

ROW Code section from 1st Draft, 2nd draft section in Red	Summary of issue	Issue/Concern	OCT Response	Changes or edits to documents
12.15.020	Authority and administration	The City, in Section 12.15.20 attempts to expand its taxation powers beyond the taxation of revenue without authority or justification. Under the City's proposed ordinance, it would be seeking to tax these public purpose charges twice – first when the public purpose charges are collected from utility customers and again when those funds are used to pay utility bills.	The ROW access fee is not a tax. The proposed code is within the city's authority.	None required
12.15.030.E	Definition of "Communications Services"	Communications Service definition conflicts with the Telecommunications Act of 1996 and the Oregon Revised Statutes. The City's attempt to expand the definition beyond that required by the Federal and State laws conflicts with the jurisdiction of both the FCC and the OPUC. As written, the language could be interpreted to require electric utilities to obtain two separate licenses because its internal communication services [i.e., Advanced Metering Infrastructure, or AMI] are utilized during the provision of electric services. See 12.15.080 Section J(2).	The city is not restricted to defining "communications services" to be congruent with the Telecommunications Act or Oregon state law. There should not be any "revenue" earned from internal communications, therefore there would be no fee imposed. Two separate licenses would not be required as one license would cover and include all services.	Added definition "Public communication system".
12.15.030.H	Definition of "Gross revenues" and Gross revenues/transparency	The broad and ambiguous definition what "gross revenue" covers in the proposed Ordinance belies the City's purported goal of administrative efficiency and instead reveals its purpose of revenue generation. The proposed ROW ordinance appears to be intended to massively increase City revenues on the backs of customers. Draft [code] does not define "gross revenues" and instead leaves that definition to a separate set of administrative rules that have not been released. Gross revenue definition conflicts with Oregon Revised Statutes (ORS 759.005(9)(a))	The city's intent is to streamline its efforts, treat all entities equally. The city is not imposing any fees on the residents. If an entity passes the fees onto its customers, that is a decision made by the provider, not the City. Gross Revenue is clearly defined in the administrative rules and is not in conflict with the ORS.	None required
12.15.030.N 12.15.030.Q	Definition of "right-of-way"	Streamline definition of "right-of-way" definition in code §12.15.030.N. As drafted, it does not really define the term, not only because it contains the qualifier "includes, but is not limited to" (words that should be deleted), but also because it merely defines the term by cross-reference, first to the definition of the term "street" in City Code section 17.04.010, which in turn cross-references to the City Charter, apparently to the definition of "street" in Charter §9-101.	This is the city of Portland's definition as defined by City code and Charter. This definition is consistent with other municipalities.	None required
12.15.030.S 12.15.030.X	Definition of "wireless communications service"	"Communication Services" definition, this definition should clarify that data and information transport to support the provision of electric service (e.g., Advanced Metering Infrastructure (AMI) system) is not considered "Wireless communication services" for purposes of the ordinance. As written, the language could be interpreted to require electric utilities to obtain two separate licenses because its internal communication services are utilized during the provision of electric services. See 12.15.080 Section J(2).	The services described are Wireless and Communication services, however, there should not be any "revenue" earned from internal communications, therefore there would be no fee imposed. Two separate licenses would not be required as one license would cover and include all services.	None required
12.15.050	Preemption	Right of Way fee conflicts with taxation limitations on telecommunications utilities in the Oregon Revised Statutes (ORS 221.515, ORS 403.105). The proposed rule assesses a right of way fee upon gross revenue but specifies the fee is not a tax.	ORS 221.515 is a privilege tax limitation, this is not a tax and thus doesn't apply.	None required
12.15.060	Rule making authority	Section 12.15.060 describes broad rule-making authority, etc. What is the intended scope of rule-making authority vs. what will need to go to Council for approval?	What is proposed is similar to OCT's existing rule making authority. The City has full confidence in the decision making abilities of its staff. Council will approve the authority levels described in the documents.	None required
12.15.060.C 12.15.060F	Authority and administration	The changes appear designed to collect revenue, with unelected city staff able to do significant rulemaking to effectuate and change substantive rights with no public process. See Proposed Ordinance § 12.15.060.C, F (1)-(2) (allowing staff or agents to adopt rules by posting a notice on the City website and waiting two weeks)	What is proposed is similar to OCT's existing rule making authority. The City has full confidence in the decision making abilities of its staff. Council will approve the authority levels described in the documents.	None required

12.15.070 12.15.70.B 12.15.70.C	Registration	An annual registration requirement in Proposed Ordinance § 12.15.070 seems particularly inefficient and at odds with the City's purported aims of easier administration for energy utilities given our long histories of serving Portland residents and businesses. Listing "the facilities over which the utility services will be provided" is not administratively practical. Further, the requirement is vague	The annual registration is applied to all entities, not just energy providers. It is necessary as often times the information changes and the city is not informed. This will only be required, if there are changes. The "list" of facilities will be in the form of a GIS Map, see section 12.15.080.A.3	None required
12.15.080.G	Length of franchise/license	10-year franchises provide stability and predictability to the rates that companies using the ROW pay the City. This enables service providers to know an important part of their cost structure and to utilize that information in setting rates for services and making other financial decisions.	Technology and laws can change rapidly; having 10-year terms makes it difficult for the city to respond.	None required
12.15.080.I	Reservation of rights	Section 12.15.080(I) appears to reserve to the City broad rights to attach its facilities, including wireless facilities, to poles owned by utility providers, without charge. What is the scope of facilities the City intends to attach to others' poles? What is the process for a pole owner to demonstrate that such attachment is not feasible, etc.?	The City is reviewing this requirement for possible deletion	Under review.
12.15.080.L	Leases and sales of utility facilities and Sales	This is not workable in the context of joint pole use and may be preempted by state law to the extent it attempts to require City authorization for joint pole use and attempts to define the obligations and liabilities of owners and users of jointly used poles. This requirement is administratively burdensome because it could extend to a utility's scrap/recycle contracts for equipment or sale of vintage used equipment. State law requires that utilities report significant utility asset sales to the OPUC and those reports, are public documents. The requirement that the purchaser also notify the City under subpart d is administratively burdensome and unnecessary. Leases and Sales of Utility Facilities conflicts with municipal authority over telecommunications utilities in Oregon Revised Statutes (ORS 759.375) Furthermore, telecommunications utilities are required by the federal Telecommunications Act of 1996 to lease portions of facilities to other providers. These leases are approved by and recorded at the OPUC. City involvement in this process would infringe directly on the OPUC's statutory authority, and could be construed as a barrier to entry under 47 USC §253	Authorization from the city is not pre-empted, as the pole is within the City's ROW and under its authority. The City has the right and duty to know who owns and is responsible for any facilities within the city. This requirement does not infringe on the authority of the OPUC.	None required
12.15.080.M	Renewal	Suggests the city determine grant or denial of renewal of licenses within 30 days rather than 90 days	The city may make a determination before 90 days. 90 days is a reasonable time period.	None required
12.15.080.N 12.15.80.N5	Termination - Termination - Lack of transparency and clarity Removal of utility facilities	Termination conflicts with municipal authority over telecommunications utilities in the Oregon Revised Statutes. This lack of clarity and transparency is compounded by the proposed ROW ordinance providing no notice and opportunity to cure in this context. See Proposed Ordinance § 12.15.080.N.4. A utility's obligation under this provision should be to restore the portion of the right of way disturbed by the removal to its pre-existing condition.	There is not conflict. Section 12.15.080.N.3 contains an opportunity to cure.	None required
12.15.090.A.4	Interference	Suggests new threshold before any continuous interference where city can require utility operator to reduce or cease operations: any interference in excess of 48 hours or <u>two business days</u> (underlined text was suggested to be added)	The city is a first responder and it will not allow any of its operations impaired.	None required
12.15.090.B.1	Pipeline services	Proposed Ordinance § 12.15.090.B.1 and other sections of the proposed ordinance appears likely in conflict with the authority of our regulator, the Oregon Public Utility Commission, particular insofar as the changes would seek to ban or impermissibly place burdens upon certain utilities.	There is no conflict.	None required

<p>12.15.100 12.15.140</p>	<p>Attachment fees /Fees / ILEC, privilege taxes</p>	<p>In experiences with right-of-way ordinances, franchise fees are in lieu of right-of-way fees entirely. This is important, especially if the City and electric utility are able to successfully negotiate a franchise with a different gross revenue calculation. Both state and federal law limit the level of fees the City may charge for use of the ROW to recovery of the City's reasonable costs. The proposed rule assesses a right of way fee upon gross revenue but specifies the fee is not a tax. Upon closer examination, the base for the fee is the identical base for the statutorily authorized telecommunications utility privilege tax. Municipalities are authorized to levy a privilege tax on a telecommunications utility's gross revenues as defined and may not be required to pay other fees</p>	<p>The city is not restricted to "recovery of reasonable costs", except for Small Wireless facilities. The City is entitled to "fair and reasonable" compensation. As this is not a "privilege tax", the city is allowed to impose fees.</p>	<p>None required</p>
<p>12.15.100.B 12.15.140</p>	<p>Linear foot fee / Exclusion for linear foot fee for leased facilities</p>	<p>As drafted, the code does not address how the length of an operator's facilities will be determined; instead, the draft code (in §12.15.100.B.) merely states that an operator who does not serve customers in the City "will pay the linear per-foot fee" set by the City Council. Specify amount of linear per-foot fee and mechanism for adjusting the fee. The new code should retain the lease exclusion or provide another, comparable rule for multiple users of the same section of right-of-way....the proposed code does not provide an explicit lease exclusion (or other rule) for shared use of facilities. The proposed ordinance does not establish the fee for linear-foot arrangements. Instead, it leaves that to be set by the City Council, presumably to be revised from time-to-time. This provides no information that providers can use to reliably forecast their costs to price their services and make other financial plans. It is also unfair because providers who have invested considerable sums in installing facilities in, and typically under, the City's ROW cannot practically relocate those facilities if the City were to raise the fee to unacceptable levels. If the City is committed to abandoning franchises, however, it should address this issue by establishing ROW fees in the ordinance and limiting adjustments to changes in the CPI.</p>	<p>The linear footage will be determine by the GIS map (section 12.15.080.A.3) and the fee is set in the fee schedule. Every entity that uses the City's right of way is required to compensate the city for that use.</p>	<p>None required</p>
<p>12.15.110.A 12.15.110.B 12.15.110.B.2 12.15.110.B.3 12.15.110.B.4 12.15.110C 12.15.110D</p>	<p>Audits / BLAB appeals - burden of proof / Audits & Audits - Penalties</p>	<p>This section should be changed to allow utilities to provide maps and other information to the City of Portland in lieu of on-site inspection. The relevant departments may not be located within the City of Portland, and there may not be much to "access" that cannot be provided electronically</p>	<p>The City has add a section for the entity to provide a GIS map of its facilities. The City must have the right to on-site inspections and access to all records within the City.</p>	<p>None required</p>
<p>12.15.120.A 12.15.120A.1 12.15.120.A.2 12.15.120.A.4 12.15.120.A.4.b 12.15.120.B 12.15.120.B.1 12.15.120.B.2 12.15.100</p>	<p>Insurance / Insurance - cancellation of policies / Insurance - additional insureds /Insurance - required coverage / Insurance - required coverage - Automobile liability / Indemnification</p>	<p>Should allow companies to self-insure. There is no such provision preventing the insurance from being cancelled if the city is not notified. Clarifying that this coverage will not be provided by the employer's liability policy which is part of the workers compensation policy. Many general liability policies are 1M/2M but the limit requirement can be satisfied by utilizing umbrella coverage. The coverage will be provided per accident. Insurance and Indemnification requirements are extraordinary. The proposed rule requires a period of "forever" for indemnification to the City and its agents for environmental conditions which is well beyond the reasonable limits of insurance policy coverage as well as beyond all applicable Oregon statutes of limitation. Utilities should only be responsible for indemnifying its own actions or the actions of third parties that it has control over.</p>	<p>This will be allowed on a case by case basis to be determined by OCT with prior written approval.</p>	<p>See Section 12.15.100.A(5)</p>

12.15.130 12.15.110	Financial assurance	The letter of credit for electric utilities should be waived. Both Portland providers are long-standing, credit worthy entities. Financial Assurance requirements are will disproportionately affect smaller ROW occupants or those with fewer overall customers. For companies with a small number of subscribers within the boundary of the City of Portland and statutory constraints on the fees and taxes that may be levied, the likely fee will be less than \$1,000 per month. Mandating a bond or similar instrument of one hundred times the amount of forecasted monthly remittance is excessive.	The requirement may be waived, upon written approval from the City.	None required
12.15.160 12.15.130	Equal employment opportunity/affirmative action/minority business	While purportedly focused on ease of administration, the proposed changes also attempt to mandate various employment and contracting practices through a utility license law. Company does not dispute the value of these practices, and last year, purchased \$31.5 million goods and services from verified minority-, woman- or veteran-owned businesses. However, adding these requirements here will increase, rather than decrease, the administrative burden on the Office of Community Technology.	These are standard provisions that comply with city policy.	None required
12.15.170	Penalties	Penalties in the amounts in this section can add up to excessive amounts quickly. Penalties do not provide sufficient due process. The City cannot grant itself fine assessment authority and then deny the utility the opportunity to pursue administrative due process through a hearing or similar procedure before the City Council. This proposed measure would also usurp the OPUC's jurisdiction over alleged misconduct by public utilities in the state, and bypasses that procedure (which provides due process) at the Commission.	The city will provide ample opportunity for the provider to correct any violations. There is nothing that limits the entities to seek relief as allowed by law.	None required
12.15.200	Applicability of ordinance	FAQ/ordinance language is ambiguous regarding applicability. Does the City intend any portion of the ordinance to be applicable immediately, regardless of when relevant franchises expire? The proposed changes invite conflict with existing franchises, with no clear process for resolution. Proposed Ordinance § 12.15.200 (making chapter applicable to existing franchise agreements).	The new code will be effective on January 1, 2023. It will apply to anyone without a valid agreement or those in a holdover status. The code will apply to all existing valid agreements, if there is no conflict.	None required
N/A	Streamline submission of information	We also suggest that a current franchisee, who already has provided the City with the required documentation on the length of its facilities in the public right-of-way should, in a sense, be "grandfathered," so that upon transitioning to the new licensing code the franchisee would not be required to again submit the same information to the City. (This last point perhaps could be handled by administrative rule adopted after the code is enacted by the City Council.)	All entities that own facilities within the city will now be required to provide exact GIS locations of the facilities. The city is entitled to know the location of facilities within its boundaries. See section 12.15.080(3).	None required
N/A	Current franchise status	when is their agreement going to end?	All existing valid franchise agreement will remain valid until the expiration date.	None required
N/A	Process and Timeline	Only one comment period	Second comment period has been added.	None required
N/A	Attachment fees	Will ROW Usage fees for wireless still be calculated and imposed on a per attachment basis? Will the separate fee ordinance referenced in the ROW usage fee section have other details about the calculation of fees?	Fees for attachments are established in the fee schedule. The attachment fee is only for the attachment and not the use of the ROW.	None required
N/A	Attachment fees	How will the City avoid duplicative charges under the new structure?	There is are no duplicative charges.	None required
N/A	Fee ordinance	What is the status of the fee ordinance?	The fee schedule is now available for comment.	None required
N/A	Cost study	ROW fees for small wireless facilities must be cost-based, under the 2018 FCC Order. Does the City have a cost study to support the proposed fees and will it be available for review?	The 2018 FCC order requires the fees be a "reasonable approximation of the state or local government's costs". The fees imposed for small cell wireless facilities is a reasonable approximation.	None required
N/A	General	ROW code proposed is nothing like those in other cities in terms of breadth of scope, lack of clarity and transparency (of process)	The code proposed is similar to that of other jurisdictions in Oregon.	None required
N/A	Process	Stakeholders were not part of the drafting of the code	Stakeholders are invited to provide feedback for review by the city. The City is not required to have Stakeholders involved in drafting regulations, codes, or policies of the city.	None required

N/A	Fees, transparency	As noted above, the proposed ROW ordinance defers actually setting fees until some future date and as noted above, vests rulemaking authority with non-elected City staff or agents with no public process.	The fee schedule is now available for comment. City Council will approve and adopt the fees.	None required
N/A	Cost to customers	This regulation will be an increase in cost to residents of Portland, during a time of economic hardship brought on by COVID 19 pandemic, without notification or ability to redress the increases in utility bills this will require.	The fees are not imposed upon the residents.	None required
N/A	Cost to customers	Utilities are key inputs for cost of goods for certain sectors, because of this a thoughtful economic analysis of compounded cost increases should be considered for unintended consequences for supply chains, as all utility cost will go up throughout the city.	This comment is not actionable.	None required
N/A	Exclusion for linear foot fee for leased facilities	Current franchise excludes from the per-foot charge facilities that are leased from another licensee (see definition of "System"). The new Code provisions would eliminate that exclusion and would base the fee on all facilities that a licensee "uses" without regard to ownership. Carriers have relied on the lease exclusion for decades so they would not be required to pay duplicative ROW fees where the facility owner pays an ROW fee for the entire extent of the impact of its facilities on the ROW. Under the existing regime, the owner of the facility (typically, a conduit containing fiber optic cables) pays the full linear charge for the incursion of the facility into the ROW. If the owner has excess capacity (which is a common occurrence for fiber optic cables), it may choose to make that available for use by other providers, and it may also recover a portion of the ROW charges from those other users. This use of the fibers by other providers imposes no additional impact on the ROW, for example in terms of space used or the need to open the street to install facilities. Under these facts, there is no reasonable basis for the City to charge the other providers for use of the ROW when the full	Fees are not assessed based on the impact to the ROW. Fees are assessed for the use of the ROW. Any entity that uses facilities located within the rights of way, belonging to the public, should compensate the public for use of their property.	None required
N/A	General	Did not receive notice of the proposed ROW ordinance so has not had the ability to thoroughly examine all implications associated with the proposed language. However, some items of particular concern are apparent: 1) taxation implications; 2) unfettered discretion of the City Counsel to set fees; 3) requirements to provide in-kind services; 4) infringing on the jurisdiction of the Oregon Public Utility Commission; and 5) conflicts with statutory language.	Additional comment period has been provided.	None required