

ORDINANCE NO. 009/2022

AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF MONROE, AMENDING MONROE MUNICIPAL CODE TITLE TO BY ADOPTING A NEW CHAPTER 5.54, UTILITIES AND TELECOMMUNICATIONS FRANCHISES, ESTABLISHING RULES AND REGULATIONS REGARDING UTILITY FRANCHISE REQUIREMENTS AND TELECOMMUNICATIONS FRANCHISE REQUIREMENTS, AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the Monroe City Council desires to adopt franchise application and review procedures for utilities and telecommunications seeking access to the City's rights-of-way; and

WHEREAS, contemporaneous with the consideration of this ordinance, City Council approved Ordinance No. 008/2022 which enacted amendments to its wireless communication facilities provisions located in MMC 22.62 in order to provide for permitting and aesthetic oversight of wireless communication facility deployments within the City; and

WHEREAS, City Council acknowledges that the growing use of smart phones and other personal wireless devices creates a substantial need for wireless data transmission, and that telecommunications companies are anticipating deployments within the City's rights-of-way thereby requiring the City to adopt code that will properly oversee and manage such deployments within the City's rights-of-way; and

WHEREAS, adoption of the contemporaneous land use controls on wireless communication facility deployments requires integration with the City's franchise code in order to properly manage the anticipated deployments; and

WHEREAS, the City Council now desires to adopt the new MMC 5.54 as set forth herein and finds that such amendments will protect the public's health, safety and welfare.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF MONROE, WASHINGTON, DO ORDAIN AS FOLLOWS:

Section 1. Purpose. The purpose of this ordinance is to establish franchising requirements and revisions for persons seeking to use the City's public rights-of-way.

Section 2. Findings of Fact. The Monroe City Council hereby adopts and incorporates the recitals set forth above as Findings of Fact justifying the development regulations adopted by this ordinance.

Section 3. Amendment of Title 5 MMC. Title 5 of the Monroe Municipal Code, Business Regulations and Licensing, is hereby amended by the adoption of a new

Chapter 5.54, Utilities and Telecommunications Franchises, as set forth in Exhibit A, attached and incorporated hereby this reference as if set forth in full.

Section 4. Non-Substantive Editing Changes Authorized. The Mayor or designee is hereby authorized to make non-substantive editing changes to the amendments adopted by this ordinance to provide for consistency and clarity in formatting.


Section 5. Severability. If any section, sentence, clause or phrase of this ordinance should be held to be invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality shall not affect the validity or constitutionality of any other section, sentence, clause or phrase of this ordinance.

Section 6. Effective Date. This ordinance, being an exercise of a power specifically delegated to the City legislative body, is not subject to referendum and shall take effect five days after passage and publication of an approved summary thereof consisting of the title.

ADOPTED by the City Council and APPROVED by the Mayor of the City of Monroe, at a regular meeting held this 8th day of March, 2022.

First Reading: 02/22/2022
Adopted: 03/08/2022
Published: 03/11/2022
Effective: 03/16/2022


CITY OF MONROE, WASHINGTON:


Geoffrey Thomas (Mar 9, 2022 16:39 PST)

Geoffrey Thomas, Mayor

ATTEST:

APPROVED AS TO FORM:


Jodi Wycoff (Mar 10, 2022 07:51 PST)
Jodi Wycoff, City Clerk



Zach Lell (Mar 9, 2022 11:03 PST)
J. Zachary Lell, City Attorney

Exhibit A

Monroe Municipal Code

Chapter 5.54: Utilities and Telecommunications Franchises

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Article I. General Provisions.

5.54.010 Purpose.

A. The purpose of this Chapter is to set forth the procedures and requirements for obtaining and maintaining a franchise to construct, install, operate, maintain, remove, repair or replace facilities within the right-of-way for the provision of utility services or telecommunications services to the public.

B. Cable television permits and franchises are separately regulated under Chapter 5.52 MMC.

5.54.020 Definitions.

For the purpose of this Chapter, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. Words not defined herein shall be given the meaning set forth in Title 47 of the United States Code, as amended, RCW Chapter 35.99, as amended, and in Chapters 22.12 and 22.62 of the Monroe Municipal Code. Words not otherwise defined shall have their common and ordinary meaning:

A. "Affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.

B. "Applicant" means any person submitting an application for a franchise.

C. "City" means the City of Monroe, a municipal corporation of the state of Washington in its present incorporated form or in any later recognized, consolidated, enlarged or reincorporated form.

D. "City property" means any real property owned by City, whether in fee or other ownership estate of interest.

E. "Director" means the Public Works Director or designee.

F. "Excess capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility with the right-of-way that is or will be available for use for additional telecommunications facilities.

G. "Facility" or "facilities" means the plant, equipment and property including but not limited to the poles, pipes, mains, conduits, ducts, pedestals, power meters, antennas, radios, electronics, cables, wires, plant, and other appurtenances and equipment located under, on or above the surface of the ground within the right-of-way and used or to be used for the purpose of providing utility services or telecommunications services.

H. "Franchise" or "franchise agreement" is a contract by which a grantee is allowed to use City right-of-way for the purpose of carrying on the business in which it is generally engaged, including furnishing service to members of the public. For purposes of this Chapter, the term "franchise" does not include cable television franchises and permits which are separately regulated under Chapter 5.52 MMC.

I. "Grantee" means the person, firm or corporation to whom or which a franchise, as defined in this section, is granted by the council under this Chapter and the lawful successor, transferee or assignee of such person, firm or corporation.

J. "Grantor" means the City of Monroe acting through its City Council.

K. "Overhead facilities" means utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

L. "Person" includes corporations, companies, associations, joint stock companies, firms, partnerships, limited liability companies, other entities, and individuals.

M. "Public right-of-way" or "right-of-way" is defined consistently with RCW 35.99.010(5) and means land acquired or dedicated for public roads and streets but does not include:

1. State highways;
 2. Land dedicated for road, streets, and highways not opened and not improved for motor vehicle use by the public;
 3. Structures, including poles and conduits, located within the right-of-way;
 4. Federally granted trust lands or forest board trust lands;
 5. Lands owned or managed by the state parks and recreation commission;
- or

6. Federally granted railroad rights-of-way acquired under 43 U.S.C. Sec 912 and related provisions of federal law that are not open for motor vehicle use.

N. "Service provider" is defined consistently with RCW 35.99.010(6). Service providers shall include those infrastructure companies that provide telecommunications services or equipment to enable the deployment of personal wireless services.

O. "State" means the state of Washington.

P. "Telecommunications service" is defined consistently with RCW 35.99.010(7). Telecommunications service means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means for hire, sale, or resale to the general public. For the purpose of this subsection, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols but does not include "cable service" as that term is defined in Chapter 5.52 MMC.

Q. "Utility services" means the generation, transmission or distribution of electric energy, natural gas, steam, water, or liquid fuels.

5.54.030 Franchise Agreement.

A. The city may grant any person, by ordinance, a nonexclusive franchise to install, construct, operate, maintain, remove, repair or replace facilities in the right-of-way for the provision of utility services or telecommunications services to the public. The grant of a franchise shall be made pursuant to the procedures, terms, and conditions set forth in this Chapter. No provision of this Chapter requires the granting of a new franchise if, in the opinion of the City Council, the granting of an additional franchise is not in the public interest, unless otherwise required by law.

B. It is unlawful for any person to install, construct, operate, maintain, remove, repair or replace facilities in the right-of-way for the provision of telecommunications services or cable without first obtaining a franchise pursuant to this Chapter if for telecommunication services or Chapter 5.52 MMC if for cable services. The franchise is a "master permit" within the meaning of RCW 35.99.010(3).

5.54.040 Facilities lease required.

No person who desires to construct or erect facilities or equipment on City structures, including poles, or on City property outside of the right-of-way shall locate such facilities or equipment on such City structures or property unless granted a facilities lease from the City. The City Council reserves unto itself the sole discretion to lease City property, and no vested or other right shall be created by this section or any provision of this Chapter applicable to such facilities leases. Site specific agreements for small wireless facilities regulated by Chapter 22.62 MMC and located in the right-of-way shall not require City Council approval and may be approved by the Public Works Director.

5.54.050 Application to existing franchise ordinances, agreements, lease, and

permits – Effect of other laws.

A. Except as otherwise provided herein or permitted by applicable federal or state law, this Chapter shall have no effect on any franchise ordinance, franchise agreement, lease, permit, or other authorization existing on or before the effective date of the ordinance codified in this Chapter, to use or occupy public ways or City property until:

1. The expiration of said franchise ordinance, franchise agreement, lease, permit, or authorization; or

2. The amendment to an unexpired franchise ordinance, franchise agreement, lease, permit, or authorization, unless both parties agree to defer full compliance to a specific date not later than the present expiration date.

B. Nothing in this Chapter shall be deemed to create an obligation upon any person for which the City is forbidden to require pursuant to federal, state, or other law.

5.54.060 Fees.

A. The fees, charges and fines provided for in this Chapter and any compensation charged and paid for the public ways provided for herein, whether monetary or in-kind (to the extent permitted by law), are separate from, and additional to, any and all federal, state, local, and City taxes as may be lawfully levied, imposed or due from any person, their customers or subscribers or on account of the lease, sale, delivery or transmission of utility or telecommunications services.

B. Franchise applications are subject to application and review fee or fee deposit in an amount as determined by the City Council and adopted by resolution. This application and review fee shall cover the actual costs associated with the City's initial review of the application. This application and review fee shall be deposited with the City as part of the application filed pursuant to this Chapter.

C. All grantees shall, within 30 days after written demand therefor, reimburse the City for all direct, actual, costs and expenses incurred by the City in connection with any grant, modification, amendment, renewal, or transfer of any franchise.

D. Specific franchise fees may be determined by negotiation between the City and the prospective franchisee, to the extent permitted under applicable state law and federal law.

E. Prior to issuance of an applicable right-of-way permit or small wireless facility permit, or any other necessary permit, the applicant shall pay a permit fee in an amount as determined by the City Council and adopted by resolution, or the actual costs incurred by the City in reviewing such permit application.

Article II. Franchise Agreement.

5.54.070 Application.

Application for new franchise shall be submitted to the Director and shall include the following information:

A. Applicant's name, address, and telephone number and the name, address and telephone number of the duly authorized officer or employee of the applicant. If the application is submitted by an agent of the applicant (i.e., by someone other than a duly authorized officer or employee of the applicant), the following information shall also be provided: (a) the agent's name, address and telephone number; and (b) documentation of the agent's authority to submit the application on behalf of the applicant.

B. Applicant's business structure, e.g., corporation, limited liability company, partnership, sole proprietorship.

C. Identification of the service area for which the franchise is requested, including a map of the area to be covered by the franchise and, if known, specific locations of the initial build-out and proposed future build-out locations, including which proposed facilities will be underground, ground based or aerial. A citywide franchise area may be requested.

D. Description of the services that the applicant expects to provide within the city, including whether the services will be provided to the general public, to commercial and/or residential customers, or to other utilities or telecommunications providers.

E. Description of the type(s) of facilities to be installed in the right-of-way.

F. To the extent locations for installations are known, preliminary engineering plans, specifications and a map showing where the facilities are to be located within the City, all insufficient detail to identify:

1. The location and/or route requested for the applicant's proposed facilities;
2. The location of applicant's overhead and underground facilities, other lines and equipment in the rights-of-way in the proposed location and/or along the proposed route;
3. The specific trees, structures, improvements, facilities, lines and equipment and obstructions, if any, that the applicant proposes to temporarily or permanently remove or relocate.

G. If the applicant is proposing an underground installation within new ducts or conduits to be constructed within the rights-of-way and to the extent specific locations are known:

1. The location proposed for the new ducts or conduits;

2. Evidence that there is sufficient capacity within the rights-of-way for the proposed facilities.
- H. A preliminary construction schedule and completion date.
 - I. Evidence that the applicant is registered to participate in the one-number locator service, as described in RCW Chapter 19.122, if applicable.
 - J. If the applicant is proposing small wireless facilities, an accurate map showing the existing locations, if any, of any existing small wireless facilities in the rights-of-way, owned or operated by the applicant.
 - K. An application fee which shall be set by the City Council to recover City costs in accordance with applicable federal and state law.
 - L. Description of applicant's previous experience providing the proposed services and facilities, including a list of all other franchises awarded applicant in the state of Washington.
 - M. The name, address and telephone number of any person, other than applicant, who will have any ownership interest in, or commercial use of, the proposed facilities.
 - N. Proof that applicant possesses all governmental licenses, certificates or authorizations that are necessary to lawfully conduct the proposed franchise activities.
 - O. Explanation of whether applicant-proposed services or any portion thereof will be subject to tax under Chapter 3.12 MMC.
 - P. Information demonstrating applicant's financial capacity to construct, maintain and operate the proposed franchise facilities in compliance with the requirements of this Chapter, as may be shown by its operations in other cities, financial statements, or other means.
 - Q. A statement as to whether applicant has had any franchise revoked or been held to be in violation of any franchise and, if so, a full explanation of the reasons for such violation and/or revocation and the steps taken by the applicant to cure all resulting harms and prevent their reoccurrence.
 - R. Such other information as the Director, in his/her discretion, shall deem appropriate.

5.54.080 Determination by the City.

Within the time periods established by state and/or federal law, as applicable, after receiving a complete application hereunder, the City Council shall grant or deny a franchise application. If the City Council denies a franchise, such denial must be based on one of the following:

- A. The financial and technical ability of the applicant;
- B. The legal ability of the applicant to provide the services;
- C. The capacity of the rights-of-way to accommodate the applicant's facilities;
- D. The capacity of the rights-of-way to accommodate additional facilities if the application is granted;
- E. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the application is granted, giving consideration to an applicant's willingness and ability to mitigate and/or repair same;
- F. The public interest in minimizing the cost and disruption of construction with the rights-of-way;
- G. The service that the applicant will provide to the region;
- H. To the extent permissible by state and federal law, the effect, if any, on general public health, safety, and welfare in City's sole opinion if the application is granted;
- I. Applicable federal, state and local laws, regulations, rules and policies;
- J. Such other factors as may demonstrate that the grant to use the rights-of-way will serve the community interest.

5.54.090 Franchise agreement execution.

No franchise shall be granted hereunder unless the applicant and the City have executed a written agreement setting forth the particular terms and provisions under which the franchise to occupy and use rights-of-way will be granted. All franchises granted pursuant to this Chapter shall contain substantially similar terms and conditions.

5.54.100 Nonexclusive grant.

No franchise granted hereunder shall confer any exclusive right, privilege, or franchise to occupy or use the rights-of-way for delivery of services or any other purposes.

5.54.110 Rights granted.

- A. No franchise granted hereunder shall convey any right, title, or interest in the rights-of-way, but shall be deemed a franchise only to use and occupy the rights-of-way for the limited purposes and term stated in the grant.
- B. No franchise granted hereunder shall authorize or excuse a grantee from securing such further easements, leases, permits or other approvals as may be required

to lawfully occupy and use the rights-of-way. Grantee shall obtain the written approval of the facility or structure owner, including the City, if the grantee does not own it, prior to attaching to or otherwise using a facility or structure in the right-of-way.

C. No franchise granted hereunder shall be construed as any warranty of title.

5.54.120 Term of grant.

Unless otherwise specified in a franchise, a franchise granted hereunder shall be valid for a term of not more than 5 years.

5.54.130 Incorporation by reference.

The provisions of this Chapter shall be incorporated by reference in any franchise approved hereunder. However, in the event of any conflict between this Chapter and the franchise, the franchise shall be the prevailing document.

5.54.140 Renewal applications.

Unless otherwise agreed in the franchise, a grantee that desires to renew its franchise under this Article shall, not more than 180 days nor less than 90 days before expiration of the current franchise, file an application with the City for renewal of its franchise which shall include the following:

- A. The information required pursuant to MMC 5.54.070.
- B. Any information required pursuant to the franchise agreement between the City and the grantee.
- C. An application fee as provided in MMC 5.54.060.

5.54.150 Renewal determination.

After receiving a complete application for franchise renewal, the City shall determine whether to grant or deny the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reasons for nonrenewal. Prior to granting or denying the renewal of a franchise under this Article, the City Council shall consider the following:

- A. The applicant's compliance with the requirements of this Chapter and the franchise.
- B. Applicable federal, state and local laws, rules and policies.
- C. Such other factors as may demonstrate that the continued grant to use the rights-of-way will serve the community interest.

5.54.160 Obligation to cure as a condition of renewal.

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

Article III. Conditions of Franchise Agreements.

5.54.170 General duties.

All grantees, before commencing any construction in the rights-of-way, shall comply with all requirements of this Article.

5.54.180 Acceptance.

No franchise granted pursuant to the provisions of this Chapter shall become effective unless and until the franchise has been accepted by the grantee. Either before the franchise is presented to Council or within 60 days after the effective date of the ordinance or other City action granting a franchise, or within such extended period of time as may be authorized by the City, the applicant shall file written acceptance of the franchise in a form satisfactory to the City Attorney, together with the bonds, certificate(s) of insurance policies, and security fund required by this Article. Acceptance of a franchise shall consist of executing the written agreement granting the franchise and returning said franchise to the City within the period of time specified herein.

5.54.190 Police power.

In accepting any franchise, the grantee shall acknowledge that its rights are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public and it agrees to comply with all applicable general laws enacted by the City pursuant to such power.

5.54.200 Duty to provide information.

Within 30 days of a written request from the City, each grantee shall furnish the City with information sufficient to demonstrate that:

- A. The grantee has complied with all requirements of this Chapter;
- B. All fees due the City in connection with the services and facilities provided by the grantee have been properly collected and paid by the grantee;
- C. All books, records, maps and other documents maintained by the grantee with respect to its facilities within rights-of-way shall be made available for inspection by the Director at reasonable times and intervals; provided, however, that nothing in this section shall be construed to require a grantee to violate state or federal law regarding subscriber privacy, nor shall this section be construed to require a grantee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature.

5.54.210 Leased capacity.

A grantee shall have the right, without prior City approval, to offer or provide fiber capacity or bandwidth to other carriers, resellers, customers, or subscribers consistent with a franchise; provided, however, that the grantee shall remain responsible for compliance with this Chapter and such franchise.

5.54.220 Contractors and subcontractors.

A grantee's contractors and subcontractors shall be licensed and bonded in accordance with the City's ordinances, regulations, and requirements. Work by contractors and subcontractors is subject to the same restrictions, limitations, and conditions as if the work were performed by a grantee. Grantee shall be responsible for all work performed by its contractors and subcontractors and others performing work on its behalf as if the work were performed by it and shall ensure that all such work is performed in compliance with the franchise and applicable law.

5.54.230 Insurance.

Unless otherwise provided in the franchise, each grantee shall secure and maintain the following liability insurance policies insuring both the grantee and the City as an additional insured against claims for injuries to persons, death or damages to property which may arise from or in connection with the exercise of the rights, privileges and authority granted to the grantee:

A. Commercial General Liability Insurance Written on an Occurrence Basis. The insurance policy shall be endorsed to provide a per project general aggregate and there shall be no exclusions for liability arising from explosion, collapse or underground property damage. The policy shall have limits not less than:

1. \$3,000,000 for bodily injury, property damage, products-completed operations, stopgap liability, personal injury and advertising injury, and liability assumed under an insured contract;
2. \$6,000,000 general aggregate, per project aggregate and products-completed operations aggregate.

B. Automobile liability insurance covering all owned, nonowned, hired and leased vehicles with a minimum combined single limit for bodily injury and property damage of \$2,000,000 per accident.

C. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000. Grantee may satisfy this requirement by being a qualified self insurer.

D. Pollution liability insurance shall be in effect throughout the entire franchise term, with a limit of not less than \$1,000,000 per occurrence, and \$2,000,000 in the aggregate.

E. Excess or umbrella liability policy shall be excess over and at least as broad in coverage as the commercial general liability and automobile liability insurance with limits not less than \$5,000,000 per occurrence and annual aggregate.

F. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the franchise, and such other period of time during which the grantee is operating without a franchise, or is engaged in the removal of its telecommunications facilities. The insurance policies shall include the City, and its elected and appointed officers, officials, agents, employees, representatives, engineers, consultants and volunteers as additional insureds. The grantee shall provide a certificate of insurance (COI), together with the additional insured endorsement(s) to the City, upon acceptance of the franchise. Payment of deductibles and self-insured retentions shall be the sole responsibility of the grantee. The insurance required by this section shall apply separately to each insured against whom a claim is made or suit is brought. The grantee's required insurance shall be primary insurance with respect to the City, its officers, officials, employees, agents, engineers, consultants, and volunteers. Any insurance, self-insurance, or self-insured pool coverage maintained by the City shall be excess of the grantee's required insurance and shall not contribute with it. Receipt by the City of any certificate or evidence of insurance showing less coverage than required is not a waiver of grantee's obligations to fulfill the requirements. Grantee may utilize primary and excess liability insurance policies to satisfy the insurance policy limits required in this section. Grantee's excess liability insurance policy shall provide "follow form" coverage over its primary liability insurance policies.

G. Grantee is obligated to notify the City of any cancellation or intent not to renew any insurance policy required pursuant to this section 30 days prior to any such cancellation. Within 15 days prior to said cancellation or intent not to renew, grantee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this section. Failure to provide the insurance cancellation notice and to furnish to the City replacement insurance policies meeting the requirements of this section shall be considered a material breach of the franchise.

H. Grantee's maintenance of insurance, its scope of coverage and limits as required herein shall not be construed to limit the liability of the grantee to the coverage provided by such insurance, or otherwise limit the City's recourse to any remedy available at law or in equity. If the grantee maintains higher insurance limits than the minimums shown above, the City shall be insured for the full available limits of commercial general and excess or umbrella liability maintained by the grantee, irrespective of whether such limits maintained by the grantee are greater than those required by this code or whether any certificate of insurance furnished to the City evidences limits of liability lower than those maintained by the grantee. Further, grantee's maintenance of insurance policies required by this franchise shall not be construed to excuse unfaithful performance by grantee.

I. Upon approval by the City and based on conditions set by the City in the franchise, the grantee may self-insure under the same terms as required by this section. Further, the Public Works Director may modify these insurance requirements within the franchise as he/she deems necessary to comply with the City's risk management policies or as

otherwise approved by the City's Risk Manager; provided, that any such changes provide adequate protection for the City.

5.54.240 General indemnification.

As consideration for the issuance of a franchise, the franchise shall include an indemnity clause substantially conforming to the following:

A. Grantee hereby releases, covenants not to bring suit and agrees to indemnify, defend, and hold harmless the City, its elected and appointed officers, officials, employees, agents, engineers, consultants, volunteers, and representatives from any and all claims, costs, judgments, awards, or liability to any person arising from injury, sickness, or death of any person or damage to property:

1. For which the negligent acts or omissions of grantee, its agents, servants, officers or employees in performing the activities authorized are the proximate cause;
2. By virtue of grantee's exercise of the rights granted herein;
3. By virtue of the City's permitting grantee's use of the rights-of-way or other City property;
4. Based upon the City's inspection or lack of inspection of work performed by grantee, its agents and servants, officers or employees in connection with work authorized on a telecommunications facility, rights-of-way or other City property over which the City has control pursuant to any franchise issued;
5. Arising as a result of the negligent acts or omissions of grantee, its agents, servants, officers or employees in barricading, instituting trench safety systems or providing other adequate warnings of any excavation, construction, or work upon a telecommunications facility, in any rights-of-way in performance of work or services;
6. Based upon radio frequency emissions or radiation emitted from grantee's equipment located upon a telecommunications facility, regardless of whether grantee's equipment complies with applicable federal statutes and/or FCC regulations related thereto.

B. Grantee's indemnification obligations pursuant to subsection A of this section shall include assuming potential liability for actions brought against the City by grantee's own employees and the employees of grantee's agents, representatives, contractors, and subcontractors even though grantee might be immune under Title 51 RCW from direct suit brought by such an employee. It is expressly agreed and understood that this assumption of potential liability for actions brought against the City by the aforementioned employees is with respect to claims against the City arising by virtue of grantee's exercise of its rights. In addition to the indemnification obligations throughout this Section, the obligations of grantee under this subsection B shall be mutually negotiated between the

parties. Grantee shall acknowledge that the City would not enter into an agreement without grantee's waiver thereof. To the extent required to provide this indemnification and this indemnification only, grantee will waive its immunity under Title 51 RCW relating solely to indemnity claims made by the City directly against grantee for claims made against the City by grantee's employees as provided in RCW 4.24.115.

C. Inspection or acceptance by the City of any work performed by grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Provided that grantee has been given prompt written notice by the City of any such claim, said indemnification obligations shall also extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination of any litigation or the institution of any litigation. The City has the right to defend or participate in the defense of any such claim and has the right to approve any settlement or other compromise of any such claim.

D. In the event that grantee refuses the tender of defense in any suit or any claim, said tender having been made pursuant to this section, and said refusal is subsequently determined by a court having jurisdiction (or such other tribunal that the parties agree to decide the matter), to have been a wrongful refusal on the part of grantee, then grantee shall pay all of the City's costs for defense of the action, including all reasonable expert witness fees, reasonable attorneys' fees, the reasonable costs of the City, and reasonable attorneys' fees of recovering under this Subsection.

E. The obligations of grantee under the indemnification provisions of this section shall apply regardless of whether liability for damages arising out of bodily injury to persons or damages to property were caused or contributed to by the concurrent negligence of the City, its officers, agents, employees or contractors. The provisions of this section, however, are not to be construed to require the grantee to hold harmless, defend, or indemnify the City as to any claim, demand, suit, or action which arises out of the sole negligence of the City. In the event that a court of competent jurisdiction determines that a franchise is subject to the provisions of RCW 4.24.115, the parties agree that the indemnity provisions hereunder shall be deemed amended to provide that the grantee's obligation to indemnify the City hereunder shall extend only to the extent of grantee's negligence.

F. Notwithstanding any other provisions of this section, grantee assumes the risk of damage to its telecommunications facilities located in the rights-of-way and upon City property from activities conducted by the City, its officers, agents, employees and contractors, except to the extent any such damage or destruction is caused by or arises from any the sole negligence or willful or malicious action on the part of the City, its officers, agents, employees or contractors. Grantee releases and waives any and all such claims against the City, its officers, agents, employees and contractors. In no event shall the City be responsible for indirect, special, consequential, or punitive damages or losses, including but not limited to lost income or business interruption, whether or not a party has been advised of the possibility of such damage and notwithstanding the theory of liability in which an action may be brought. Grantee further agrees to indemnify, hold harmless and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of grantee's

telecommunications facilities as the result of any interruption of service due to damage or destruction of grantee's telecommunications facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors.

G. These indemnification requirements shall survive the expiration, revocation, or termination of a franchise issued thereunder.

5.54.250 Security.

Prior to or upon acceptance of a franchise pursuant to this Chapter, each grantee shall establish a permanent security instrument with the City by furnishing a security instrument in an amount as determined by the Public Works Director in cash, bond, an unconditional letter of credit or other security instrument acceptable to the City, which security instrument shall be maintained at the sole expense of the grantee so long as any of the grantee's facilities are located within the publicways of the City.

A. The security instrument shall serve as security for the full and complete performance of the franchise and of this Chapter, including any costs, expenses, damages or loss the City pays or incurs, including civil penalties, because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the City.

B. Before any claims are made against the security instrument, the City shall give written notice to the grantee:

1. Describing the act, default or failure to be remedied, or the damages, cost or expenses which the City has incurred by reason of the grantee's act or default;
2. Providing a reasonable opportunity for the grantee to first cure the existing or ongoing default or failure, if applicable;
3. Providing a reasonable opportunity for the grantee to pay any monies due the City before the City withdraws the amount thereof from the security, if applicable;
4. That the grantee will be given an opportunity to review the act, default or failure described in the notice with the Public Works Director.

C. Grantee shall ensure the security instrument is the most current and shall furnish an updated security instrument upon 30 days' written notice from the City.

D. Upon termination or expiration of a franchise, the City shall release the security instrument to the grantee within 30 days after removal or abandonment in place (if allowed) of grantee's facilities within the public ways.

5.54.260 Construction and warranty bond.

A. Unless otherwise provided in a franchise, or where a standing bond in an amount and format agreeable to the Public Works Director has been retained by a grantee, a bond written by a surety acceptable to the City in the amount by the City's construction design standards shall be deposited before construction is commenced.

B. The construction bond shall remain in force until 60 days after substantial completion of the work, as determined by the Public Works Director, including restoration of public ways and other property affected by the construction.

C. The construction bond shall guarantee, to the satisfaction of the City:

1. Timely completion of construction;
2. Construction in compliance with applicable plans, permits, technical codes and standards;
3. Proper location of the facilities as specified by the City;
4. Restoration of the public ways and other property affected by the construction;
5. The submission of as-built drawings after completion of the work as required by this Chapter; and
6. Timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.

D. A warranty bond is required during the warranty period to ensure adequate funds for the City to perform the necessary warranty work should grantee not do so for improvements against any defective work or labor done or defective materials used in the performance of the improvements throughout the warranty period. The warranty period shall be for 2 years following completion and acceptance of the improvements unless a longer warranty period is required by the Public Works Director. This security shall be consistent with the amount determined in the City's construction design standards and shall be posted prior to the release of the construction bond. Such bond will be released by the City consistent with the requirements of the City's construction design standards.

5.54.270 Coordination of construction activities.

All grantees are required to cooperate with the City and with each other.

A. Upon request, grantees shall provide the City with a schedule of their proposed construction activities in, around, or that may affect the public ways within the next 12 months.

B. Each grantee shall meet with the City and other grantees of the public ways annually or as determined by the City to schedule and coordinate construction in the public ways.

C. To the extent possible, all construction locations, activities and schedules shall be coordinated to minimize public inconvenience, disruption or damages.

5.54.280 Assignments or transfers of grant of franchise.

A. A franchise may not be directly or indirectly assigned, transferred, or disposed of by sale, lease, merger, consolidation, or other act of grantee, by operation of law or otherwise, unless prompt written notice is provided to the City within sixty (60) days of the assignment. In the case of transfer or assignment as security by mortgage or other security instrument in whole or in part to secure indebtedness, such notice shall not be required unless and until the secured party elects to realize upon the collateral. For purposes of this section, no assignment or transfer of a franchise shall be deemed to occur based on the public trading of grantee's stock; provided, however, any tender offer, merger, or similar transaction resulting in a change of control shall be subject to the provisions of a franchise.

B. Any transactions which singularly or collectively result in a change of 50% or more of the ownership or working control (for example, management of grantee or its facilities) of the grantee or of the ownership or working control of the grantee's facilities within the City, or of the ownership or working control having ownership or working control of the grantee or of the grantee's facilities within the City, or of control of the capacity or bandwidth of the grantee's facilities within the City, shall be considered an assignment or transfer requiring notice to the City pursuant to a franchise. Such transactions between affiliated entities are not exempt from notice requirements. A grantee shall notify the City of any proposed change in, or transfer of, or acquisition by any other party of control of a grantee within sixty (60) days following the closing of the transaction.

5.54.290 Revocation or termination of grant.

A franchise granted by the City to use or occupy rights-of-way may be revoked for any one or more of the following reasons:

- A. Construction or operation at an unauthorized location;
- B. Misrepresentation or lack of candor by or on behalf of a grantee in any application to the City;
- C. Unauthorized abandonment of facilities in the rights-of-way;
- D. Failure to relocate or remove facilities as required in this Chapter;
- E. Failure to pay taxes, compensation, fees or costs when and as due the City;
- F. Insolvency or bankruptcy of the grantee;
- G. Violation of a material provision of this Chapter;
- H. Violation of a material term of a franchise.

5.54.300 Notice and duty to cure.

In the event that the Public Works Director believes that grounds exist for revocation of a franchise, the grantee shall be given written notice of the apparent violation or noncompliance, be provided a short and concise statement of the nature and general facts of the violation or noncompliance, and be given a reasonable period of time not exceeding 30 days to furnish evidence that:

- A. Corrective action has been, or is being, actively and expeditiously pursued to remedy the violation or noncompliance.
- B. Rebutts the alleged violation or noncompliance.
- C. It would be in the public interest to impose some monetary damages, penalty, or sanction less than revocation.

5.54.310 Hearing.

In the event that a grantee fails to provide evidence reasonably satisfactory, as provided under MMC 5.54.300, to the Public Works Director, he/she shall refer the apparent violation or noncompliance to the City Council. The City Council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

5.54.320 Lesser sanctions.

If persuaded that the grantee has violated or failed to comply with a material provision of this Chapter or of a franchise or applicable codes, ordinances, resolutions, or statutes, the City Council shall determine whether to revoke the franchise, and issue a written decision relating thereto, or to establish some monetary damages, penalty, lesser sanction and cure, considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

- A. Whether the misconduct was egregious;
- B. Whether substantial harm resulted;
- C. Whether the violation was intentional;
- D. Whether there is a history of prior violations of the same or other requirements;
- E. Whether there is a history of overall compliance;
- F. Whether the violation was voluntarily disclosed, admitted or cured.

Article IV Construction Standards.

5.54.330 Permit required.

- A. Other than as exempted by this Chapter or other applicable law, no grantee or

person acting under the authority granted to a grantee shall construct or install facilities within the right-of-way or engage in ground disturbance activities within the right-of-way without first obtaining a right-of-way permit for such work pursuant to Chapter 12.36 MMC or, where applicable, a small wireless permit pursuant to Chapter 22.62 MMC.

B. When necessary to address an imminent threat to public health, safety or the environment, grantees may perform work prior to obtaining a permit as required under subsection (A) of this section; provided, that in such cases the franchisee shall notify the department and apply for a permit for such work as soon as practicable.

5.54.340 Location of facilities.

Unless otherwise specified in a franchise, all facilities shall be constructed, installed, and located in accordance with the following terms and conditions:

A. Facilities shall be installed within an existing underground duct or conduit whenever excess capacity exists within such utility facility, unless such location is not feasible due to the technology employed in the facility.

B. A grantee with written authorization to install overhead facilities shall install its facilities on pole attachments to existing or replacement utility poles only, and then only if surplus space is available; provided that, small wireless facilities may be installed on new poles as allowed by Chapter 22.62 MMC.

C. Whenever any existing telephone facilities, electric utilities, cable facilities, or telecommunications facilities are located underground within rights-of-way, a grantee with written authorization to occupy the same rights-of-way, must also locate its facilities underground to the extent technically feasible; provided that, small wireless facilities may be installed in accordance with Chapter 22.62 MMC.

D. Whenever any new or existing telephone facilities, electric utilities, cable facilities, or telecommunications facilities are relocated underground within rights-of-way, a grantee shall concurrently relocate its facilities underground if technically feasible; provided that, small wireless facilities may be relocated in accordance with Chapter 22.62 MMC.

E. If requested, a grantee shall provide the City with additional duct or conduit and related structures necessary to access the conduit; provided, that:

1. The City enters into a contract with the grantee consistent with RCW 80.36.150. The contract rates to be charged should recover the incremental costs of the grantee. If the City makes the additional duct or conduit and related access structures available to any other entity for the purposes of providing telecommunications or cable television service for hire, sale, or resale to the general public, the rates to be charged, as set forth in the contract with the entity that constructed the conduit or duct, shall recover at least the fully allocated costs of the grantee. The grantee shall state both contract rates in the contract. The City shall inform the grantee of the use, and any change in use, of the requested duct or conduit and related access structures to determine the applicable rate to be paid

by the City.

2. Except as otherwise agreed by the grantee and the City, the City shall agree that the requested additional duct or conduit space and related access structures will not be used by the City to provide telecommunications or cable television service for hire, sale, or resale to the general public.

3. The City shall not require that the additional duct or conduit space be connected to the access structures and vaults of the grantee.

4. The value of the additional duct or conduit requested by the City shall not be considered a public works construction contract.

5.54.350 Interference with the rights-of-way.

No grantee may locate or maintain its facilities so as to unreasonably interfere with the use of the rights-of-way by the City, by the general public or other persons, or other persons authorized to use or be present in or upon the rights-of-way. All such facilities shall be moved by and at the expense of the grantee, temporarily or permanently, as determined by the City.

5.54.360 Damage to property.

No grantee or any person acting on a grantee's behalf shall take any action or permit any action to be done which may impair or damage any rights-of-way, including specifically City property, real or personal, or rights -of-way, or other property located in, on or adjacent thereto except in accordance with this Chapter.

5.54.370 Notice of work.

Any private property owner whose property will be affected by a grantee's work shall be afforded 10 working days advance written notice of such work.

5.54.380 Repair and emergency work.

In the event of an emergency or an emergency repair necessary to protect the public, restore service or mitigate further damage to the system, a grantee may commence such repair and emergency response work as required under the circumstances; provided, the grantee shall notify the Director as promptly as possible, before such repair or emergency work or as soon thereafter as possible if advance notice is not practicable, and obtain applicable permits pursuant to MMC 5.54.330.

5.54.390 Maintenance of facilities.

Each grantee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements.

5.54.400 Relocation or removal of facilities.

A. The City may require grantee, to protect, support, temporarily disconnect, relocate, and remove, its facilities within the right-of-way when reasonably necessary for construction, alteration, repair, or improvement of the right-of-way for purposes of and for public welfare, health, or safety. These projects may include but are not limited to, improving the rights-of-way for traffic conditions, dedications of new rights-of-way and the establishment and improvement thereof, widening and improvement of existing rights-of-way, street vacations, freeway construction, change or establishment of street grade, or the construction of any public improvement or structure by any governmental agency acting in a governmental capacity or as otherwise necessary for the operations of the City or other governmental entity, regardless of the type of entity (public or private) performing the project.

B. The City shall notify the grantee as soon as practicable of the need to relocate pursuant to subsection A above and shall specify the date by which the relocation shall be completed. The City shall consult with the grantee on the construction schedule. The grantee shall complete the relocation by the date specified by the City, unless a later date is set for completion pursuant to RCW 35.99.060(2), or by mutual agreement of the City and the grantee.

C. Except as otherwise provided by law, the costs and expenses associated with relocations or disconnections ordered pursuant to subsection A above shall be borne by grantee, provided however grantee shall not be limited in its ability to seek reimbursement for relocation costs when permitted by RCW 35.99.060.

D. The City may require the relocation of grantee's facilities at grantee's expense in the event of an unforeseen emergency that creates an immediate threat to the public safety, health or welfare.

5.54.410 Building moving.

Whenever any person shall have obtained permission from the City to use any public right-of-way for the purpose of moving any building, a grantee shall have five (5) business days to coordinate raising or removing its facilities to accommodate the moving of the building. In no case shall raising or removing its facilities to accommodate the moving of the building take longer than 30 days unless agreed to in writing by the person moving the building; provided, that the person desiring to move the building shall comply with all requirements of the City for the movement of buildings. All raising or removing of grantee's facilities which obstruct the removal of such building shall be at the expense of the person desiring to move the building.

5.54.420 Removal of unauthorized facilities.

Within 30 days following written notice from the City, any grantee, service provider, or other person that owns, controls, or maintains any unauthorized facility within the rights-of-way shall, at its own expense, remove such facilities from the rights-of-way. If such grantee fails to remove such facilities, the City may cause the removal and charge the

grantee for the costs incurred. A facility or system is unauthorized and subject to removal in the following circumstances:

- A. Upon expiration or termination of the grantee's franchise;
- B. Upon abandonment of a facility within the rights-of-way;
- C. If the system or facility was constructed or installed without the prior grant of a franchise;
- D. If the system or facility was constructed or installed without the prior issuance of a required utility right-of-way permit;
- E. If the system or facility was constructed or installed at a location not permitted by the grantee's franchise;
- F. Any such other reasonable circumstances deemed necessary by the Director.

5.54.430 Emergency removal or relocation of facilities.

The City retains the right and privilege to cut or move any facilities located within the rights-of-way as the City may determine to be necessary, appropriate, or useful in response to any public health or safety emergency. The City shall not be liable to any grantee or any other party for any direct, indirect, or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this section. Grantee shall be responsible for any costs incurred by the City in remediating any such emergency.

5.54.440 Damage to grantee's facilities.

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

5.54.450 Restoration.

Restoration shall comply with the following requirements:

- A. When a grantee, or any person acting on its behalf, does any work in or affecting any rights-of-way, or any other property, it shall, at its own expense, promptly remove any obstructions therefrom and restore such ways or property to the same condition which existed before the work was undertaken.
- B. If weather or other conditions do not permit the complete restoration required hereunder, the grantee shall temporarily restore the affected rights-of-way or other property. Such temporary restoration shall be at the grantee's sole expense and the

grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.

C. A grantee or other person acting on its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work or affecting rights-of-way or any other property.

D. All restoration shall comply with the City's Public Works Design and Construction Manual.

5.54.460 Facilities plans and maps.

A. Within 90 days after completion of construction, and if required by permit, a grantee shall furnish the City with complete sets of plans, drawn to scale and certified to the City as accurately as reasonably possible and depicting the horizontal location and configuration of all facilities constructed pursuant to the construction permit. The Public Works Director shall have the discretion to prescribe the number of copies and format of said record drawings, consistent with City codes and policies, and to require submission of such record drawings in a digital format.

B. Upon request, but no more than once per year, the City may request that the grantee provide a map or maps showing the location of all grantee's facilities within the public ways.

5.54.470 Safety requirements.

A grantee, in accordance with applicable federal, state and local safety requirements, shall, at all times, employ ordinary care and shall install and maintain and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury or nuisance to the public. All structures and all lines, equipment and connections in, over, under and upon the streets, sidewalks, alleys and public ways or places of a permit area, wherever situated or located, shall at all times be kept and maintained in a safe, suitable condition and in accordance with the approved plans. Grantee shall endeavor to maintain all equipment lines and facilities in an orderly manner. Additionally, grantee shall keep its facilities free of debris and anything of a dangerous, noxious or offensive nature or which would create a hazard or undue vibration, heat, noise or any interference with City services. The City reserves the general right to see that the grantee's facilities are constructed and maintained in a safe condition. If a violation of the National Electrical Safety Code, other applicable regulation, or an otherwise unsafe condition is found to exist by the City, the City will establish a reasonable time for a grantee to make necessary repairs, unless the City determines that the unsafe condition requires immediate resolution which in such case the City can require the grantee to immediately repair or in the absence of the grantee's availability make the repairs itself. If the repairs are not made within the established time frame or when immediate repair is required, the City may make the repairs itself or have them made and collect all reasonable costs thereof from a grantee. All costs, including administrative costs, incurred by the City in repairing any unsafe conditions shall be borne by grantee and reimbursed

to the City.

5.54.480 Stop work order.

On notice from the City that any work is being performed contrary to the provisions of this code, or in an unsafe or dangerous manner as determined by the City, or in violation of the terms of any applicable permit, laws, regulations, or standards, the work may immediately be stopped by the City. The stop work order shall:

- A. Be in writing;
- B. Be given to the person doing the work or posted on the work site;
- C. Be sent to grantee by overnight delivery;
- D. Indicate the nature of the alleged violation or unsafe condition; and
- E. Establish conditions under which work may be resumed.

5.54.490 Abandonment.

A. A grantee that has determined to discontinue its operations in the City must submit to the City, within 90 days of the planned date for discontinuance of operation, a proposal and instruments for transferring ownership of its facilities to the City. If a grantee proceeds under this clause, the City may at its option:

- 1. Accept assignment of the facilities; or
- 2. Require the grantee, at its own expense, to remove the facilities.

B. Facilities of a grantee who fails to comply with the preceding subsection and which, for 180 days, remain unused shall be deemed to be abandoned. Abandoned facilities are deemed to be a nuisance. After the lapsing of such 180 days and upon 30 days' notice to the grantee, the City may exercise any remedies or rights it has at law or in equity, including but not limited to:

- 1. Abating the nuisance;
- 2. Requiring removal of the facilities at the expense of the grantee; or
- 3. Removing abandoned facilities at the expense of the grantee in conjunction with a proposed construction project.

C. This section shall not apply to the abandonment of a cable system as defined by Chapter 5.52MMC.












Franchise Code Ordinance

Final Audit Report

2022-03-10

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