days.

**Section 13. Usage Fee.**

A. Except as set forth in subsection B of this section, every person that owns utility facilities in the City's rights-of-way and every person that uses or controls utility facilities in the City's rights-of-way to provide utility service, whether or not the person owns the utility facilities used to provision the utility services and every person that provides utility services within the City, will pay the usage fee for every utility service provided in the amount determined by resolution of the City Council.

B. A utility operator whose only facilities in the ROW are facilities mounted on above-ground 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 (other than equipment necessary to operate the mounted facilities that has been expressly approved by the City to be placed in the ROW), will pay the 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 will be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter and will be accompanied by information sufficient to illustrate the calculation of the amount payable.

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

D. Usage fee payments required by this section will be reduced by any franchise fees or privilege taxes, due to the City, but in no case will be less than zero dollars (\$0).

E. Unless otherwise agreed to in writing by the City, the Usage fee set forth in subsection A of this section will be paid quarterly, in arrears, within thirty (30) days after the end of each calendar quarter. Each payment will be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable (a remittance form will be provided by the City). The City may request and will be provided at no cost to the City, any additional reports or information it deems necessary, in its sole discretion, to ensure compliance by the utility provider, utility operator or licensee. Such information may include, but is not limited to: chart of accounts, total revenues by categories and dates, list of products and services, narrative documenting calculation, details on number of customers within the City limits, or any other information needed for the City to easily verify compliance.

F. The calculation of the Usage fee required by this section will 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, utility operators and licensee subject to this Ordinance. 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 Usage fees or any other fees required by this Ordinance

#### Section 14. ~~Penalties and Interest on Usage Fee~~

~~Penalties and interest~~ imposed by this section are in addition to any penalties that may be assessed under other ordinances or regulations of the City.

1. Any person who has not submitted the required remittance forms or remitted the correct fees when due as provided in Section 13 will pay ~~City a penalty listed below in addition to the amount due~~ interest on any past due amounts in the amount of nine percent (9%) per annum, or such maximum amount permitted by law:
  - a. ~~First occurrence during any one calendar year; Ten percent (10%) of the amount owed, or Twenty five dollars (\$25.00), whichever is greater.~~
  - b. ~~Second occurrence during any one calendar year; Fifteen percent (15%) of the amount owed, or Fifty dollars (\$50.00), whichever is greater.~~
  - c. ~~Third occurrence during any one calendar year; Twenty percent (20%) of the amount owed, or Seventy five dollars (\$75.00), whichever is greater.~~
  - d. ~~Fourth occurrence during any one calendar year; Twenty five percent (25%) of the amount owed, or One hundred dollars (\$100.00), whichever is greater.~~
2. If the City determines that the nonpayment of any remittance due under this section is due to fraud or intent to wrongfully evade the provisions hereof, ~~an additional~~ penalty of twenty-five percent (25%) of the amount owed, or Five hundred dollars (\$500.00), whichever is greater, will be added thereto in addition to other penalties stated in ~~s~~Section 14.

**Commented [CL14]:** We believe these penalties are excessive and likely unenforceable under Oregon law, in particular for unintentional wrongdoing. We suggest limiting the interest payments to the maximum interest permitted by Oregon law and rely on the penalty provision in subpart 2 and in Section 19.

3. ~~In addition to the penalties imposed, any person who fails to remit any fee when due as provided in Section 13 will pay interest at the rate of 1.5% per month or fractions thereof, without proration for portions of a month, on the total amount due (including penalties), from the date on which the remittance first became delinquent, until received by the City.~~

**Commented [CL15]:** We suggest one interest rate calculation for past due amounts.

4.3. Every penalty imposed, and ~~such~~ interest as it accrues under the provision of this section, will be merged with, and become part of, the fee required to be paid.

The City or its designee, in their sole discretion, will have the authority to reduce or waive the penalties and interest due under Section 14.

### Section 15. Audits and Records Requests.

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

1. Every Utility Licensee, Utility Operator and Utility Provider will furnish the City, at no cost to the City, with information sufficient to demonstrate compliance with all the requirements of this Ordinance, any franchise agreements or other agreements, if any, including but not limited to payment of any applicable Business Registration fee, licensing fee, usage fee, attachment fee, franchise fee or privilege taxes.
2. Every Utility Operator, Utility Provider and Utility Licensee will 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 or use of facilities, within the rights-of-way. Access will be provided within the City unless prior arrangement for access elsewhere has been made and approved by the City.

**Commented [CL16]:** For the safety and security of our electric system/grid, we cannot provide ALL information about our facilities. We will provide sufficient information to verify compliance with the ordinance/franchise though.

B. If the City's audit of the books, records and other documents or information of the Utility Licensee, Utility Operator or Utility Provider demonstrate that there has been underpaid the usage fee, licensing fee, attachment fee or franchise fee or any other fee or payment by two percent (2%) or more in any one (1) year, the licensee, utility operator, or utility provider will reimburse the City for the cost of the audit, in addition to any interest owed pursuant to Section 14 or as specified in other agreements or franchises with the City.

C. Any underpayment, including any interest or audit cost reimbursement, will be paid within thirty (30) days of the City's notice of such underpayment. Any overpayment will be credited toward the next quarterly payment owed to the City or in the event no payment is owed at the end of the next calendar quarter, City shall pay such amounts to the licensee, utility operator or utility provider within thirty (30) days after the end of such quarter.

D. The Licensee, Utility Provider or Utility Operator is not required to maintain records for more than ~~six-three (36)~~ years. The City is not required to maintain records beyond the State retention schedules.

**Section 16. Insurance and Indemnification.**

**A. Insurance.**

1. All utility operators will 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 (\$3,000,000.00) for property damage resulting from any one accident; and
    - iii. Three million dollars (\$3,000,000.00) for all other types of liability.
  - b. Commercial Automobile liability insurance for owned, non-owned 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.
  - c. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars (\$1,000,000.00).
  - d. If not otherwise included in the policies required by subsection a. above, maintain 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).
  - e. Utility operator may utilize primary and umbrella liability insurance policies to satisfy the preceding insurance policy limit requirements.
2. The limits of the insurance will be subject to statutory changes as to maximum limits of liability imposed on municipalities of the state of Oregon. The insurance will be without prejudice to coverage otherwise existing and will name, or the certificate of insurance will name, with the exception of worker's compensation, as additional insureds the City and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The insurance will not be canceled or materially altered without thirty (30) days prior written notice first being given to the City, and the certificate of insurance will include such an endorsement. If the insurance is canceled or materially altered, the utility operator will 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 will 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 will 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 Ordinance is effective, and as necessary thereafter, the utility operator will 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 Ordinance, including any costs, expenses, damages or loss the City pays or incurs because of any failure 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 under this Ordinance.

C. Indemnification.

Each utility licensee will ~~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 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 licensee or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, relocation 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 Ordinance or by a franchise agreement. The acceptance of a Utility license, or of a franchise granted by the City, will constitute such an agreement by the applicant whether the same is expressed or not, unless expressly stated otherwise in the license or franchise. Upon notification of any such claim the City will notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.

**Commented [CL17]:** The last sentence implies an option to defend rather than an obligation. The licensee would still be obligated to pay the costs of defense if it chose not to.

**Commented [CL18]:** We suggest consolidating paragraphs 1 and 2.

~~1. Every utility licensee will 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 licensee's failure to remove or relocate any of its facilities in a timely manner, unless the utility licensee's failure arises directly from the City's negligence or willful misconduct.~~

**Section 17. Compliance.**

Every Utility licensee, utility operator and utility provider will 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 Utility License granted under this Ordinance.

**Section 18. Confidential/Proprietary Information.**

If any person is required by this Ordinance 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 will 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 will 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.

**Section 19. Penalties.**

A. Any person found in violation of any of the provision of this Ordinance or the Utility License will 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 will be deemed to exist separately for each and every day during which a violation exists.

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

C. The City or its designee, in their sole discretion, will have the authority to reduce or waive the penalties and interest due under this subsection 19.

**Section 20. Severability and Preemption.**

A. The provisions of this Ordinance will be interpreted to be consistent with applicable federal and state law, and will 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 Ordinance 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 Ordinance will not be affected thereby but will be deemed as a separate, distinct and independent provision, and such holding will not affect the validity of the remaining portions hereof, and each remaining section, subsection, clause, phrase, term, provision, condition, covenant and portion of this Ordinance will 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 will be preempted only to the extent required by law and any portion not preempted will survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision will thereupon return to full force and effect and will thereafter be binding without further action by the City.

**Section 21. Application to Existing Agreements.**

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

**Commented [CL19]:** The scale of the penalties are significantly higher than we see in the majority of the cities in our service territory. \$500 is most common. This would be in addition to the penalties associated with intentional wrongdoing in Section 14.



August 10, 2020

*Via Email*

McKenzie Granum, Assistant City Attorney  
City of Woodburn  
270 Montgomery Street  
Woodburn, OR 97071  
*mckenzie.granum@ci.woodburn.or*

Reba Crocker  
ROW Consultants LLC  
*usreba@rowmanagers.com*

Re: Verizon Wireless Comments--Woodburn OR ROW Ordinance

Ms. Granum and Ms. Crocker-

Thank you for the opportunity to comment on the proposed ordinance on behalf of Verizon Wireless. We appreciate the city's work to update the right of way code to allow for small wireless facilities and to comply with federal law. There are, however, a number of concerning issues we identify below and would accept your Ms. Crocker's offer of a virtual meeting to work through them:

1. Section 2 B PURPOSE AND INTENT, encourages the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City and suggests that full cost recovery are priorities for the city. The fee schedule does not reflect these priorities. Percentage of gross revenue fees have been recognized as not being reflective of actual costs.<sup>1</sup> This purpose section also speaks to the purpose of the utility license to reimburse the city's costs associated with the use of the right of way. Requiring a license and fees for persons who are providing communications services without actually using the right of way lacks the appropriate nexus to justify the requirement.

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<sup>1</sup> Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018)(“Order”).

2. The term "attachment" is undefined in this ordinance. Verizon requests inclusion of this definition: "Attachment" means all of the physical components of a system or network, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plant, antennas, equipment, and other facilities, located within, under or above the ROW, any portion of which are used or designed to be used to deliver, transmit, or otherwise provide utility service.

3. Section 13 USAGE FEE --Section B--It is not clear why the city would be entitled to collect an attachment fee when an operator places equipment on ROW structures that are not owned by the city. The city is already made whole by the fees paid by the owner of the structure. It is also unclear in Section A as to whether a utility operator would pay both a right of way usage fee and an attachment fee. Verizon suggests that the city clarify that the utility operators that attach to city owned structures in the right of way and meet the criteria in Subsection B and will pay an attachment fee, and are not subject to the ROW Usage fee in Subsection A.

4. The city's fee schedule assesses a percentage of gross revenue fee for communications services other than small wireless facilities. The recent FCC Order specifically provides that gross revenue fees are not reflective of actual cost to the city for use of the right of way and that municipalities may not recover more than actual and reasonable costs for small wireless facilities in the right of way. Order at ¶170. Service and revenue cannot be broken down by type of equipment, so it would not be possible to calculate a gross revenue fee for macro sites only. Moreover, Verizon neither owns nor uses macro facilities in the right of way to provide communications services in Woodburn. To the extent that communications services are provided without use of any facilities within the right of way, there is no adequate nexus to assess a right of way use or license fee or to require a license.

5. Section 8 N (4) provides that there is no pro-rata refund of annual license fees in the event the operator terminates the license. This is an unearned windfall for the city and should be deleted.

August 11, 2020  
Page 3

Thank you again for the opportunity to weigh in on the proposed ordinance. We look forward to working with you to help develop an ordinance that makes the city whole, complies with all applicable federal and state law and allows for reasonable use of the right of way.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kim Allen', with a long horizontal stroke extending to the right.

Kim Allen, Wireless Policy Group  
On behalf of Verizon Wireless



August 11, 2020

McKenzie Granum, Assistant City Attorney  
City of Woodburn  
270 Montgomery Street  
Woodburn, OR 97071

SENT VIA EMAIL: [mckenzie.granum@ci.woodburn.or.us](mailto:mckenzie.granum@ci.woodburn.or.us)

Re: Small Wireless Facilities  
Draft Utility Licensing and Right-of-Way Usage Fees

Dear Ms. Granum:

New Cingular Wireless PCS, LLC (“AT&T”) appreciates the opportunity to comment on the draft utility licensing and right-of-way usage fees proposed to apply to communications services and wireless facilities, which the City of Woodburn (“City”) plans to take to public hearing on September 14, 2020.

AT&T supports the City’s efforts to update its wireless codes and fees for greater consistency with federal law – most notably, the 2018 Federal Communications Commission (“FCC”) Order<sup>1</sup> – as well as advancements in technology.

With regard to the City’s proposed utility licensing and right-of-way (“ROW”) usage fees, AT&T has numerous concerns.

Specifically, AT&T objects to the proposed assessment of ROW “usage” fees based on revenue from its wireless communication facilities located on private property. At this time, AT&T has no wireless facilities located in the City’s ROW, and the AT&T wireless facilities currently serving Woodburn citizens do not “use” the ROW under the proposed utility services ordinance or under commonly-understood principles.

Also of concern, the draft fee resolution states that the 7% fee will apply to “Communications (other than Small Cell Wireless Facilities).” As a practical matter, it is simply not possible to separate revenue derived from service provided by small wireless

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<sup>1</sup> *Accelerating Wireless and Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd 9088 (2018)(“Order”).

August 11, 2020

Page 2

facilities from other wireless service revenue. Among other issues, by their design, small wireless facilities typically add capacity to an area that is already covered; in other words, they are often installed to improve the *quality* of wireless service in an area, so the exception is practicably ineffective.

***AT&T is Not Currently “Using” the City’s ROW***

Because AT&T provides wireless service in the City through facilities located on private property, AT&T is not “using” the ROW for purposes of assessing a ROW usage fee.

AT&T does not “use” the ROW when it is merely a customer of other utilities. AT&T currently provides wireless “Communications Services,” as that term is defined in the draft utility services ordinance, within the City, but not yet via wireless facilities located in the ROW.

We understand the City’s ROW consultant to believe that a wireless service provider “uses” the ROW when it is a backhaul customer via fiber owned and operated by another service provider. To confirm, AT&T has not installed any fiber facilities within the City’s ROW to connect to its wireless facilities located on private property. Further, even if AT&T were to install small wireless facilities in the City’s ROW, AT&T’s practice has been to contract with a licensed fiber provider to bring fiber service to its wireless facilities. In other words, for its wireless facilities AT&T is the fiber provider’s customer, not a provider of communications service via fiber. The fiber provider will at all times remain the owner and operator of the fiber lines, and as such will be responsible for obtaining its own licenses, permits and approvals from the City for installation and operation of fiber within the City’s ROW and paying any relevant fees for usage of the City’s ROW. See Section 5 of draft fee resolution. Most of AT&T’s wireless facilities consume power provided through facilities laid in the ROW – would the City take the position that AT&T is “using” the ROW to provide wireless service because it is an electric customer?

AT&T does not “use” the ROW when it merely emits radio frequency (“RF”) waves that may cross a ROW. We understand the City’s ROW consultant has also advanced the opinion that a wireless provider “uses” the ROW any time its RF waves cross a ROW. We do not believe that the utility services ordinance supports such a position. Importantly, the purpose of the ordinance is to “conserve the limited *physical capacity*” of the ROW and reimburse the City for the “costs of granting and regulating access” from those entities “causing such costs.” Section 2. AT&T’s emission of RF waves over a

ROW does not impact the physical capacity of the ROW or add costs to the City's ROW management.

Finally, the City's consultant's view of the applicability of a ROW usage fee based on a percentage of revenue is contrary to AT&T's understanding of the League of Oregon Cities model utility ordinance. You will see in the Usage Fee section of the City's draft ordinance, Section 13(A)-(B), that the site-specific usage fee for a utility facility mounted on an above-ground structure within the ROW, when the structure is owned by another entity, is said to be an *exception* to otherwise applicable ROW fees based on a percentage of revenue. Section 13(A) ("*Except as set forth in subsection B of this section*").

### ***The 2018 FCC Order***

In 2018, the FCC addressed the limits imposed by Sections 253 and 332 of the Telecommunications Act<sup>2</sup> on a local jurisdiction's regulation of small wireless facility deployment.<sup>3</sup> The FCC concluded that ROW access fees and other fees violate Sections 253 or 332(c)(7) unless three conditions are met: (1) the fees are a reasonable approximation of the local government's costs, (2) only objectively reasonable costs are factored into those fees, and (3) the fees are no higher than the fees charged to similarly-situated competitors in similar situations.<sup>4</sup>

Specifically, Sections 253 and 332 bar local governments from imposing requirements that would prohibit or have the effect of prohibiting the ability of an entity to provide telecommunications service, although local governments are allowed to charge telecommunications providers "fair and reasonable compensation" for use of the ROW.<sup>5</sup>

Further, the FCC concluded "that an appropriate yardstick for 'fair and reasonable compensation,' and therefore an indicator of whether a fee violates Section 253(c), is whether it recovers a reasonable approximation of a state or local government's objectively reasonable costs of... maintaining the ROW... or processing an application or permit."<sup>6</sup> The FCC continued, "fees are only permitted to the extent they represent a reasonable approximation of the local government's objectively reasonable costs..."<sup>7</sup> otherwise, the fees violate Sections 253 and 332. ROW fees must be "*related to and*

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<sup>2</sup> 47 U.S.C. §§ 253, 337.

<sup>3</sup> *Id.*

<sup>4</sup> FCC Order, ¶ 50.

<sup>5</sup> 47 U.S.C. §253(c).

<sup>6</sup> FCC Order, ¶ 72 (citations omitted).

<sup>7</sup> *Id.*, ¶ 32, footnote 71.

August 11, 2020  
Page 4

*caused by*” the location of a small wireless facility and reflect the facility’s “*degree of actual use* of the public rights-of-way.”<sup>8</sup> The FCC *Order* set a presumptively reasonable recurring fee for small wireless facilities located in the right-of-way of \$270 per year, per facility.<sup>9</sup>

Moreover, the courts have specifically recognized that “gross revenue fees generally are not based on the costs associated with an entity’s use of the ROW, and where that is the case, are preempted under Section 253(a).”<sup>10</sup>

The extension of the proposed 7% communications fee to small wireless facilities, which would be the practical effect of the City’s proposal, is unlawful.

Finally, while the 2018 *Order* did not set a presumptively reasonable ROW fee for macrocell facilities, such fees must also meet the requirements of Sections 253 and 332.

We appreciate the City’s consideration of AT&T’s comments and for all of the efforts by the City’s leaders and staff to establish workable policies for the wireless industry, including AT&T, and the people living and working in the Woodburn community.

Thank you for your consideration of these comments.

Sincerely,



Meridee Pabst  
meridee.pabst@wirelesspolicy.com

cc: Reba Crocker, ROW Consultants LLC

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<sup>8</sup> Id. at footnote 131 (emphasis added).

<sup>9</sup> FCC *Order*, ¶ 79.

<sup>10</sup> Id., ¶ 70 (citations omitted).

# City of Woodburn Emergency Operations Center

August 24, 2020

# Goal of Emergency Management

- Ensure the safety and security of the residents of our community
- Provide resources and support for safe on-scene operations

# Why Do We Need An EOC?

- To facilitate the coordinated response by emergency management staff.
- To communicate with all levels of government, the private sector and the public.
- The EOC shall collect and disseminate, as well as store for future use, a variety of disaster-relevant information.

# EOC Universal Priorities

- Save Lives
- Stabilize the Incident
- Protect Property
- Protect the Environment

# EOC Activation

- Authority: Woodburn Emergency Management Ordinance #2315
- This authority is granted through ORS 401
- ORS 401.025 Defines **EMERGENCY** as: “any man-made or natural event or circumstance causing or threatening loss of life, injury to person or property, human suffering or financial loss”
- The authority to declare a state of emergency is delegated to the City Administrator. If the City Administrator is unable to act due to absence or incapacity, the Emergency Program Manager or Incident Commander may declare a State of Emergency

# National Incident Management System (NIMS)

- NIMS uses the Incident Command System (ICS)
- This provides:
  - Flexibility
  - Standardization
  - Unified Effort

# NIMS Common Framework

- Resource Management
  - Personnel
  - Equipment
  - Supplies
  - Teams
  - Facilities

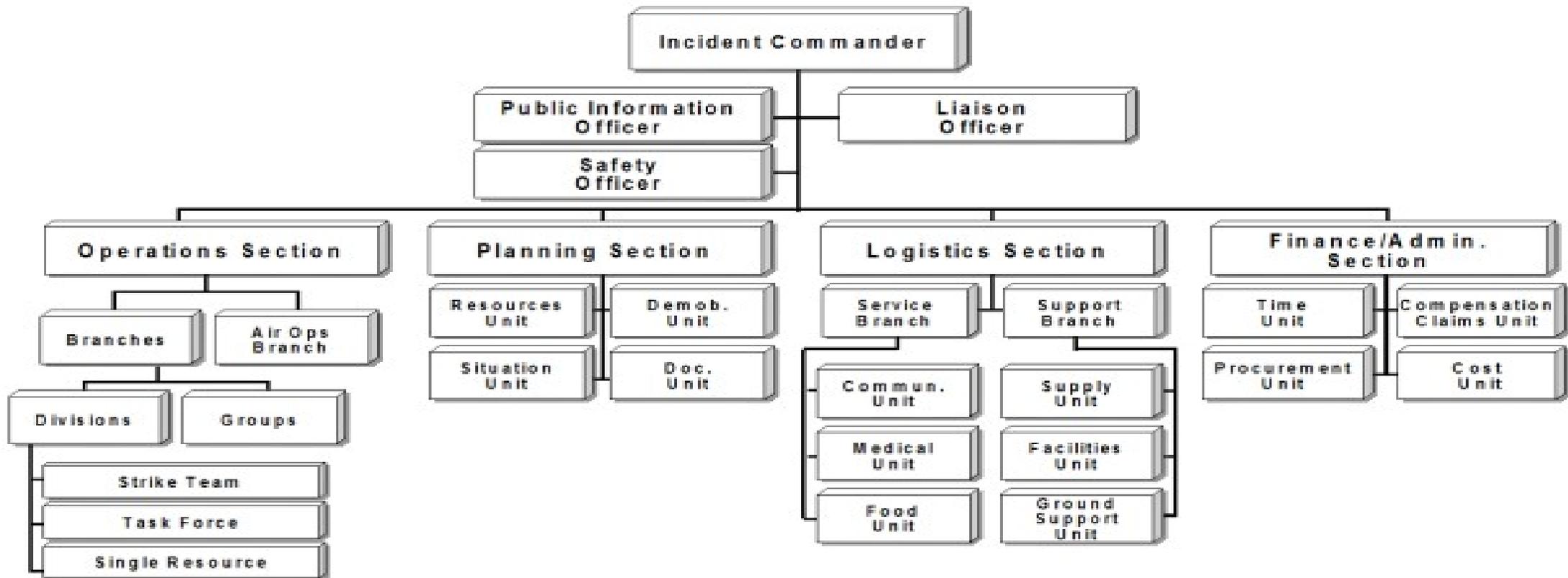
# NIMS Common Framework

- Command and Coordination Described
  - Leadership Roles
  - Processes
  - Organizational Structures
    - Operational Level
    - Coordinating and Supporting Level

# NIMS Common Framework

- Communication and Information Management
  - Ensures all personnel and other decision makers have the appropriate means and information needed to make and communicate decisions.

# ICS Basic Structure



## Area of Responsibility

- Tactical Activities On Scene
- Incident Support, coordination, resource acquisition, information gathering, analysis and sharing
- Policy guidance, senior-level decision making
- Outreach and communication with media and public

## NIMS Functional Group

- Incident Command Post
- Emergency Operations Center
- Policy Group
- PIO, Joint Information System (JIS)

# EOC Coordinates Operations

- Determine priorities/objectives for incident (Policy Group)
- Establish operational periods
- Assign and support operational requests
- Adjust budgets, policies, priorities to make resources available (Policy Group)
- Facilitate inter-agency decision making
- Coordinate inter-agency public information
- Locate/Acquire/deploy additional resources

# EOC Staffing

Incident Commander	Deputy Chief/Asst. City Manager/ Operations Division Commander/ CRD Commander/ WFD (Chief/Command Officer)/ Public Works Director
Operations Chief	Deputy Chief/ Operations Division Commander/ CRD Commander/ WFD Personnel
Law Enforcement	Operations Division Commander/ CRD Commander/ WPD Sergeant
Fire/EMS	WFD Personnel
Planning Logistics	Community Development Director/Finance Director/Transit Manager/H.R. Director
Legal	City Attorney/Assistant City Attorney
Public Works	Public Works Director/City Engineer
P.I.O.	Public Information Officer/Designee
Communications	METCOM Staff

# RESOURCES

- City of Woodburn
- Marion County Emergency Management
  - Equipment
  - Volunteer Groups
- Oregon Emergency Response System (OERS)
  - The purpose of the Oregon Emergency Response System (OERS) is to coordinate and manage state resources in response to natural and technological emergencies and civil unrest involving multi-jurisdictional cooperation between all levels of government and the private sector.
  - OERS is the primary point of contact by which any public agency provides the state notification of an emergency or disaster, or requests access to state or **FEDERAL** resources.