

CITY OF HOBBS  
ORDINANCE NO. \_\_\_\_\_

**AN ORDINANCE TO ADOPT RIGHT OF WAY MANAGEMENT REGULATIONS.**

BE IT ORDAINED BY THE GOVERNING BODY OF THE CITY OF HOBBS, NEW MEXICO, that the following Chapter be added to the Hobbs Municipal Code.

Proposed Ordinance

City of Hobbs Municipal Code entitled “Right of Way Management Regulations”

**RIGHT OF WAY MANAGEMENT REGULATIONS**

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### **12.01.010 Title**

This chapter is known and may be cited as the CITY OF HOBBS RIGHT OF WAY MANAGEMENT ORDINANCE.

### **12.01.020 Purpose**

The city commission adopts this chapter to better:

- A. Manage a limited resource to the long term benefit of the public;
  
- B. Minimize inconvenience to the public occasioned by the emplacement and maintenance of facilities in the public right of ways;
  
- C. Establish clear and consistent rules governing work performed within and occupations of the public's right of ways.
  
- D. It is the intent of this ordinance to only address and/or allow the placement of facilities and work within public right of ways not addressed within other sections of the Hobbs Municipal Code.

### **12.01.030 Definitions**

For the purposes of this chapter the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. Unless otherwise expressly stated, words not defined herein shall be given the meanings set forth in title 47 of the United States Code, as amended, and, if not defined therein, their common and ordinary meaning.

**AFFILIATE:** When used in relation to any person, means another person who de facto or de jure owns or controls, is owned or controlled by, or is under common ownership or control with, such person.

**CITY:** City of Hobbs, New Mexico, and any agency, department, or agent thereof.

**CITY MANAGER:** The person appointed pursuant to section 6.2 of the City Charter or his\her designee.

**CITY ENGINEER:** The city engineer or the city engineer's designee.

**COMMUNICATIONS FACILITY OR COMMUNICATIONS SYSTEM:** Facilities for the provision of "communications services", as that term is defined herein.

**COMMUNICATIONS SERVICES:** Telecommunications services, interactive computer services, and any other services involving the transmission of information by electronic or optical signals, except that it shall not include cable service as that term is used in the cable communications policy act of 1984, as amended.

**COMMISSION:** The principal governmental body of the city of Hobbs, New Mexico, its officers, or a representative person or entity as may be designated to act on its behalf.

**FACILITY OR FACILITIES:** Any tangible asset in the public right of way used to provide drainage, sanitary or storm sewer, gas, electric, water, oil/gas pipelines or communication/information services.

**FEDERAL COMMUNICATIONS COMMISSION OR FCC:** The federal communications commission or any successor.

**FRANCHISE:** An authorization granted by the city to an entity to construct, maintain, or emplace facilities generally upon, across, beneath, and over the public rights of way in the city, subject to the terms and conditions specified in a franchise agreement. The term also includes an authorization by the New Mexico PRC or other appropriate authority or as otherwise authorized by law.

**FRANCHISE AGREEMENT:** The contract entered into between the city and a grantee that sets forth the terms and conditions under which the franchise may be exercised.

**GRANTEE:** A person that has been granted a franchise by the city or right to operate within Hobbs or such other parties that wish to locate facilities in the right of way.

**INFRASTRUCTURE OR INFRASTRUCTURES:** to have the same meaning as **FACILITY OR FACILITIES**.

**LICENSEE:** A person who has received a license to locate a facility or facilities within the right of way.

**OWNER OR OPERATOR OF A FACILITY:** Any person which has a possessory interest in such facility or which controls or is responsible for, through any arrangement, the management and operation of such facility.

**PERMITTEE:** A person who has received a permit to work within the right of way.

**PERSON:** Any individual, corporation, partnership, association, joint stock company, trust, governmental entity, or any other legal entity, but not the city.

**PUBLIC IMPROVEMENT:** means, by way of illustration and without limitation, any improvements for roadways and pavements, sidewalks, curbs and gutters, landscaping, street lights, foundations, poles and traffic signal conduits, water mains, sanitary and storm sewers, tunnels, subways, people movers, viaducts, bridges, underpasses, overpasses, public buildings or public structures, or other public installations or improvements which are to be used by the general public.

**PUBLIC RIGHT OF WAY:** The surface and space above, on, and below any public highway, avenue, street, lane, alley, boulevard, concourse, driveway, bridge, tunnel, park, parkway, public easement, or right of way within the city in which the city now or hereafter holds any property interest which, consistent with the purposes for which it was dedicated or otherwise acquired, may be used for the purpose of constructing, operating, and maintaining a facility.

**TELECOMMUNICATIONS:** This term has the meaning ascribed to it in 47 USC section 153(43).

**TELECOMMUNICATIONS SERVICE:** This term has the meaning ascribed to it in 47 USC section 153(46).

**ROW WORK PERMIT:** A permit issued by the city to enter upon the public rights of way at specified times and places to erect, construct, emplace, or otherwise work on facilities.

**ROW OCCUPANCY LICENSE:** A license granted to a person, outside of a franchise agreement, specifying the location and terms allowing facilities within public right of ways.

### **12.01.040 Authority**

The City Commission, pursuant to the general powers; body politic and corporate powers, Section 3-18-1 NMSA 1978, specifically, to protect generally the property of its municipality and its inhabitants and to preserve peace and order within the municipality, enacts the ordinance codified in this chapter.

### **12.01.050 Reservation of rights; police power**

All rights and privileges granted in a franchise agreement are subject to the police powers of the city and its rights under applicable laws and regulations to exercise its governmental powers to their full extent and to regulate a grantee and the construction, operation and maintenance of the grantee's infrastructures, including, but not limited to, the right to adopt, amend, and enforce ordinances and regulations as the city shall find necessary in the exercise of its police powers, the right to adopt and enforce applicable building, permitting and safety ordinances and regulations, the right to adopt and enforce ordinances and regulations relating to equal employment opportunities, and the right to adopt and enforce ordinances and regulations concerning right of way, telecommunications, utility and cable television consumer protection and service standards and rate regulation provisions.

Further, nothing in this chapter shall prevent the City from constructing, repairing or replacing sewers; grading, paving, repairing, or replacing any right of way; or constructing, repairing, or replacing any other public work or facility, or from performing work pursuant to weather related activities or response to natural disasters. Nothing shall prevent the City from altering the layout or design of a right of way for public safety reasons.

### **12.01.060 Permit required**

- A. No person shall install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, or operate any facility upon, across, beneath, or over any public right of way in the city or other city property without first obtaining from the city the necessary permit(s)\license(s) required under local, state or federal law.
- B. An owner or operator of facilities may be required to hold different permits\licenses for its use of the public rights of way to provide different services. For example, and without limitation, the owner or operator of facilities that provides both cable service and wireless internet service must obtain both a franchise agreement and any permit(s)\license(s) required for facilities to provide wireless internet service.

## 12.01.070 Construction standards

- A. Compliance with Regulations; Safety Practices: Construction, operation, maintenance, and repair of facilities shall be in accordance with all applicable law and regulation, and with sound industry practice. All safety practices required by law shall be used during construction, maintenance, and repair of facilities.
- B. Excavations: No holder of any work permit for any facility shall dig, trench, or otherwise excavate in the public right of way without complying with the provisions of the New Mexico one call system.
- C. Prevention Of Failures And Accidents: An owner or operator shall at all times employ at least ordinary care and shall install and maintain using commonly accepted methods and devices preventing failures and accidents that are likely to cause damage, injury, or nuisance to the public.
- D. Most Stringent Standards Apply: In the event of a conflict among codes and standards, the most stringent code or standard shall apply (except insofar as that standard, if followed, would result in a system that could not meet requirements of federal, state or local law, or is expressly preempted by other such standards).
- E. Construction Schedule: Every owner or operator shall, at least thirty (30) days prior to commencing significant construction activity (including a significant rebuild, upgrade, or repair to existing facilities)—emergencies excepted - upon, across, beneath, or over any public right of way in the city or other city property, strive to provide to the city in writing the date on which the owner or operator anticipates it will begin construction and the approximate length of time required for such construction. This timeframe represents a preference only.
- F. Coordination Of Construction With City: Prior to the erection, construction, upgrade, or rebuild of any facilities in the public right of way, the owner or operator of such facilities shall first submit to the city for written approval a concise description of the facilities proposed to be erected or installed, including engineering drawings, if required by the city, together with maps and plans indicating the proposed location of all such facilities. The owner or operator shall provide the best information it has in such reasonable format as may be specified by the city engineer for the city's planning function. No such erection or construction shall be commenced by any person until approval therefor has been received from the city. At the time of such approval, the city shall inform the grantee whether the

reports and other information described by subsection 12.01.170 of this chapter shall be required with respect to the approved construction.

- G. **Coordination of Construction With Third Parties:** Developers or other parties planning the construction or opening of streets in the city shall provide reasonable notice to the city and to the owners or operators of facilities subject to this chapter so that joint trenching and joint emplacement of facilities may be conducted wherever practicable. Such owners and operators shall similarly provide notice to each other and to any relevant developers, for the same purpose. The city shall maintain a list of owners and operators of facilities subject to this chapter for reference by other parties.
- H. **City Engineer Stakeholder Meetings:** The city engineer may establish recurring meetings of businesses who make use of the right of way for their facilities and contractors who perform such work to discuss ongoing and upcoming projects to further the efforts of coordinating projects within the right of way.
- I. **Contractors and Subcontractors:** Any contractor or subcontractor used for work or construction, installation, operation, maintenance, or repair of facilities in the public right of way must be properly licensed and insured under laws of the state and all applicable local ordinances. Each contractor or subcontractor shall have the same obligations with respect to its work as an owner or operator of the facility would have if the work were performed by the owner operator. An owner or operator shall be responsible for all activities carried out by its contractors, subcontractors and employees at the owner's or operator's request.
- J. **Publicizing Proposed Construction Work:** Except in the case of an emergency, before commencing a project (for which Franchisee, or its contractor, has pulled the applicable permit) in Right of way upon which residential property is located or is abutting thereto, Franchisee shall notify such abutting residents at least two (2) days prior to the date that Franchisee proposes to commence construction. Notice shall be in writing by one of the following methods: in person, by posted notice on the Right of way where the proposed project is scheduled to be built (which notice is to be capable of being read by passing motorists), by door hanger, or by mail, with a description of the proposed project and the name of Franchisee and its telephone number.

#### 12.01.080 Placement of facilities

- A. All facilities shall be installed and located to minimize interference with the rights and convenience of other property owners.

- B. An owner or operator of a facility shall not place facilities, equipment, or fixtures where they will interfere with any other facilities, or obstruct or hinder in any manner the various utilities serving the residents of the city or their use of any public right of ways.
- C. The city may reasonably require the placement of facilities to ensure that users of the public right of ways do not interfere with each other and that the public right of ways are used safely and efficiently. For example, in the case of an owner or operator of a fiber optic network that is not a franchisee, the city engineer may order extra ducts for fiber optic cable be installed for use by the city or other grantees or permittees when, in the opinion of the city engineer, the subject right of way is too congested due to existing facilities and space limitations or will likely be used by at least four other entities including the city for running fiber optic cable. Such company shall then certify to the city engineer the additional cost of said installation per linear foot which the city shall pay. Other future users of the surplus duct will be charged an upfront, one-time fee to locate in said duct to recover a proportional share of the city's upfront and carrying costs as calculated by the city engineer. This fee will be in addition to, and not in lieu of, any recurring, or one-time fee charged by city for location within the right of way.
- D. Every grantee or licensee that ceases operating or maintaining any facility shall, upon written request of the city within one (1) year of the cessation of maintenance of such facility, promptly remove it. Should the grantee or permittee neglect, refuse, or fail to remove such facility, the city may remove the facility at the expense of the grantee or licensee. The obligation to remove shall survive the termination of the franchise or permit for a period of two (2) years and shall be bonded. The city engineer may determine that it is in the best interests of the city to allow the facility to be wholly or partially abandoned in place.
- E. No owner or operator of a facility shall erect new aerial facilities, other than to repair existing facilities, in or on a public right of way in which both electric and telephone service providers have placed their lines underground, or within a subdivision which was originally developed to provide underground services.
- F. A grantee or licensee shall use, with the owner's permission, existing poles, conduits and other facilities whenever feasible. A grantee or licensee may not erect poles, conduits, or other facilities in public right of way without the express permission of the city. Copies of agreements for use of conduits or other facilities shall be filed with the city upon city request.
- G. The city engineer may develop and institute a standardized cross-section location protocol for new or reconstructed right of way.

### **12.01.090 Relocation of facilities**

The owner or operator of a facility on or within the public right of way shall, at its own expense, upon written notice from the city reasonably in advance, promptly relocate any facility located on or within the public right of way as the city may deem necessary or appropriate to facilitate the realignment, reconstruction, improvement or repair of public streets, sidewalks, curbs, drains, sewers, and public improvements of any sort; provided, however, that an operator may be permitted to abandon any property in place with the written consent of the city. This subsection does not apply to relocations covered by 12.01.100(C).

### **12.01.100 Restoration**

- A. Unless governed contractually between the owner or operator and its customer, if an owner or operator of a facility disturbs a pavement, sidewalk, driveway or other surfacing, or landscaping, or other structure, either on private property or in public right of way, the owner or operator shall replace and restore all pavement, sidewalk, driveway or other surfacing, or landscaping disturbed, in substantially the same condition and in a good, workmanlike, timely manner, in accordance with any standards for such work set by the city. Such restoration shall be undertaken within no more than ten (10) days after the damage is incurred, weather permitting, and shall be completed as soon as reasonably possible thereafter. The owner or operator shall guarantee and maintain restoration of a public improvement for at least one year against defective materials or workmanship.
- B. In the event an owner or operator of a facility fails to complete any work required for the protection or restoration of the public right of way, or any other work required by city law or ordinance, within the time specified by and to the reasonable satisfaction of the city, the city, following notice and an opportunity to cure, may cause such work to be done, and the owner or operator of a facility shall reimburse the city the cost thereof within thirty (30) days after receipt of an itemized list of such costs; or the city may recover such costs through the security fund provided by an owner or operator of a facility, pursuant to the procedures for recovery from the security fund specified in the owner's or operator's franchise agreement or license.
- C. Any and all public right of way, public property, or private property that is disturbed or damaged during the construction, repair, replacement, relocation, operation, maintenance, or reconstruction of a system shall be promptly repaired by the owner or operator of a facility.

### **12.01.110 ROW Work Permits**

- A. Unless otherwise provided by law, franchise, city authorization or emergency circumstances, no person shall install, erect, hang, lay, excavate, bury, draw, emplace, construct, or reconstruct any facility upon, across, beneath, or over any public right of way in the city, or enter into the public right of way to work on a facility, without first obtaining a ROW Work Permit therefor from the city. Notwithstanding the foregoing, under no provision in this chapter shall any ROW Work Permit or other approval from the city be required to install, construct, repair, maintain or replace any Franchisee service drop.
- B. Denial. The city engineer may deny a ROW Work Permit for failure to meet the requirements of this chapter, failure to meet monetary obligations to the city or if such denial is necessary to protect the health, safety and welfare or the right of way and its current use. Failure to meet the requirements includes, but is not limited to, striking or damaging another facility within the right of way.
- C. Large Capital Programs. The city engineer may develop and institute a special streamlined permit and inspection process for large capital programs by mutual agreement with the applicant or applicants in the case of a joint project after receiving authorization from the city manager.
- D. The city engineer may issue a stop work order to anyone failing to secure the proper permit or for not following the ordinances or city standards.

### **12.01.120 Business license**

A Franchise or ROW Occupancy License under this chapter does not render unnecessary or take the place of any generally applicable business license that may be required by the city for the privilege of transacting and carrying on a business within the city generally.

### **12.01.160 Administration and permitting to use space within the right of way**

The city engineer shall oversee the following administrative functions:

- A. Collect, or cause to be collected, any applicable fees from all owners or operators of facilities using public right of way in the city;
- B. The City Commission shall approve by resolution the amount and formula for a right

of way occupancy fees;

- C. Be responsible for the continuing enforcement of all terms and conditions of city-granted franchises as such pertains to the occupation of public right of ways.

The city engineer shall oversee permitting as follows:

- A. The city shall not grant, issue, or enter into any franchise or occupation license that grants or allows exclusive use or occupancy of the right of way.
- B. The city shall not grant or issue a ROW Occupation License for any new non-franchisee facility, proposed to be emplaced after the adoption of this code, having a height in excess of 40' as measured vertically from the adjacent roadway centerline.
- C. An application for a Franchise, ROW Occupation License or ROW Work Permit shall be filed with the city engineer on a form developed and provided by the city engineer.

Authority to issue Permits\Licenses; form of Permits\Licenses and term.

- A. Permits\Licenses required by this chapter shall be issued by the city engineer. The city engineer shall review each application and shall issue each permit\license which he or she determines to be in compliance with the requirements of this chapter and any other applicable local, state, or federal requirements. In issuing a permit, the city engineer may require a change in the proposed location of the licensee's infrastructures where necessary to avoid interference with other infrastructures within the public right of way.
- B. Permits\Licenses issued pursuant to this chapter shall be in writing and shall be executed by the permittee\licensee. The form of permits\licenses to be issued shall be uniform, but shall be subject to periodic review and modification. When available, the city engineer may implement an electronic or digital permit\license system.
- C. Limit on term of franchises; limit on initial or renewal term of licenses.
  - (1) No franchise for use of the public right of way shall be granted for a term in excess of 10 years.
  - (2) No ROW Occupancy License granted by the city engineer shall be issued or renewed for a term in excess of 10 years.

D. Existing Facilities. Non-franchisee facilities emplaced and existing prior to the adoption of this Ordinance located within a previously granted easement are exempt from the issuance of a license.

E. Application for initial issuance of a license; registration required.

A person desiring to obtain a ROW Occupancy License as required in this code shall make application for a license for such use and occupancy as provided in this chapter, and shall pay an application fee for initial issuance of the license. The application fee for initial issuance of a license and any future changes thereto shall be effective upon its inclusion in a schedule of fees adopted by the city commission by resolution such fee shall be based in part upon the administrative costs of processing the license. The application for initial issuance of a ROW Occupancy License shall be filed with the city engineer not less than 60 days prior to the proposed effective date of the license and shall be filed upon a form provided by the city for that purpose. The application shall include, at a minimum, the following information:

- (1) The name, address and telephone number of the applicant.
- (2) The name, address and telephone number of a responsible person whom the city may notify or contact at any time or in case of emergency concerning the infrastructures.
- (3) A statement of the purpose for the infrastructures proposed for installation in the public right of way, the type of service it will provide, and the intended customers\person which it will serve.
- (4) Any additional information which the city engineer in his or her discretion may require.

F. Issuance and renewal of license; license revocation and cancellation.

To obtain renewal of a ROW Occupancy License, the licensee shall file a renewal application with the city engineer on the form provided by the city and pay an application fee for renewal of the license. The renewal application fee and any future changes thereto shall be effective upon its inclusion in a schedule of fees adopted by the city commission by resolution. The renewal application shall be filed with the city engineer not less than 180 days prior to the expiration of the initial or any renewal term of the license. Upon receipt of the renewal application, the city engineer shall conduct a review of the licensee and the licensee's prior use of the public right of way to determine the licensee's continued compliance with the requirements as stated herein. If on the basis of such review the city engineer determines that the licensee and the licensee's prior

use of the public right of way complies with all requirements, the city engineer may renew the permit for an additional term of up to 10 years.

If on the basis of such review the city engineer determines that the licensee and the licensee's use of public right of way do not comply with one or more of the requirements as herein stated, the city engineer shall give notice of intent not to renew the license. If a licensee holds multiple licenses for use or occupancy of various right of ways within the city for the same or similar purpose, the licensee shall be required to renew all such licenses under a single license at such time as the earliest issued license expires.

In determining the length of the term of an initial or a renewal license, the city engineer shall take into consideration the likelihood that the city will require the use of the specific portion of the subject right of way for municipal purposes or that such use of the subject right of way will unduly burden the city or the public in its use of the subject right of way during the proposed term of the license and the life cycle of the facilities to be deployed. A license shall not be issued or renewed if the city engineer determines that any of the following conditions exist in the right of way proposed for permitting:

- (1) There is insufficient space in the right of way to accommodate the proposed use, given the other existing uses thereof;
- (2) The proposed facilities would interfere with or conflict with existing or planned city infrastructures or Franchisees infrastructures located or planned to be located in the right-of- way;
- (3) Such use is incompatible with adjacent public or private uses of that right of way;
- (4) Such use would involve an unacceptably high frequency of repair or maintenance to the facility thereby requiring excessive excavation in or obstruction of the right of way; or
- (5) The construction or installation of such facility would interfere with a public improvement undertaken or to be undertaken by the city or with an economic development project in which the city has an interest or investment.

If during the term of any license the city engineer determines that the license should be revoked due to the licensee's failure to comply with any of the requirements herein stated, the city engineer shall give notice of intent to revoke such license.

- G. The following shall constitute grounds for refusal to issue or renew a ROW Occupancy License, or for denial or revocation of a ROW Work Permit:

The licensee's\permittee's failure to observe or comply with any of the following:

- (1) The licensee's\permittee's use or prior use of public right of way has been conducted in full and timely compliance with all laws and regulations applicable thereto, and the licensee\permittee has complied fully and in a timely manner with the requirements of any previously issued license\permit, and with the orders or instructions of city officials issued pursuant to this chapter; or
- (2) The licensee\permittee is current in the payment of license\permit fees, if applicable, and the licensee\permittee has made such payments fully and when due.
- (3) The licensee's\permittee's commission of any of the following acts:
  - (4) The licensee\permittee has made a misleading statement or a material misrepresentation in connection with an application for initial issuance or renewal of a license\permit, in connection with its registration of its use of the public right of way or in connection with its use of public right of ways.
  - (5) The licensee\permittee has transferred its equipment, its business, or its permit to another person or has made a change in use of its equipment, without giving the city notice thereof and obtaining city consent thereto.
  - (6) Striking or damaging another facility within the right of way.
  - (7) The city engineer shall give notice of intent to cancel such license\permit if during the term of any license\permit the city engineer determines that:
    - a. The licensee's\permittee's continued use of the public right of way will unduly burden the city or the public in its use of that property;

b. The public right of way for which the license\permit was issued will be required for municipal purposes during the term of the license\permit;

c. The licensee's\permittee's equipment at a particular location will interfere with:

- i. A present or future city use of the right of way;
- ii. A public improvement undertaken or to be undertaken by the city;
- iii. An economic development project in which the city has an interest or investment; or
- iv. The public's safety or convenience in using the right of way for ordinary travel; or
- v. The public health, safety and welfare requires it.

Notice of intent not to renew a license\permit for use of the public right of way shall be given to the licensee\permittee, either by certified mail, return receipt requested, or by actual service or delivery thereof, which notice shall be given not more than 90 days after submission of the renewal application. Notice of intent to revoke or cancel a license\permit shall also be given to the licensee\permittee in the manner provided above. The notice shall set forth the grounds for refusal to issue or renew or for revocation or cancellation and shall inform the licensee\permittee of the right to an appeal hearing upon request. Such request for hearing shall be filed in writing with the Planning Department, and the hearing shall be scheduled and held by the Planning Board at their next regularly scheduled public meeting. At the hearing, the licensee\permittee shall have the burden of establishing that the grounds asserted in the notice do not exist. Upon the effective date of revocation or cancellation as provided in the city engineer's notice thereof, or upon the effective date specified in the city engineer's written decision upon the licensee's\permittee's appeal, the licensee\permittee shall be required to cease its use and occupancy of the right of way or to remove or relocate its equipment therefrom, as provided in the notice or decision. Equipment not removed or relocated from the right of way as required in such notice or order shall be considered a nuisance and may be removed, relocated, or taken possession of by the city, at the

licensee's\permittee's expense. Except in emergency circumstances, the requirement to relocate, remove, or cease use of equipment shall be suspended during the pendency of any appeal taken by a licensee\permittee.

If a license\permit is refused or cancelled upon the basis that the subject right of way is or will be required for municipal purposes, the applicant or licensee\permittee shall not be entitled to an appeal. However, in that event, the licensee shall be entitled to a partial refund of the annual fee already paid, such refund to be computed on the basis of 1/12 of the required annual fee multiplied by the number of unexpired whole months of the year remaining in the license term. In all other cases where a license is not issued or renewed or is revoked, no refund of any portion of the required annual fee shall be paid to the licensee.

Notwithstanding the notice and hearing requirements above, the city engineer may, in emergency circumstances, order the immediate relocation or removal of equipment from the right of way.

Regardless of any other provision, a refusal, cancellation or revocation may be appealed under the applicable processes specified in local, state or federal law.

Failure to secure, renew or comply. Any person who fails to secure or renew a franchise or license\permit required under this chapter or any franchisee or licensee who fails to comply with the requirements of the respective franchise or license, or this chapter, or with any other applicable legal requirements shall, upon notification of such violation by the city engineer, immediately act either to abate the violation or to cease its use and occupancy of the right of way and remove its equipment or system from the right of way.

- H. Transfer of franchise, license, lease, business, or equipment without city's consent; change in use of equipment without city's consent.

A license issued pursuant to this chapter shall not be transferred to any other person without the prior written notice to the city engineer. A licensee shall not transfer the license, the business, or the equipment in the right of way to another person without giving the city engineer 90 days' prior written notice of such proposed transfer. In such notice, the licensee shall clearly identify

the proposed transferee, giving the name and address of a representative of the transferee who is authorized to discuss and provide information to the city regarding the transfer.

A franchisee or licensee shall not change the use of its equipment without giving the city 90 days' prior written notice of such proposed change in use. In such notice, the franchisee or licensee shall clearly and completely set forth the proposed change in use of equipment, how it would be accomplished, including any excavations required to accomplish such change, and projections as to the future maintenance implications of such change in use. Any proposed change in use of franchisee's or licensee's equipment shall require the prior approval of the city engineer. Such approval may be withheld if the city engineer determines that the proposed use of the equipment at that location would be incompatible with or would likely damage or endanger other uses of the right of way, would involve a higher level of maintenance activities than the present use, would involve more street excavation or greater traffic disruption than the present use, or would be otherwise inappropriate.

I. Amendment to license\permit.

If a licensee\permittee with a current license\permit issued pursuant to this chapter proposes to expand, reduce, relocate or modify any portion of its facilities or scope of work within public right of way, the licensee\permittee shall file an application for an amendment to the current license\permit with the city engineer, shall pay the administrative application fee, and shall further comply with all other applicable requirements of this chapter. An application for an amendment to a current license\permit shall include relevant new information of the type required in connection with the initial application for a license\permit. If approved, the amended license\permit shall be issued by the city engineer in the same manner as the original license\permit. However, if the amendment involves only one or more new hook-on connections to the permitted utility system and if the new connections will be made entirely through the permittee's existing underground utility conduit or ducts so as not to require any excavation in the public right of way or by means of overhead wires or cables between existing utility poles, the licensee shall not be required to pay an additional administrative fee as part of the application for amendment.

J. Duties of licensee\permittee.

The licensee\permittee shall be responsible for repairing or reimbursing other licensed or franchised utilities or other persons or entities lawfully using the right of way for any damage to their property caused by negligence of the licensee\permittee or its agents, employees or contractors in connection with the installation, construction, reconstruction, repair, operation, disconnection or removal of the licensee's\permittee's equipment or system.

## 12.01.170 Reports and records

Upon request, the city shall have the right to inspect and analyze at any time during normal business hours at the nearest office of an owner or operator of facilities, or, if such office is not in the city, then at such other location in the city as the city may reasonably designate, all books, receipts, maps, records, codes, programs, and disks or other storage media and other like material reasonably appropriate in order to monitor compliance with the terms of this chapter or applicable law. This includes not only the books and records directly relevant to enforcement of this chapter or the owner's or operator's franchise agreement that are held by the operator, but any books and records held by an affiliate, or any contractor, subcontractor or any person holding any form of management contract for the facilities in the public right of way to the extent such books or records relate to the facilities. An owner or operator is responsible for collecting the information and producing it at a location as specified above. The city shall provide the owner or operator with advance notice stating the types of records sought to be reviewed and the reason for such review.

Contacts and maps: Unless this requirement is waived in whole or in part in writing by the city each owner or operator of facilities in the public right of way shall maintain and produce or allow access upon request the following items:

An organizational chart with contact information for the portion of the organization most relevant to its operations within the right of way.

Detailed, updated electronic maps, in a format specified by the city, depicting the location of all facilities located in public right of way.

Construction Updates: Unless this requirement is waived in whole or in part by the city, the owner or operator of facilities in the public right of way shall deliver or make available upon request the following updates to the city:

Monthly construction reports to the city for any major construction undertaken in the public right of way until such construction is complete. The owner or operator must submit updated as built system design maps to the city, or make them available for inspection, with notice of their availability, within thirty (30) days of the completion of system construction in any geographic area. These maps shall be developed on the basis of post-construction inspection by the owner or

operator and construction personnel. Any departures from design must be indicated on the as built maps.

Records Required: An owner or operator of facilities in the public right of way shall at all times maintain:

A full and complete set of plans, records, and "as built" maps showing the exact location of all equipment installed or in use in the city, exclusive of customer service drops.

A file showing its plan and timetable for future major construction of the facilities.

Remote Site Visit: If any requested records, maps or plans, or other requested documents are too voluminous, or for security reasons cannot be copied and moved, then an owner or operator of facilities in the public right of way may request that the inspection take place at some other location; provided, that the owner or operator must pay reasonable travel expenses incurred by the city in inspecting those documents or having those documents inspected by its designee, as charges incidental to the enforcing of the owner's or operator's franchise or other authorization for use of the public right of way.

#### **12.01.180 Bond or letter of credit**

No person shall install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, or operate any facility upon, across, beneath, or over any public right of way in the city or other city property until the owner or operator shall have filed with the City Clerk a bond and/or letter of credit, in a form acceptable to the city, running in favor of the city, to guarantee the obligations of the owner or operator under this chapter and applicable law. The amount of the bond or letter of credit shall be as specified by the City Manager. Cost factors to be considered will be the scope of services provided by the contractor, the impact on the public right of way, the reasonable cost of removal of the facilities and the cost of restoration of any affected public right of way or other property.

#### **12.01.190 Insurance**

An owner or operator shall maintain insurance covering its facilities and operations in the public

right of way, naming the City as additionally insured, as specified in a specific provision of this chapter or in its franchise agreement or license. Upon request, proof of such insurance shall be submitted to the city engineer prior to beginning any work.

### **12.01.200 Enforcement**

**Penalties:** For violation of provisions of this chapter the city may seek fines in the amounts of \$100 for a first offense within a year, \$200 for a second offense within a year, and \$300 for a third or subsequent offense within a year. The penalties shall be assessable against an owner or operator and shall be chargeable to its performance bond and/or letter of credit, at the city's discretion.

**Injunctive Relief:** In addition to any other remedies hereunder, the city may seek an injunction to mitigate or terminate a violation, or employ any other remedy available at law or equity, including, but not limited to, imposition of penalties.

**Timely Performance or Compliance:** Any failure of the city to insist on timely performance or compliance by any person shall not constitute a waiver of the city's right to later insist on timely performance or compliance by that person or any other person.

**Termination On Account Of Certain Assignments or Appointments:**

To the extent not prohibited by the United States bankruptcy code, a franchise under this chapter shall terminate automatically by force of law one hundred twenty (120) calendar days after an assignment for the benefit of creditors or the appointment of a receiver or trustee (including a debtor in possession in a reorganization) to take over the business of the owner or operator, whether in bankruptcy or under a state law proceeding; provided, however, that such franchise shall not so terminate if, within that one hundred twenty (120) day period:

Such assignment, receivership or trusteeship has been vacated; or

Such assignee, receiver, or trustee has cured any defaults and has fully complied with the terms and conditions of this chapter and any applicable agreement and has executed an agreement, approved by any court having jurisdiction, under which it assumes and agrees to be bound by the terms and conditions of this chapter and any applicable agreement.

In the event of foreclosure or other judicial sale of any of the facilities, equipment, or property of an owner or operator of facilities in the public right of way, its franchise under this chapter shall automatically terminate thirty (30) calendar days after such foreclosure or sale, unless:

The city has approved a transfer to the successful bidder; and

The successful bidder has covenanted and agreed with the city to assume and be bound by the terms and conditions binding its predecessor. Any mortgage, pledge or lease of facilities in the public right of way shall be subject and subordinate to the rights of the city under this chapter any applicable agreement, and other applicable law.

If a franchise under this chapter is terminated for any reason, the city may, at its discretion, require the grantee or permittee to remove its facilities from the public right of way and to restore the public right of way to their prior condition at the owner's or operator's expense, or that of their sureties. If an owner or operator whose franchise has been terminated fails, after reasonable notice from the city, to remove its facilities from the public right of way, such facilities shall be deemed abandoned and ownership forfeited to the city.

**Remedies Cumulative:** All remedies specified in this chapter are cumulative unless otherwise expressly stated. The exercise of one remedy shall not foreclose use of another, nor shall the exercise of a remedy or the payment of liquidated damages or penalties relieve an operator of its obligations to comply with this chapter. In exercising any remedy specified in this chapter, the city shall comply with any substantive and procedural requirements for exercising such remedies in an owner's or operator's franchise agreement, license or other authorization.

**Reduce or Waive Penalties:** The City Manager may reduce or waive any of the above listed penalties for good cause shown.

### **12.01.210 Indemnification**

Any indemnity provided shall include, but not be limited to, the city's reasonable attorney fees incurred in defending against any such claim, suit, or proceeding. Recovery by the city of any amounts under insurance, the performance bond or letter of credit, or otherwise shall not limit in any way a person's duty to indemnify the city, nor shall such recovery relieve a person of its obligations pursuant to a franchise or in any respect prevent the city from exercising any other right or remedy it may have.

### **12.01.220 Severability**

If any term, condition, or provision of this chapter shall, to any extent, be held to be invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the city and shall thereafter be binding on owners and operators.

SEVERABILITY CLAUSE. If any of the provisions of this ordinance are for any reason illegal or void, then the lawful provisions of this ordinance, which are separable from said unlawful provisions shall be and remain in full force and effect, the same as if the ordinance contained no illegal or void provisions.

REPEALER. All ordinances or parts of ordinances in conflict with the provisions of this ordinance are hereby repealed.

EFFECTIVE DATE. This ordinance shall be in full force and effective after its final passage and publication as by law provided.

PASSED, ADOPTED AND APPROVED this \_\_\_ day of \_\_\_\_\_, 2018

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SAM D. COBB, Mayor

ATTEST:

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JAN FLETCHER, City Clerk