

Delete Chapter 7.12 (Franchises and Utility Privilege Tax Law)
Delete Chapter 7.14 (Utility License Law)

Exhibit A – Chapter 12.15

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12.15.010 Short Title.

The ordinance codified in this Chapter will be known and may be referenced as the "Utility Access to the Right-of-Way" ordinance.

12.15.020 Purpose and Intent.

The purpose and intent of this Chapter is to:

- A. Grant and manage reasonable access to the right-of-way, held in trust by the City, for utility purposes and to conserve the limited physical capacity of the right-of-way consistent with applicable state and federal law;
- B. Ensure that the City's current and ongoing costs of granting and managing access to and the use of the right-of-way 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, who have invested millions of dollars in public funds to build and maintain the right-of-way,

from persons who generate revenue by placing or using facilities in the right-of-way and charging residents for services delivered via those facilities;

- D. Ensure that all utility companies, persons and other entities owning or operating facilities or providing services within the City register and comply with the ordinances, rules and regulations of the City;
- E. Ensure that the City can continue to fairly and responsibly protect the public health, safety and welfare of its residents, and ensure the structural integrity of its right-of-way when a primary cause for the early and excessive deterioration of the right-of-way is its frequent excavation by persons whose facilities are located in the right-of-way;
- F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the City.

12.15.030 Definitions.

For the purposes of this Chapter the following terms, phrases, words and their derivations will have the meaning given below. 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 word "will" is mandatory and "may" is permissive.

- A. "Business License Appeals Board" means the board in Section 7.02.295 of the City Code.
- B. "Cable service" is 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.
- C. "City" means the City of Portland, an Oregon municipal corporation, and individuals authorized to act on the City's behalf.
- D. "City Council" means the elected governing body of the City.
- E. "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 services includes all forms of telephone services and voice, video, data or information transport, but does not include: (i) cable service; (ii) open video system service, as defined in 47 C.F.R. 76; (iii) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor; (iv) public communications systems; and (v)

direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

- F. "Director" means the director for the City's Office for Community Technology or any successor City bureau.
- G. "Fossil fuels" means petroleum products (such as crude oil and gasoline), coal, methanol and gaseous fuels (such as natural gas and propane) that are made from decayed plants and animals that lived millions of years ago and are used as a source of energy. Denatured ethanol and similar fuel additives with less than five percent (5%) fossil fuel content, biodiesel/renewable diesel with less than five percent (5%) fossil fuel content, and petroleum-based products used primarily for nonfuel uses (such as asphalt, plastics, lubricants, fertilizer, roofing and paints) are not fossil fuels.
- H. "Gross revenue" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectables, derived from the operation of utility facilities in the City, subject to all applicable limitations in state or federal law.
- I. "License" means the authorization granted by the City to a utility operator pursuant to this Chapter.
- J. "Office" means the Office for Community Technology or any successor City bureau, along with its employees and agents.
- K. "Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association, local service district, governmental entity or other organization, including any natural person or any other legal entity.
- L. "Pipeline system" means all pipeline facilities, together with pump stations, gathering lines and distribution facilities for the transportation of petroleum or petroleum products, including asphalt, aviation gasoline and distillate fuel oil, located in or below the right-of-way.
- M. "Public communications system" means any system owned or operated by a government entity or entities for their exclusive use for internal communications or communications with other government entities, and includes services provided by the State of Oregon pursuant to ORS 190.240 and 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.
- N. "Right-of-way" means and includes, but is not limited to, the surface of and the space above and below any street as defined in City Code Section 17.04.010,

road, alley or highway within the City, used or intended to be used by the general public, to the extent the City has the right to allow for their use.

- O. "State" means the State of Oregon.
- P. "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, plants, structures, equipment and other facilities, located within, under or above the right-of-way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service.
- Q. "Utility operator" or "operator" means any person who owns, places, operates or maintains a utility facility within the City.
- R. "Utility service" means the provision, by means of utility facilities permanently located within, under or above the right-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, wireless communications services, cable services, water, sewer or storm sewer, pipeline, public pay phones or other services to or from customers within the corporate boundaries of the City, or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.
- S. "Wireless communications facilities" means the equipment, and associated structures, needed to transmit or receive electromagnetic signals. A wireless communications facility typically includes antennas, supporting structures, enclosures or cabinets housing associated equipment or cable and may be attached to utility or City-owned structures or poles in the right-of-way. Wireless communications facilities also include strand-mounted devices and associated equipment.
- T. "Wireless communications services" means any wireless service using Federal Communications Commission-licensed or unlicensed spectrum including without limitation any personal wireless services, as defined in 47 U.S.C. § 332(c)(7)(C).
- U. "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.

12.15.040 Jurisdiction and Management of the Public Right-of-Way.

- A. The City has jurisdiction and exercises regulatory management over and controls access to all right-of-way within the City under authority of the City Charter and state 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 Chapter 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.

12.15.050 Regulatory Fees and Compensation Not a Tax.

- A. The fees and costs provided for in this Chapter, and any compensation charged and paid for use of the right-of-way provided for in this Chapter, are separate from, and in addition to, any and all other City, local, state and federal charges, including any permit fee, or any other generally applicable fee, tax or charge on the business, occupation, property or income, as may be levied, imposed or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery or transmission of utility services.
- B. The City has determined that any fee or tax provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees or taxes are not imposed on property or property owners.
- C. The fees and costs provided for in this Chapter are subject to applicable state and federal laws.

12.15.060 Administration.

- A. This Chapter will be administered by the Director. General management of the right-of-way will be administered by the Bureau of Transportation pursuant to City Code Title 17 and its accompanying rules, regulations and policies.
- B. The Director may adopt procedures, forms and written policies for administering this Chapter.
- C. Authority granted to the Director may be delegated, in writing, to employees or agents of the Office.

- D. The Director may, upon request, issue written interpretations of how this Chapter applies in general or to specific circumstances.
- E. Nothing in this Chapter precludes the informal disposition of controversy by the Director, in writing, whether by stipulation or agreed settlement.
- F. The Director may adopt rules relating to matters within the scope of this Chapter.
 - 1. Before adopting a new rule, the Director must notify interested parties and hold a public comment period. Such notice, which may be provided by mail or electronic means, such as posting on the Office's website, must be distributed at least two (2) weeks before the close of the public comment period. The notice must include instructions on how an interested party may comment on the proposed rule, a brief description of the subjects covered by the proposed rule and how to access the full text of the proposed rule.
 - 2. During the public comment period, the Director will receive written comments concerning the proposed rule. At the conclusion of the public comment period, the Director will either adopt the proposed rule, modify it or reject it, taking into consideration the comments received. If a substantial modification is made, an additional public comment period will be held. Unless otherwise stated, all rules are effective upon adoption by the Director. All rules adopted by the Director will be filed in the Office. Copies of all current rules will be posted on the Office's website and made available to the public upon request.
 - 3. Notwithstanding Subsections 1 and 2 above, the Director may adopt an interim rule without prior public notice upon a finding that failure to act promptly will result in serious prejudice to the public interest or the interest of the affected parties, stating the specific reasons for such prejudice. An interim rule adopted pursuant to this Subsection is effective for a period of not longer than one-hundred eighty (180) calendar days. The Director may extend the interim rule past the one-hundred eighty (180) calendar days for good cause, as determined in the Director's sole discretion.
- G. Specific Controls the General. If a conflict exists between two City Code provisions, one of them a general requirement and the other a specific requirement, the more specific requirement will operate as an exception to the general requirement regardless of the priority of enactment.

12.15.070 Registration.

- A. Registration Required. Every person who desires to provide utility services to customers within the City will register with the City prior to providing any utility services to any customer in the City. Every person providing utility services to

customers within the City as of the effective date of this Chapter will register within forty-five (45) calendar days of the effective date of this Chapter.

- B. Annual Registration. After registering with the City pursuant to Subsection A of this Section, the registrant will, by December 31 of each year, file with the City a new registration form if it intends to provide utility service at any time in the following calendar year. Registrants that file an initial registration pursuant to Subsection A of this Section on or after September 30 will not be required to file an annual registration until December 31 of the following year.
- C. Registration Application. The registration will be on a form provided by the City, and will be accompanied by any additional documents required by the City to identify the registrant and its legal status, describe the type of utility services provided or to be provided by the registrant and list the facilities over which the utility services will be provided. Failure to receive or secure a form will not relieve any person from the obligation to register and pay the associated fees under this Chapter.
- D. Registration Fee. Each application for registration will be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council sufficient to fully recover all of the City's costs of administering the registration program.

12.15.080 Licenses.

- A. License Required.
 - 1. Except those utility operators with a valid franchise agreement from the City, every person will obtain a license from the City prior to conducting any work in the right-of-way.
 - 2. Every person that owns or controls utility facilities in the right-of-way as of the effective date of this Chapter will apply for a license from the City within forty-five (45) calendar days of the later of: (i) the effective date of this Chapter, or (ii) the expiration of a valid franchise from the City, unless a new franchise is granted by the City pursuant to Subsection E of this Section.
- B. 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 City to identify the applicant and 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, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this Chapter.

- C. License Application Fee. The application will be accompanied by a nonrefundable application fee or deposit set by resolution of the City Council in an amount sufficient to fully recover all of the City's costs related to processing the application for the license.
- D. Determination by City. The City will issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is denied, the written determination will include the reasons for denial. The license will be evaluated based upon the provisions of this Chapter, the continuing capacity of the right-of-way to accommodate the applicant's proposed utility facilities and the applicable local, state and federal laws, rules, regulations and policies.
- E. Franchise Agreements. If the public interest warrants, the City and utility operator may enter into a written franchise agreement, or written interagency agreement if the utility operator is a City bureau, that includes terms that clarify, enhance, expand, waive or vary the provisions of this Chapter, consistent with applicable state and federal law. The franchise agreement may conflict with the terms of this Chapter with the review and approval of the City Council. The interagency agreement may conflict with the terms of this Chapter with the review and approval of the Director and the directors of bureaus who are parties to the agreement. The franchise agreement or interagency agreement will be subject to the provisions of this Chapter to the extent such provisions are not in conflict with the franchise agreement or interagency agreement. In the event of a conflict between the express provisions of an agreement and this Chapter, the agreement will control.
- F. Rights Granted.
1. The license will authorize the licensee, subject to the provisions of the City Code including without limitation Title 17, and applicable provisions of state or federal law, to construct, place, maintain and operate utility facilities in the right-of-way for the term of the license.
 2. Any license granted pursuant to this Chapter will not convey equitable or legal title in the right-of-way and may not be transferred or assigned except as authorized in Subsection K of this Section.
 3. Neither the issuance of the license nor any provisions contained in the license 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, as it may exist at the time the license is issued or thereafter obtained.

- G. Term. Subject to the termination provisions in Subsection N of this Section, the license granted pursuant to this Chapter will remain in effect for a term of five (5) years.
- H. License Nonexclusive. No license granted pursuant to this Section will confer any exclusive right, privilege, license or franchise to occupy or use the right-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 right-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 right-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.
- I. Reservation of City Rights. The City may, without charge, install and maintain City-owned streetlights, signs and equipment, including but not limited to government-owned wireless communications systems operated by the City and used for governmental infrastructure management, fire or police communications or internal government communications, to be attached to any utility operator's utility facilities. If applicable, these attachments will be subject to the requirements of the utility operator's tariffs on file with the Oregon Public Utility Commission. Whenever required by state or federal occupational safety and health laws or rules, the City will use qualified workers for all such work.
- J. Multiple Services.
1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and right-of-way access fee requirements of this Chapter for the portion of the facilities and extent of utility services delivered over those facilities. Nothing in this paragraph requires a utility operator to pay the registration, license or right-of-way access fee requirements owed to the City by a third party using the utility operator's facilities.
 2. A utility operator that provides or transmits more than one utility service over its facilities is not required to obtain a separate license or franchise for each utility service, provided that it gives notice to the City of each utility service provided or transmitted and pays the applicable right-of-way access fee for each utility service.
- K. Transfer or Assignment. Unless exempted by applicable state and federal laws, the 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 the proposed transferee or assignee is authorized under all applicable laws to

own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under state or federal laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee will become responsible for fulfilling all the obligations under the license with respect to all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license. The City's granting of consent in one instance will not render unnecessary any subsequent consent in any other instance. No transfer or assignment may occur until the successor transferee has provided proof of insurance pursuant to Section 12.15.120.

L. Leases and Sales of Utility Facilities.

1. Leases. The licensee will obtain the written consent of the City prior to leasing any portion of its utility facilities, which consent will not be unreasonably withheld, conditioned or delayed. However, the licensee may lease any portion of its utility facilities in the ordinary course of its business without otherwise obtaining the City's written consent, so long as the licensee remains solely responsible for locating, servicing, repairing, relocating or removing such portion of its utility facilities. A lessee of any portion of the licensee's utility facilities will not obtain any rights under this Chapter and will be required to register pursuant to Section 12.15.070. Upon written request from the City, a licensee will provide to the City the name and business address of any lessees of its utility facilities. A licensee is not required to provide such information if disclosure is prohibited by applicable law or a valid agreement between the licensee and the lessee, provided that the licensee takes reasonable steps to ensure that its lessees are in compliance with this Chapter.
2. Sales. A licensee may sell portions of its utility facilities in the ordinary course of its business, without otherwise obtaining the City's written consent, so long as the licensee complies with the following conditions:
 - a. The sale is to the holder of a current and valid franchise, license, permit or other similar right granted by the City;
 - b. Within fourteen (14) calendar days of the sale being executed and becoming final, the licensee will provide written notice to the City, describing the portions of the utility facilities sold by the licensee, identifying the purchaser of the utility facilities, the location of the utility facilities and providing an executed counterpart or certified copy of the sales documents;
 - c. The licensee remains solely responsible for locating, servicing, repairing, relocating, or removing its remaining utility facilities; and

- d. Within fourteen (14) calendar days of the sale being executed and becoming final, the purchaser of such utility facilities will file written notice to the City that it has assumed sole responsibility for locating, servicing, repairing, relocating or removing the purchased utility facilities under the purchaser's current and valid franchise, license, permit or other similar right granted by the City. The purchaser will not obtain any of the licensee's rights under this Chapter.
- M. **Renewal.** At least ninety (90), but no more than one-hundred eighty (180), calendar days prior to the expiration of a 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 the application 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 within ninety (90) calendar days of submission of the application. If the City determines that the licensee is in violation of the terms of this Chapter at the time it submits its application, the City may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the City, before the City will consider the application or grant the license. If the City requires the licensee to cure or submit a plan to cure a violation, the City will grant or deny the license application within ninety (90) calendar 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 License.** The Director may revoke or terminate a license granted pursuant to this Chapter for any of the following reasons:
 - a. Violation of any of the provisions of this Chapter;
 - b. Violation of any provision of a license;
 - c. Misrepresentation in a license application;
 - d. Failure to pay taxes, compensation, fees or costs due the City after final determination of the taxes, compensation, fees or costs;
 - e. Failure to restore the right-of-way after construction as required by City Code or other applicable local or state laws, ordinances, rules and regulations;
 - f. Failure to comply with technical, safety or engineering standards related to work in the right-of-way;

5. Removal of Utility Facilities. If the City has revoked or terminated a license or if a license has expired without being renewed or extended, all the utility operator's rights under the license will immediately cease and be divested. Thereafter, except as otherwise provided in writing by the Director, the utility operator will obtain permits and other permissions and at its own expense remove its utility facilities from the right-of-way and restore the right-of-way to the standards provided in applicable regulations of the City.

12.15.090 Utility-Specific Provisions.

A. Wireless Services.

1. Utility operators will comply with the design and aesthetic requirements for wireless communications facilities adopted by the Bureau of Transportation.
2. Collocation. Wireless communications facilities will be attached to poles and other infrastructure located within the right-of-way. Utility operators will allow and encourage providers of wireless communications services to collocate wireless communications facilities on poles and other infrastructure with existing wireless communications facilities.
3. Radio Frequency Emission Levels. All existing and proposed wireless communications facilities are prohibited from exceeding, or causing other wireless communications facilities to exceed, the radio frequency emission standards specified in 47 C.F.R. 76 § 1.1310.
4. Interference. A utility operator will install wireless communications facilities of the type and frequency that will not cause harmful interference that is measurable in accordance with then-existing industry standards to any equipment of the City that is operating within its licensed frequencies, if any. In the event any wireless communications facilities cause such interference, and after the City has notified the licensee of such interference by a written communication, the utility operator will take all reasonable steps necessary to correct and eliminate the interference including but not limited to powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of forty-eight (48) hours following notification, the City may require the utility operator to reduce power or cease operations until the utility operator can repair the interfering equipment. If, after a period of six (6) months, the utility operator is unable to fully eliminate the interference, the City may require the utility operator to relocate the equipment.

5. No diminution of light, air or signal transmission by any structure (whether or not erected by the City) will entitle a utility operator to any reduction of the right-of-way access fee, nor result in any liability to the City.

B. Pipeline Services.

1. Utility operators will operate in a manner that is consistent with City Code and Binding City Policy, including Resolution No. 37168, which prohibits additions or alterations to facilities that expands or increases the capacity to transport fossil fuels.
2. At any point during the term of a license, a licensee may seek to amend, alter or add to its pipeline system by filing with the City's Office for Community Technology a map showing such proposed changes. The Office will respond in writing with its approval, modifications or denial (and its reasoning for any modifications or denial) within forty-five (45) calendar days from receiving the proposal.

C. Public Pay Phones Services.

1. At the City's request, any utility operator providing public telephone service will:
 - a. Disable the ability of a specified public telephone to receive incoming calls;
 - b. Disable the ability of a specified public telephone to process telephone calls made to pagers;
 - c. Disable the total operation of a specified public telephone on a temporary basis to discourage unlawful activity; or
 - d. Relocate a specified public telephone on a temporary or permanent basis to discourage unlawful activity.
2. Removal of Public Telephones. The City, upon twenty (20) calendar days' written notice, may require a utility operator to remove or relocate any public telephone installed in the right-of-way. A utility operator will comply with applicable City Code and regulations to obtain permits and other permissions and may otherwise remove any public telephone after twenty (20) calendar days' written notice to the City; and may otherwise relocate any public telephones with the City's approval. When any telephone booth installed is removed or relocated, the utility operator will restore the location site to a condition satisfactory to the Bureau of Transportation. If the utility operator fails to remove any public telephone when required to do so, the City may remove the public telephone and will be reimbursed

for its full costs.

12.15.100 Right-of-Way Access Fee.

- A. Except as set forth in Subsection B of this Section, every person that owns utility facilities in the City and every person that uses utility facilities in the City to provide utility service, whether or not the person owns the utility facilities used to provide the utility services, will pay the right-of-way access fee for every utility service provided using the right-of-way in the amount determined by ordinance of the City Council.
- B. A utility operator whose only facilities in the right-of-way do not serve any customers within the corporate boundaries of the City will pay the linear per-foot fee set by City Council ordinance for those facilities. Unless otherwise agreed to in writing by the City, the fee will be paid annually, in advance, for each year during the term of the license by January 2 each calendar year, and will be accompanied by information sufficient to illustrate the calculation of the amount payable and on a form satisfactory to the Director. The utility operator will pay interest at a rate of 0.833 percent simple interest per month or a fraction of ten percent (10%) per year, computed from the original due date of the fee to the fifteenth (15th) day of the month following the date of payment.
- C. Right-of-way access fee payments required by this Section will be reduced by any franchise fee payments received by the City, but in no case will be less than zero dollars (\$0).
- D. Unless otherwise agreed to in writing by the City, the fee set forth in Subsection A of this Section will be paid quarterly, in arrears, for each quarter during the term of the license within forty-five (45) calendar days after the end of each calendar quarter, will be accompanied by an accounting of gross revenue, if applicable, and a calculation of the amount payable, and be in a form satisfactory to the Director. For any payment made after the due date, the utility operator will pay interest at a rate of 0.833 percent simple interest per month or a fraction of ten percent (10%) per year, computed from the original due date of the fee to the fifteenth (15th) day of the month following the date of payment.
- E. The calculation of the right-of-way access fee required by this Section will be subject to all applicable limitations imposed by state or federal law.
- F. The City reserves the right to enact other fees and taxes applicable to the utility operators subject to this Chapter. Unless expressly authorized by the City in enacting such fee or tax, or required by applicable state or federal law, no utility operator may deduct, offset or otherwise reduce or avoid the obligation to pay any lawfully enacted fees or taxes based on the payment of the right-of-way access fee or any other fees required by this Chapter.

- H. Interest amounts properly assessed in accordance with this Section may only be reduced or waived by the Director for good cause, according to and consistent with written policies.
- I. No Accord. The City's acceptance of payment will not be construed as an accord that the amount paid is, in fact, the correct amount, nor as a release of any claim the City may have for further or additional sums payable.

12.15.110 Audits.

- A. Payment of the right-of-way access fee under this Chapter will be subject to audit for compliance with the requirements of this Chapter. The Director may determine the audit's scope, provided that the audit will be limited to fees due during a three (3) year period prior to the date of the City's written request under this Section.
- B. Within thirty (30) calendar days of a written request from the City, or as otherwise agreed to in writing by the City:
 - 1. Every utility operator will furnish the City with information sufficient to demonstrate that the operator is in compliance with all the requirements of this Chapter, and its franchise agreement, if any, including but not limited to payment of any applicable license or registration fee, right-of-way access fee or franchise fee.
 - 2. Every utility operator 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 within the right-of-way. Access will be provided within the City unless prior arrangement for access elsewhere has been made with the City.
 - 3. If any utility operator fails, refuses or neglects to provide or make records available to the Director for determining the amount of fees due or payable, the Director may determine the amount of the fees due or payable based upon readily-available facts and information. The Director will notify the utility operator in writing of the amount of such fee so determined, together with any penalty or interest due. The total of such amounts will become immediately due and payable.
 - 4. Final audit determinations appealable to the Business License Appeals Board using the process set forth in City Code Section 7.02.290. The utility operator must file an appeal within thirty (30) calendar days of the date of the final audit determination letter. In such an appeal, the utility

operator will have the burden of establishing that the Director's determination is incorrect, either in whole or in part.

5. The filing of any notice of appeal to the Business License Appeals Board will not stay the effectiveness of the Director's determination unless the Business License Appeals Board so directs.
- C. Any underpayment, including any interest, will be paid within thirty (30) calendar days of the City's notice to the utility operator of such underpayment.
- D. Penalties. A penalty of five percent (5%) of any underpayment will be due within forty-five (45) calendar days of written notice from the City, if the City's review of payments under this Chapter discloses that a utility operator has paid ninety percent (90%) or less of the principal amount owing for the period under review.

12.15.120 Insurance and Indemnification.

- A. Insurance. Work will not commence until all insurance requirements listed below have been met and certificates have been approved by the City Attorney and filed with the City Auditor. All required insurance must be issued by companies or financial institutions with an AM Best rating of A- or better and dully authorized to do business in the State of Oregon.
 1. Insurance Certificate. As evidence of the required insurance coverage, a utility operator will furnish compliant insurance certificates, including required endorsements, to the City. The certificates will list the City as a Certificate Holder. There will be no cancellation of the insurance without thirty (30) calendar days' prior written notice to the City. If the insurance is cancelled or terminated prior to the end of a license, the utility operator will provide a new policy with the required coverage. Failure to maintain insurance as required may be considered a breach of the license.
 2. Additional Insureds. The coverage will apply as to claims between insureds on the policy. The insurance will be without prejudice to other coverage. For liability coverage, the insurance certificate will list the City as a Certificate Holder and include as additional insureds "the City of Portland, Oregon and its officers, employees and agents" and an endorsement to the liability policy will confirm the listing of the City as an additional insured. Notwithstanding the listing of additional insureds, the insurance will protect each additional insured in the same manner as though a separate policy had been issued to each, but nothing herein will operate to increase the insurer's liability as set forth elsewhere in the policy beyond the amount or amounts for which the insurer would have been liable if only one person or interest had been named as insured.

3. Insurance Costs. The utility operator will be financially responsible for all pertinent deductibles, self-insured retentions or self-insurance.
4. Required Coverage. The limits provided below will be subject to any changes as to the maximum limits imposed on municipalities of the State of Oregon by Oregon state law during the term of a license.
 - a. Commercial General Liability. A utility operator will provide and maintain commercial general liability and property damage insurance in the amount of \$2,000,000 (two million dollars) per occurrence, and aggregate limit of \$4,000,000 (four million dollars) that protects the utility operator and the City and its officers, employees and agents from any and all claims, demands, actions and suits for damage to property or personal injury arising from the utility operator's work under this Chapter.
 - b. Automobile Liability. A utility operator will carry automobile liability insurance with a combined single limit of \$1,000,000 (one million dollars) each occurrence, and an umbrella or excess liability coverage of \$2,000,000 (two million dollars), for bodily injury and property damage. The insurance will include coverage for any damages or injuries arising out of the use of automobiles or other motor vehicles by the utility operator.
 - c. Workers' Compensation. A utility operator will comply with the workers' compensation law, ORS Chapter 656, as it may be amended. If required, a utility operator will maintain coverage for all subject workers as defined by ORS Chapter 656 and will maintain a current, valid certificate of workers' compensation insurance on file with the City Auditor for the entire period during which work is performed under a license.

B. Indemnification.

1. To the fullest extent permitted by law, each utility operator will defend, indemnify and hold harmless the City and its officers, employees and agents from and against any and all liability, causes of action, claims, damages, losses, judgments and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failure to act or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors or lessees in the construction, operation, maintenance, repair or removal of its facilities, and in providing

or offering utility services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this Chapter or by a franchise agreement. The acceptance of a license under Section 12.15.080 of this Chapter will constitute such an agreement by the applicant whether the same is expressed or not. 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 operator 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 operator's failure to remove or relocate any of its facilities in the right-of-way or easements in a timely manner, unless the utility operator's failure arises directly from the City's negligence or willful misconduct.
3. Every utility operator will also forever indemnify the City and its officers, employees and agents from and against any claims, costs and expenses of any kind, whether direct or indirect, or pursuant to any state or federal law, statute, regulation or order, for the removal or remediation of any leaks, spills, contamination or residues of hazardous substances directly attributable to the utility operator's work in the right-of-way. Hazardous substances will have the meaning given by ORS 465.200(16).

12.15.130 Financial Assurance.

- A. Unless otherwise agreed to in writing by the City, before a franchise granted or a license issued pursuant to this Chapter is effective, and as necessary thereafter, the utility operator will provide a financial assurance, such as a performance bond or other security, in a form acceptable to the City, as security for the full and complete performance of the franchise or license, and for compliance with the terms of this Chapter, including any costs, expenses, damages or loss to the City because of any failure attributable to the utility operator to comply with this Chapter and accompanying ordinances, resolutions, rules, regulations or policies. The utility operator will also provide, upon request, written evidence of payment of the required premium.
- B. The amount of such financial assurance will be in an amount of one-hundred thousand dollars (\$100,000). A utility operator will immediately replace or replenish to the full amount any draw-down of the financial assurance by the City. The financial assurance will be in effect until the later of: (i) termination of a franchise or license; or (ii) removal of all or part of a utility operator's utility facilities. This obligation is in addition to any performance guarantees required by applicable City Code and regulations.
- C. The financial assurance will contain a provision that it will not be terminated or otherwise allowed to expire without thirty (30) calendar days' prior written notice

first being given to the City. The financial assurance is subject to review and approval by the City Attorney.

- D. In no event will the City exercise its rights under the financial assurance if a bona fide, good-faith dispute exists between the City and a utility operator.

12.15.140 Compliance.

- A. Every utility operator will comply with all applicable state and federal laws and regulations, including regulations of any administrative agency, as well as all applicable ordinances, resolutions, rules, regulations and binding policies of the City, heretofore or hereafter adopted or established during the term of any license granted under this Chapter.
- B. No utility operator will be relieved of its obligations to comply promptly with this Chapter by reason of any failure of the City to enforce prompt compliance. The City's failure to enforce will not constitute a waiver of any term, condition or obligation imposed upon the utility operator, nor a waiver of rights by the City or acquiescence in the utility operator's conduct. The acts or omissions of affiliates are not beyond the utility operator's control, and the knowledge of affiliates will be imputed to the utility operator.
- C. The Director will have authority to issue an administrative subpoena for the purpose of collecting any information necessary to enforce any provision of this Chapter.

12.15.150 Confidential/Proprietary Information.

If any person is required by this Chapter to provide maps, records, books, diagrams, plans or other documents to the City that the person reasonably believes to be confidential or proprietary, the City will take reasonable steps to protect the confidential or proprietary nature of the documents to the extent authorized by the Oregon Public Records Law, provided that all documents are clearly marked as confidential by the person at the time of disclosure to the City. The City will not be required to incur any costs to protect such documents, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

12.15.160 Equal Employment Opportunity/Affirmative Action/Minority Business Enterprises.

- A. The utility operator will fully comply with the equal employment opportunity requirements of local, state and federal law, and, in particular, Federal Communications Commission (FCC) rules and regulations relating thereto. Upon request by the City, a utility operator will furnish the City a copy of the utility operator's annual statistical report filed with the FCC, if applicable, along with proof of the utility operator's annual certification of compliance.

The utility operator will immediately notify the City in the event the utility operator is at any time determined to be out of compliance with FCC rules or regulations.

- B. The utility operator will maintain a policy that all employment decisions, practices and procedures are based on merit and ability without discrimination on the basis of an individual's race, color, religion or nonreligion, age, sex, gender identity, national origin, sexual orientation, limited English proficiency, marital status, family status or physical or mental disability. The utility operator's policy will apply to all employment actions including advertising, recruiting, hiring, promotion, transfer, remuneration, selection for training, company benefits, disciplinary action, lay-off and termination.
- C. Affirmative Action. The utility operator will carry out its equal employment opportunity policy by making a determined and good-faith effort at affirmative action to employ and advance in employment women, minorities and the physically and mentally disabled.
- D. Minority and Female Business Enterprises. The utility operator will make determined and good-faith efforts to use minority and female business enterprises in its contracted expenditures including without limitation contracts for the acquisition of goods, services, materials, supplies and equipment used in the construction, maintenance and operation of its utility service system. If directed by the City, the utility operator will participate in the City's Minority and Female Business Enterprise Certification Program.

12.15.170 Penalties.

- A. The City will give the utility operator written notice of any violations and provide a reasonable time (no less than twenty (20) and no more than forty (40) calendar days) for the utility operator to remedy the violations. If the Director determines the utility operator is guilty of violating any of the provisions of this Chapter or the license after the time to remedy has passed, the Director will consider the standards found in Subsection C of this Section and: (i) issue a hold on any permit applications filed by the utility operator for work in the right-of-way; (ii) fine the utility operator not less than one hundred dollars (\$100) nor more than one thousand dollars (\$1,000) for each offense; or (iii) both (i) and (ii). A separate and distinct offense will be deemed committed each day on which a violation occurs or continues.
- B. Violations of this Chapter include but are not limited to:

1. Any failure to file a registration or license application at the time required under this Chapter or to promptly update registration or license information;
 2. Any failure to pay the right-of-way access fee when due;
 3. Any failure to file the documentation required to accompany the right-of-way access fee;
 4. Any failure to provide or make available all maps, records, books, diagrams, plans or other documents maintained by the utility operator with respect to its utility services and facilities within the right-of-way;
 5. Any repeated failure to comply with this Chapter; and
 6. Any false statement on any registration or license application, on any documentation required to accompany the right-of-way fee, or in response to any audit or compliance investigation conducted under this Chapter.
- C. In assessing civil penalties under this Section, the Director will produce a written decision identifying the violation, the amount of the penalty and the basis for the decision. In making such determination, the Director will consider the following criteria:
1. The extent and nature of the violation;
 2. Any impacts to the City or the general public resulting from the violation;
 3. Whether the violation was repeated and continuous, or isolated and temporary;
 4. Whether the violation appeared willful or negligent;
 5. The City's costs of investigating the violation and correcting or attempting to correct the violation; and
 6. Any other factors the Director deems relevant.
- D. The Director may reduce or waive any civil penalty for good cause, according to and consistent with written policies.
- E. Except as provided in Section 12.15.110 B.4., a determination made by the Director is a quasi-judicial decision and is not appealable to the City Council. Appeals from any determination made by the Director will be solely and exclusively by writ of review to the Circuit Court of Multnomah County, as provided in ORS 34.010 to 34.100.

- F. Nothing in this Chapter will be construed as limiting any judicial or other remedy the City may have at law or in equity for enforcement of this Chapter.

12.15.180 Enforcement.

In addition to other enforcement authority, upon written approval of the Commissioner in Charge, the Director may have the City Attorney institute legal proceedings to enforce this Chapter or any determinations made by the Director under this Chapter.

12.15.190 Severability and Preemption.

- A. The provisions of this Chapter will be interpreted to be consistent with applicable state and federal law, and will be interpreted, to the extent possible, to cover only matters not preempted by state or federal law.
- B. If any article, Section, Subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this Chapter 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 article, Section, Subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter will be valid and enforceable to the fullest extent authorized by law. In the event any provision is preempted by state or federal laws, rules, regulations or decision, the provision will be preempted only to the extent required by law and any portion not preempted will survive. If any preemptive state or federal law is later repealed, rescinded, amended or otherwise changed to end the preemption, such provision of this Chapter will thereupon return to full force and effect and will thereafter be binding without further action by the City.

12.15.200 Application to Existing Agreements.

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