

*For: Monday, **July 27, 2015**, City Council Meeting*

Advance Packet Information

Dated: July 17, 2015

Included in this packet is documentation to support the following Agenda items:

ORDINANCES

1. Ordinance 15-O-745 naming Brookings Municipal Code Title 4, “Franchises,” and adding Chapter 4.05, Communications Infrastructure, to Title 4. [City Manager, pg. 2]
 - a. 15-O-745 [pg. 4]

*Obtain Public Comment Forms and view the agenda and packet information on-line at www.brookings.or.us, or at City Hall. Return completed Public Comment Forms to the City Recorder before the start of meeting or during regular business hours.

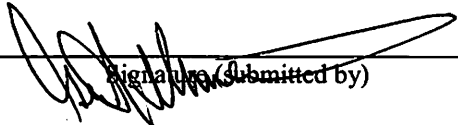
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CITY OF BROOKINGS

COUNCIL AGENDA REPORT

Meeting Date: July 27, 2015

Originating Dept: City Manager



Signature (Submitted by)

City Manager Approval

Subject: Ordinance adding a Communications Infrastructure chapter to the BMC.

Recommended Action: Adopt Ordinance 15-O-745, creating Title 4, Franchises, and adding Chapter 4.05, Communications Infrastructure, to the Brookings Municipal Code.

Financial Impact: Adoption of Ordinance 15-O-745 could be revenue-neutral or provide an opportunity for additional revenue from communications providers. The ordinance may generate some additional revenue from entities that use, but do not own, communications facilities in the City's rights of way to provide service to customers in the City.

Background/Discussion: The City has statutory and constitutional home rule authority to manage its rights of way and receive compensation for use of the rights of way, consistent with applicable state and federal laws. Historically, the City has managed this by granting franchises to each utility using the City's rights of way to provide service, including communications and cable providers. A franchise is a legally enforceable contract between the City and the utility that sets forth the terms of use of the rights of way (for example, construction, restoration and permitting) and the franchise fee, which is the compensation paid to the City for this use. Each franchise is individually negotiated and there is no ordinance or provision in the City's Municipal Code that addresses the franchise requirement.

Recently, the City has faced difficulties in reaching agreement on a new franchise with Charter Communications, a cable television service provider. In addition to the costs of long-term negotiations, there is uncertainty as to what regulations apply when providers are operating in the City with an expired franchise agreement.

Additionally, when Comcast proposed to acquire Charter and assume the franchise, management noted that the City has no provision whereby it can recover the cost of review and processing such transfers. The proposed ordinance would correct this deficiency.

An alternative to negotiating franchise agreements with each communications and cable provider is the enactment of a communications infrastructure ordinance that would provide uniform requirements for all such providers using City rights of way. The ordinance still requires franchise agreements; however, it sets out the minimum terms the City expects in every communications and cable franchise. This should simplify franchise negotiations, as the policy decisions regarding use of City rights of way will be established in the ordinance. While the City would have the authority to alter the terms of the Ordinance for any given franchisee, the

expectation would be that all providers' franchises would incorporate the ordinance's requirements rather than individual negotiations of each provision.¹

Another advantage of the ordinance is that it establishes the terms and conditions, including payment of fees, for all communications and cable providers that do not have a valid franchise from the City. This eliminates the uncertainty over applicable regulations in those instances in which a provider installs facilities in City rights of way without a franchise, or where the franchise is no longer valid.

Finally, the ordinance as proposed would require entities that use, but do not own, facilities in the City's rights of way to pay a fee to the City. To the extent such providers exist, this would be additional revenue to the City. The purpose of this provision is to ensure that the City receives fair compensation from those entities that benefit from use of the rights of way, a public asset. That benefit extends to both facility owners and non-owners. If non-owners who use facilities in the rights of way do not pay, then the City may not receive adequate compensation for the privilege of this use. For example, some competitive communications companies will essentially lease facilities from the incumbent telephone provider in order to provide competitive services. When the incumbent provider loses a customer to the competitor, the City will experience reduced franchise fees unless the competitor also must pay a fee to the City. Further, the facility owner could give a subsidiary or other affiliated entity free use of its facilities, thereby paying nothing to the City under a franchise with franchise fees based on revenue from the City's customers, while the affiliate in turn pays nothing under the City's current practice because it does not own facilities. The ordinance should address this potential scenario.

The proposed ordinance will create Title 4, Franchises, and add Chapter 4.05, Communications Infrastructure, to the Brookings Municipal Code.

Policy Considerations: The proposed ordinance essentially codifies the City's existing franchise practice, with the goal of streamlining communications franchising and establishing a uniform set of regulations for all communications (including cable) providers operating in the City. Many providers prefer to negotiate every term of a franchise rather than follow a local ordinance, and thus may raise concerns regarding the ordinance. However, most providers request equal treatment with similarly situated providers, which is more easily achieved through an ordinance rather than through individually negotiated franchise agreements.

Another policy consideration is the application of the fee to non-owners of facilities. This would be a new policy for the City. Many other cities in Oregon apply similar fees to non-owners for the reasons outlined above. The rate of this fee would be set by separate Council resolution, and likely would be a percentage of the providers' revenue from customers in the City.

Finally, under current state law, the franchise fee paid by the incumbent telephone provider for its use of the rights of way is capped at seven percent of its revenue from exchange access services. This is a limited portion of its revenue from customers in the City. State law does not preclude the City from charging a fee on non-exchange access services so long as that fee is not a fee for use of the rights of way. The draft ordinance does not extend to this revenue because it is only a fee for use of the rights of way.

Attachment(s):

- a. Ordinance 15-O-745

¹ An exception to this is the public, educational and government (PEG) access channels, financial support, and other community needs provided for in the federal Cable Act, which would be negotiated with each cable operator.

IN AND FOR THE CITY OF BROOKINGS
STATE OF OREGON
ORDINANCE 15-O-745

IN THE MATTER OF ORDINANCE 15-O-745, AN ORDINANCE NAMING BROOKINGS MUNICIPAL CODE TITLE 4, “FRANCHISES,” AND ADDING CHAPTER 4.05, COMMUNICATIONS INFRASTRUCTURE, TO TITLE 4.

Sections:

- Section 1. Ordinance identified.
- Section 2. Names Title 4.
- Section 3. Adds Chapter 4.05.

The City of Brookings ordains as follows:

Section 1. Ordinance Identified. This ordinance names Brookings Municipal Code, Title 4, “Franchises,” and adds Chapter 4.05 Communications Infrastructure to Title 4.

Section 2. Names Title 4. Title 4 of the Brookings Municipal Code is hereby named, “Franchises.”

Section 3. Adds Chapter 4.05 : Chapter 4.05, Communications Infrastructure, is hereby added as follows:

CHAPTER 4.05
COMMUNICATIONS INFRASTRUCTURE

4.05.010 Short Title and Intent

A. Short Title

This Chapter may be referred to as the “Communications Infrastructure Chapter.”

B. Jurisdiction and Management of the Public Rights of Way

1. The City has jurisdiction and exercises regulatory management over all public rights of way within the City under authority of the City Charter and state law.
2. The City has jurisdiction and exercises regulatory management over each public right of way whether the City has a fee, easement, or other legal interest in the right of way. The City has jurisdiction and regulatory management of each right of way whether the legal interest in the right of way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
3. No person may occupy or encroach on a public right of way without the permission of the City. The City grants permission to use rights of way by franchises and permits.
4. The exercise of jurisdiction and regulatory management of a public right of way by the City is not official acceptance of the right of way, and does not obligate the City to maintain or repair any part of the right of way.
5. The City retains the right and privilege to cut or move any communications facilities located within the public rights of way of the City, as the City may determine to be necessary,

appropriate or useful in response to a public health or safety emergency.

C. Regulatory Fees and Compensation Not a Tax

1. The fees and costs provided for in this Chapter, and any compensation charged and paid for use of the public rights of way provided for in this Chapter, are separate from, and in addition to, any and all other federal, state, local, and City charges as may be levied, imposed, or due from a communications provider, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of communications services.
2. The City has determined that any fee or tax provided for by this Chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees or taxes are not imposed on property or property owners.
3. The fees and costs provided for in this Chapter are subject to applicable federal and state laws.

4.05.020 Definitions

For the purpose of this Chapter the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined herein shall be given the meaning set forth in the Communications Act of 1934, as amended, the Cable Act, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act. If not defined there, the words shall be given their common and ordinary meaning.

“Cable Act” shall mean the Cable Communications Policy Act of 1984, 47 U.S.C. § 521, *et seq.*, as amended.

“Cable Service” is to be defined consistent with federal laws and means the one-way transmission to subscribers of video programming, or other programming service; and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

“City” means the City of Brookings, an Oregon municipal corporation, and individuals authorized to act on the City’s behalf.

“City Council” means the elected governing body of the City of Brookings, Oregon.

“Control” means actual working control in whatever manner exercised.

“City Property” means and includes all real property owned by the City, other than public rights of way and utility easements as those are defined herein, and all property held in a proprietary capacity by the City, which are not subject to right of way franchising as provided in this Chapter.

“Communications Facilities” means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cable, wires, plant and equipment located or to be located under, on, or above the surface of the ground and used or to be used for the purpose of providing communications services.

“Communications Provider” means any provider of communications services and includes, but is not limited to, every person that directly or indirectly owns, controls, operates or manages

communications facilities within the City.

“Communications Service” any service provided for the purpose of transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself, and includes all forms of telephone services and voice, video, data or information transport, but does not include:

- open video system service, as defined in 47 C.F.R. 76;
- private communications system services provided without using the public rights of way;
- over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and
- direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

“Communications System” see “Communications facilities” above.

“Construction” means any activity in the public rights of way resulting in physical change thereto, including excavation or placement of structures, but excluding routine maintenance or repair of existing facilities.

“Days” means calendar days unless otherwise specified.

“Director” means the Director of Public Works and Development Services, or his/her designee.

“Emergency” has the meaning provided for in ORS 401.025.

“Federal Communications Commission” means the federal administrative agency, or its lawful successor, authorized to regulate and oversee communications providers, services and providers on a national level.

“Franchise” means an agreement between the City and a grantee which grants a privilege to use public right of way and utility easements within the City for a dedicated purpose and for specific compensation.

“Grantee” means the person to which a franchise is granted by the City.

“OPUC” means the statutorily created state agency in the State of Oregon responsible for licensing and regulation of certain communications providers as set forth in Oregon Law, or its lawful successor.

“Person” means an individual, corporation, company, association, joint stock company or association, firm, partnership, or limited liability company.

“Private Communications Network” means a system, including the construction, maintenance or operation of the system, for the provision of a service or any portion of a service which is owned or operated exclusively by a person for their use and not for resale, directly or indirectly. "Private communications network" includes services provided by the State of Oregon pursuant to ORS 190.240 and 283.140.

“Public Rights of Way or Right of Way” include, but are not limited to, streets, roads, highways, bridges, alleys, sidewalks, trails, paths, public easements, and other public ways or areas, including the subsurface under and air space over these areas, within the City, but does not include parks, parkland or other City property not generally open to the public for travel. This definition applies

only to the extent of the City's right, title, interest or authority to grant a franchise to occupy and use such areas for communications facilities. "Public rights of way" shall also include utility easements as defined below.

"State" means the State of Oregon.

"Telecommunications Act" means the Communications Policy Act of 1934, as amended by subsequent enactments including the Telecommunications Act of 1996, 47 U.S.C. § 151 et seq.

"Utility Easement" means any easement granted to or owned by the City and acquired, established, dedicated, or devoted for public utility purposes. "Utility easement" does not include any easement dedicated solely for City facilities or where the proposed use by the communications provider is inconsistent with the terms and conditions of any easement granted to the City.

4.05.030 Registration Of Communications Providers

A. Purpose. The purpose of registration is:

1. To assure that all communications providers who have facilities and/or provide services within the City comply with the ordinances, rules and regulations of the City.
2. To provide the City with accurate and current information concerning the communications providers who offer to provide communications services within the City, or that own or operate communications facilities within the City.
3. To assist the City in the enforcement of this Chapter and the collection of any city franchise fees or charges that may be due the City.

B. Registration Required

1. Except as provided in BMC 4.05.030 (D) hereof, all communications providers having communications facilities within the corporate limits of the City, and all communications providers that offer or provide communications services to any customer within the City, shall register within forty-five (45) days of the effective date of this Chapter. Any communications provider that desires to have communications facilities within the corporate limits of the City or to provide communications services to any customer within the City after the effective date of this Chapter shall register prior to such installation or provision of service.
2. After registering with the City pursuant to BMC 4.05.030(B)(1), the registrant shall, by December 31st of each year, file with the City a new registration form if it intends to provide communications services at any time in the following calendar year. Registrants that file an initial registration pursuant to BMC 4.05.030(B)(1) on or after September 30th shall not be required to file an annual registration until December 31st of the following year.
3. The appropriate application and license from: a) the Oregon Public Utility Commission (PUC); or b) the Federal Communications Commission qualify as necessary registration information. To the extent not included in the application and license materials submitted pursuant to BMC 4.05.030(B)(1), applicants also shall provide the following information:
 - a. The identity and legal status of the registrant, including the name, address, and telephone number of the duly authorized officer, agent, or employee responsible for the accuracy of the registration information.

- b. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an emergency.
- c. A description of the registrant's existing or proposed communications facilities within the City, a description of the communications facilities that the registrant intends to construct, and a description of the communications services that the registrant intends to offer or provide to persons, firms, businesses, or institutions within the City.
- d. Information sufficient to determine whether the transmission, origination or receipt of the communications services provided, or to be provided, by the registrant constitutes an occupation or privilege subject to the City's business license requirements. A copy of the business license or the license number must be provided.

C. Registration Application Fee

Each application for registration as a communications provider shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council.

D. Exceptions to Registration

The following communications providers are excepted from registration:

1. Communications providers with a valid franchise agreement granted by the City pursuant to this Chapter.
2. Communications facilities that are owned and operated exclusively for its own use by the State or a political subdivision of this State.
3. A private communications network, provided that such network does not occupy any public rights of way of the City.

4.05.040 Construction Standards

A. General. No person shall commence or continue with the construction, installation or operation of communications facilities within a public right of way except as provided in BMC 4.05.040 and 4.05.050, and with all applicable codes, rules, and regulations.

B. Construction Codes. Communications facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations including the National Electrical Code and the National Electrical Safety Code.

C. Construction Permits. Except in the event of an emergency, no person shall construct or install any communications facilities within a public right of way without first obtaining a construction permit, and paying the construction permit fee established in BMC 4.05.040 (G). No permit shall be issued for the construction or installation of communications facilities within a public right of way:

1. Unless the communications provider that owns or will own the communications facilities has first filed a registration statement with the City as required by BMC 4.05.030; and
2. Unless the communications provider that owns or will own the communications facilities has first applied for and received a franchise pursuant to BMC 4.05.060.

In the event of an emergency, a franchisee or its contractor may perform work on its communications facilities without first obtaining a permit from the City, provided that, to the extent reasonably feasible, it attempts to notify the City prior to commencing the emergency work and in any event applies for a permit from the City and pays the permit fee as soon as reasonably

practicable, but not more than forty eight (48) hours after commencing the emergency work. As used in BMC 4.05.040, “emergency” means a circumstance in which immediate repair to damaged or malfunctioning communications facilities is necessary to restore lost service or prevent immediate harm to persons or property.

D. Permit Application. Applications for permits to construct communications facilities shall be submitted upon forms to be provided by the City and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

1. That the communications facilities will be constructed in accordance with all applicable codes, rules and regulations.
2. That the communications facilities will be constructed in accordance with the franchise agreement.
3. The location and route of all communications facilities to be installed aboveground or on existing utility poles.
4. The location and route of all new communications facilities on or in the public rights of way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route which are within the public rights of way. Applicant’s existing communications facilities shall be differentiated on the plans from new construction. A cross section shall be provided showing new or existing communications facilities in relation to the street, curb, sidewalk or right of way.
5. The construction methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the public rights of way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.

E. Applicant’s Verification. All permit applications shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative of the applicant, that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations.

F. Construction Schedule. All permit applications shall be accompanied by a written construction schedule, which shall include a deadline for completion of construction. The construction schedule is subject to approval by the director.

G. Construction Permit Fee. Unless otherwise provided in a franchise agreement, prior to issuance of a construction permit, the applicant shall pay a permit fee in an amount to be determined by resolution of the City Council. Such fees shall be designed to defray the costs of city administration of the requirements of this Chapter.

H. Issuance of Permit. If satisfied that the applications, plans and documents submitted comply with all requirements of this Chapter and the franchise agreement, the director shall issue a permit authorizing construction of the facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as they may deem necessary or appropriate.

I. Notice of Construction. Except in the case of an emergency, the permittee shall notify the director not less than two (2) working days in advance of any excavation or construction in the public rights of way.

J. Compliance with Permit. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The director and his/her representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

K. Noncomplying Work. Subject to the notice requirements in BMC 4.05.050(D), all work which does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Chapter, shall be removed at the sole expense of the permittee. The City is authorized to stop work in order to assure compliance with the provision of this Chapter.

L. Completion of Construction. The permittee shall promptly complete all construction activities so as to minimize disruption of the city rights of way and other public and private property. All construction work within city rights of way, including restoration, must be completed within one hundred twenty (120) days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved by the director.

M. As-Built Drawings. If requested by the City for a necessary public purpose, as determined by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and certified to the City as accurately depicting the location of all communications facilities constructed pursuant to the permit. These plans shall be submitted to the director within sixty (60) days after completion of construction, in a format acceptable to the City.

N. Restoration of Public Rights of Way.

1. When a permittee, or any person acting on its behalf, does any work in or affecting any public rights of way, it shall, at its own expense, promptly restore the affected areas to as good a condition as existed before the work was undertaken, or as otherwise required in the permit issued by the City.

2. If weather or other conditions do not permit the complete restoration required by BMC 4.05.040 (N), the permittee shall temporarily restore the affected rights of way. Such temporary restoration shall be at the permittee's sole expense and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule may be subject to approval by the director.

3. If the permittee fails to restore rights of way or property to good order and condition, the City shall give the permittee written notice and provide the permittee a reasonable period of time not exceeding thirty (30) days to restore the rights of way or property. If, after such notice, the permittee fails to restore the rights of way or property to as good a condition as existed before the work was undertaken, or as otherwise required in the permit issued by the City, the City shall cause such restoration to be made at the expense of the permittee.

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

O. Performance and Completion Bond. Unless otherwise provided in a franchise agreement, a performance bond or other form of surety acceptable to the City equal to at least 100% of the

estimated cost of constructing the communications facilities within the public rights of way of the City shall be provided before construction is commenced.

1. The surety shall remain in force until sixty (60) days after substantial completion of the work, as determined in writing by the City, including restoration of public rights of way and other property affected by the construction.
2. The surety shall guarantee, to the satisfaction of the City:
 - a. Timely completion of construction;
 - b. Construction in compliance with applicable plans, permits, technical codes and standards;
 - c. Proper location of the facilities as specified by the City;
 - d. Restoration of the public rights of way and other property affected by the construction; and
 - e. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

4.05.050 Location Of Communications Facilities

A. Location of Facilities. All facilities located within the public right of way shall be constructed, installed and located in accordance with the terms of the permit and approved final plans and specifications for the facilities, the franchise, and all applicable City codes, rules and regulations. Unless otherwise specified in a franchise agreement, whenever any existing electric utilities, cable facilities or communications facilities are located underground within a public right of way of the City, a grantee occupying the same public right of way must also locate its communications facilities underground at its own expense.

B. Interference with the Public Rights of Way. No grantee may locate or maintain its communications facilities so as to unreasonably interfere with the use of the public rights of way by the City, by the general public or by other persons authorized to use or be present in or upon the public rights of way. All use of public rights of way shall be consistent with City codes, ordinances and regulations.

C. Relocation or Removal of Facilities.

1. A grantee shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any communications facilities within the public rights of way, including relocation of aerial communications facilities underground, when requested to do so in writing by the City.
2. Nothing in BMC 4.05.050(C), shall be deemed to preclude grantee from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements, provided that grantee shall timely comply with the requirements of BMC 4.05.050(C), regardless of whether or not it has requested or received such reimbursement or compensation.
3. The City shall provide written notice of the time by which grantee must remove, relocate, change, alter or underground its communications facilities. If grantee fails to remove, relocate,

alter or underground any communications facility as requested by the City and by the date established by the City, grantee shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays, and the City may cause the communications facility to be removed, relocated, altered or undergrounded at grantee's sole expense using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations. Upon receipt of a detailed invoice from the City, grantee shall reimburse the City for the costs the City incurred within thirty (30) days.

D. Removal of Unauthorized Facilities. Within thirty (30) days following written notice from the City, any grantee, communications provider, or other person that owns, controls or maintains any unauthorized communications system, facility, or related appurtenances within the public rights of way of the City shall, at its own expense, remove such communications facilities and/or appurtenances from the public rights of way of the City. A communications system or facility is unauthorized and subject to removal in the following circumstances:

1. One (1) year after the expiration or termination of the grantee's communications franchise, unless the City has provided written authorization for abandonment in place.
2. Upon abandonment of a communications facility within the public rights of way of the City. A communications facility will be considered abandoned when it is deactivated, out of service, or not used for its intended and authorized purpose for a period of ninety (90) days or longer. A communications facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the communications facility is being replaced. The City shall make a reasonable attempt to contact the communications provider before concluding that a communications facility is abandoned. A communications facility may be abandoned in place and not removed if authorized in writing by the City and there is no apparent risk to the public safety, health, or welfare.
3. If the communications system or facility was constructed or installed without the appropriate prior authority at the time of installation.
4. If the communications system or facility was constructed or installed at a location not permitted by the grantee's communications franchise or other legally sufficient permit.

E. Coordination of Construction Activities. All grantees are required to make a good faith effort to cooperate with the City.

1. By January 1 of each year, grantees shall provide the City with a schedule of their known proposed construction activities in, around or that may affect the public rights of way.
2. If requested by the City, each grantee shall meet with the City annually or as determined by the City, to schedule and coordinate construction in the public rights of way. At that time, City will provide available information on plans for local, state, and/or federal construction projects.
3. All construction locations, activities and schedules shall be coordinated, as ordered by the director, to minimize public inconvenience, disruption or damages.

4.05.060 Communications Franchise

A. Communications Franchise

1. A communications franchise shall be required of any communications provider who desires to occupy public rights of way of the City.

2. Any person whose communications facilities occupy the public right of way without a valid franchise agreement from the City must comply with the provisions of this Chapter, including payment of the franchise fee pursuant to BMC 4.05.060(H).

B. Franchise Application

1. Any person that desires a communications franchise shall file an application with the director that includes the following information:
 - a. The identity of the applicant.
 - b. A description of the communications services that are to be offered or provided by the applicant over its communications facilities.
 - c. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the communications facilities located or to be located within the public rights of way in the City, including the location and route requested for applicant's proposed communications facilities
 - d. The area or areas of the City the applicant desires to serve and a preliminary construction schedule for build-out to the entire franchise area.
 - e. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the communications facilities and to offer or provide the communications services proposed.
 - f. An accurate map showing the location of any existing communications facilities in the City that applicant intends to use or lease.
 - g. For an applicant for a cable service franchise, all information required in 47 CFR §76.41, to the extent applicable, in addition to the other information required in BMC 4.05.060(B).
 - h. Any reasonable additional information the City deems applicable.
2. Any communications provider that occupies the public rights of way of the City without a franchise as of the effective date of this Chapter shall file an application pursuant to BMC 4.05.060(B) within forty-five (45) days of the effective date of this Chapter. Any communications provider that desires to occupy the public rights of way of the City after the effective date of this Chapter shall register prior to installation of any communications facilities in the public rights of way.

C. Application and Review Fee.

1. Subject to applicable law, applicant shall reimburse the City for such reasonable costs as the City incurs in entering into the franchise agreement.
2. An application and review fee to be determined by resolution of the City Council shall be deposited with the City as part of the application filed pursuant to BMC 4.05.060 (B). Expenses exceeding the deposit will be billed to the applicant or the unused portion of the deposit will be returned to the applicant following the determination granting or denying the franchise.

D. Determination by the City. The City shall issue a written determination granting or denying the application in whole or in part. If the application is denied, the written determination shall include

the reasons for denial. The application shall be evaluated based upon the continuing capacity of the rights of way to accommodate the applicant's proposed facilities and the applicant's legal, technical and financial ability to comply with the provisions of this Chapter and applicable federal, state and local laws, rules, regulations and policies.

E. Rights Granted. No franchise granted pursuant to this Chapter shall convey any right, title or interest in the public rights of way, but shall be deemed a grant to use and occupy the public rights of way for the limited purposes and term, and upon the conditions stated in the franchise agreement. The right granted by the franchise is limited to the right to use the public rights of way for the provision of communications services as defined herein. Nothing in the franchise shall be construed to prevent the City from grading, paving, repairing and/or altering any public rights of way, constructing, laying down, repairing, relocating or removing City facilities or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any City facilities. If any of grantee's communications facilities interfere with the construction, repair, replacement, alteration or removal of any public rights of way, public work, City utility, City improvement or City facility, except those providing communications services in competition with a grantee, grantee's facilities shall be removed or relocated as provided in BMC 4.05.050 (C) and (D), in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

F. Term of Grant. Unless otherwise specified in a franchise agreement, a communications franchise granted hereunder shall be in effect for a term of five (5) years.

G. Franchise Territory. Unless otherwise specified in a franchise agreement, a communications franchise granted hereunder shall be limited to a specific geographic area of the City to be served by the franchise grantee, and the public rights of way necessary to serve such areas, and may include the entire city.

H. Franchise Fees.

1. A communications franchise granted hereunder shall require the grantee to pay the franchise fee in an amount determined by resolution of the City Council.
2. Every communications provider that uses the public rights of way in the City to provide communications services without a franchise, whether or not the communications provider owns the communications facilities used to provide its communications services and whether or not the communications provider is required to obtain a franchise pursuant to BMC 4.05.060 (A), shall pay a right of way use fee in the amount of the franchise fee determined by resolution of the City Council. The duty to provide information set forth in BMC 4.05.070 (C) shall apply to information of communications providers subject to the right of way use fee in BMC 4.05.050 (C)(2) sufficient to demonstrate compliance with this subsection.
3. Unless otherwise agreed to in writing by the City, the fee shall be paid within thirty (30) days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of gross revenues and a calculation of the amount payable. The communications provider shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.
4. The franchise fee required by BMC 4.05.060 (H) shall be subject to all applicable limitations imposed by federal or state law.

I. Amendment of Grant. Conditions for amending a franchise are as follows:

1. A new application and grant shall be required of any communications provider that desires to extend or locate its communications facilities in public rights of way of the City which are not included in a franchise previously granted under this Chapter.
2. If ordered by the City to locate or relocate its communications facilities in public rights of way not included in a previously granted franchise, the City shall grant an amendment without further application.
3. A new application and grant shall be required of any communications provider that desires to provide a service which was not included in a franchise previously granted under this Chapter.

J. **Renewal Applications.** A grantee that desires to renew its franchise under this Chapter shall, not less than one hundred eighty (180) days before expiration of the current agreement, file an application with the City for renewal of its franchise which shall include the following information:

1. The information required pursuant to BMC 4.05.060 (B).
2. Any information required pursuant to the franchise agreement between the City and the grantee.

K. **Renewal Determinations.** Within ninety (90) days after receiving a complete application under BMC 4.05.060(J) hereof, the City shall issue a written determination granting or denying the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reasons for non-renewal. The application shall be evaluated based upon the continuing capacity of the rights of way to accommodate the applicant's proposed facilities, the applicant's compliance with the provisions of its franchise and this Chapter during the franchise term, and the applicant's legal, technical and financial ability to comply with the provisions of this Chapter and applicable federal, state and local laws, rules, regulations and policies. For a cable service franchise, the application shall also be evaluated based upon whether the applicant's proposed franchise is reasonable to meet the future cable-related community needs and interests and other criteria consistent with the Cable Act, and the renewal process shall be subject to Section 626 of the Cable Act (47 U.S.C. § 546).

L. **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.

M. **Assignments or Transfers of System or Franchise.** Ownership or control of a majority interest in a communications system or franchise may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, without the prior consent of the City, which consent shall not be unreasonably withheld or delayed, and then only on such reasonable conditions as may be prescribed in such consent.

1. Grantee and the proposed assignee or transferee of the franchise or system shall agree, in writing, to assume and abide by all of the provisions of the franchise.
2. No transfer shall be approved unless the City determines the assignee or transferee has the legal, technical and financial ability to comply with the provisions of this Chapter and applicable federal, state and local laws, rules, regulations and policies.

3. Unless otherwise provided in a franchise agreement, to the extent permitted by applicable law, the grantee shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a communications franchise.

4. Any transfer or assignment of a communications franchise, system or integral part of a system without prior approval of the City under this Section or pursuant to a franchise agreement shall be void and is cause for revocation of the franchise.

N. Revocation or Termination of Franchise. A franchise to use or occupy public rights of way of the City may be revoked for the following reasons:

1. Construction or operation in the City or in the public rights of way of the City without a construction permit.
2. Construction or operation at an unauthorized location.
3. Failure to comply with BMC 4.05.060 (M) herein with respect to sale, transfer or assignment of a communications system or franchise.
4. Misrepresentation by or on behalf of a grantee in any application to the City.
5. Abandonment of communications facilities in the public rights of way, unless the City has authorized abandonment in place pursuant to BMC 4.05.050(D)(2).
6. Failure to relocate or remove communications facilities as required in this Chapter.
7. Failure to pay taxes, compensation, fees or costs when and as due the City under this Chapter.
8. Insolvency or bankruptcy of the grantee.
9. Violation of material provisions of this Chapter.
10. Violation of the material terms of a franchise agreement.

O. Notice and Duty to Cure. In the event that the City believes that grounds exist for revocation of a franchise, the City shall give the grantee written notice of the apparent violation or noncompliance, providing a short and concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time, not exceeding thirty (30) days, to furnish evidence that:

1. Corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;
2. Rebuts the alleged violation or noncompliance; and/or
3. It would be in the public interest to impose some penalty or sanction less than revocation.

P. Public Hearing. In the event that a grantee fails to provide evidence reasonably satisfactory to the City as provided in BMC 4.05.060 (O) hereof, the City Manager may refer the apparent violation or non-compliance to the City Council. The City Council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

Q. Standards for Revocation or Lesser Sanctions. If the City Council finds that the grantee has violated or failed to comply with material provisions of this Chapter, or of a franchise agreement, the City Council shall determine whether to revoke the franchise, or to establish some lesser

sanction and cure, including but not limited to assessment of penalties pursuant to BMC 4.05.080(F), considering the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors. Whether:

1. The misconduct was egregious.
2. Substantial harm resulted.
3. The violation was intentional.
4. There is a history of prior violations of the same or other requirements.
5. There is a history of overall compliance.
6. The violation was voluntarily disclosed, admitted or cured.

R. Other City Costs. All grantees shall, within thirty (30) days after written demand therefore, reimburse the City for all reasonable direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of the franchise or any franchise agreement consistent with applicable state and federal laws.

4.05.070 General Franchise Terms

A. Facilities. Upon request, each grantee shall provide the City with an accurate map or maps certifying the location of all communications facilities within the public rights of way.

B. Damage to Grantee's Facilities. Unless directly and proximately caused by negligent, careless, wrongful, willful, intentional or malicious acts by the City, and consistent with Oregon law, the City shall not be liable for any damage to or loss of any communications facility within the public rights of way of the City as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the public rights of way by or on behalf of the City, or for any consequential losses resulting directly or indirectly therefrom.

C. Duty to Provide Information.

1. Except in emergencies, within sixty (60) days of a written request from the City, each grantee shall furnish the City with the following:
 - a. Information sufficient to demonstrate that grantee has complied with all requirements of this Chapter, including but not limited to the franchise fee payments required by BMC 4.05.060 (H) and any franchise agreement.
 - b. All books, records, maps, and other documents maintained by the grantee with respect to its facilities within the public rights of way shall be made available for inspection by the City at reasonable times and intervals.
2. Such information, books, records, maps, and other documents shall be furnished at a mutually agreed upon location within the City unless the City agrees in writing to a location outside the City.
3. If the City's audit or review of the books, records and other documents or information of the grantee demonstrate that grantee has underpaid the franchise fee by three percent (3%) or more in any one year, grantee shall reimburse the City for the cost of the audit or review, in addition to any interest owed pursuant to BMC 4.05.060 (H) or as specified in a franchise.

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

D. Compensation for City Property. If any right is granted, by lease, franchise or other manner, to use and occupy city property for the installation of communications facilities, the compensation to be paid for such right and use shall be fixed by the City.

E. Cable Service. For Communication providers providing cable service, the franchise shall include adequate capacity and support for public, educational or governmental channels, capacity on an institutional network, and other cable-related community needs and interests required by the City, subject to applicable provisions of the Cable Act and related rules of the Federal Communications Commission.

F. Leased Capacity. A grantee shall have the right, without prior City approval, to offer or provide capacity or bandwidth to its customers; provided that the grantee shall notify the City that such lease or agreement has been granted to a customer or lessee.

G. Grantee Insurance. Unless otherwise provided in a franchise agreement, each grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the grantee and the City, and its elected and appointed officers, officials, agents and employees as additional insured:

1. Comprehensive general liability insurance with limits not less than:
 - a. Three Million Dollars (\$3,000,000) for bodily injury or death to each person;
 - b. Three Million Dollars (\$3,000,000) for property damage resulting from any one accident; and,
 - c. Three Million Dollars (\$3,000,000) for all other types of liability.
2. Automobile liability for owned, non-owned and hired vehicles with a limit of One Million Dollars (\$1,000,000) for each person and Three Million Dollars (\$3,000,000) for each accident.
3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars (\$1,000,000).
4. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than Three Million Dollars (\$3,000,000).
5. The liability insurance policies required by BMC 4.05.070 (G) shall be maintained by the grantee throughout the term of the communications franchise, and such other period of time during which the grantee is operating without a franchise hereunder, or is engaged in the removal of its communications facilities. Each such insurance policy shall contain the following endorsement, or other endorsement agreed to in writing by the City:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until thirty (30) days after receipt by the City, by registered mail, of a written notice addressed to the director of such intent to cancel or not to renew."
6. Each grantee shall maintain continuous uninterrupted coverage in the terms and amounts required in BMC 4.05.070 (G). If the insurance is canceled or materially altered, the grantee shall

obtain a replacement policy that complies with the terms of BMC 4.05.070 (G) and provide the City with a replacement certificate of insurance.

7. As an alternative to the insurance requirements contained herein, a grantee may provide evidence of self-insurance subject to review and acceptance by the City.

H. General Indemnification. Each franchise agreement shall include, to the extent permitted by law, grantee's express undertaking to defend, indemnify and hold the City and its officers, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its communications facilities, and in providing or offering communications services over the communications facilities or network, whether such acts or omissions are authorized, allowed or prohibited by this Chapter or by a franchise agreement made or entered into pursuant to this Chapter.

I. Performance Surety. Before a franchise granted pursuant to this Chapter is effective, and as necessary thereafter, the grantee shall provide a performance bond, in form and substance acceptable to the City, as security for the full and complete performance of a franchise granted under this Chapter, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the City. This obligation is in addition to the performance surety required by BMC 4.05.040 (O) for construction of facilities.

4.05.080 General Provisions

A. Governing Law. Any franchise granted under this Chapter is subject to the provisions of the Constitution and laws of the United States, and the State of Oregon and the ordinances and Charter of the City.

B. Written Agreement. No franchise shall be granted hereunder except by a writing duly executed by the franchisee and the City.

C. Nonexclusive Grant. No franchise granted under this Chapter shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights of way of the City for delivery of communications services or any other purposes.

D. Severability and Preemption. If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Chapter is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal legislation, rules, regulations or decision, the remainder of the Chapter shall not be affected thereby but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this Chapter shall be valid and enforceable to the fullest extent permitted by law. In the event that federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this Chapter, then the provision shall be read to be preempted only to the extent required by law. In the event such federal or state law, rule, or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon

return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the City.

E. Penalties. A separate and distinct offense shall be deemed committed each day on which a violation occurs.

F. Other Remedies. Nothing in this Chapter shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Chapter.

G. Captions. The captions to sections and subsections throughout this Chapter are intended solely to facilitate reading and reference to the sections and provisions contained herein. Such captions shall not affect the meaning or interpretation of this Chapter.

H. Compliance with Laws. Any grantee under this Chapter shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all ordinances, resolutions, rules and regulations of the City heretofore or hereafter adopted or established during the entire term of any franchise granted under this Chapter, which are relevant and relate to the construction, maintenance and operation of a communications system.

I. Consent. Wherever the consent of either the City or of the grantee is specifically required by this Chapter or in a franchise granted, such consent will not be unreasonably withheld.

J. Application to Existing Ordinances and Agreements. To the extent that this Chapter is not in conflict with and can be implemented with existing ordinance and franchise agreements, this Chapter shall apply to all existing ordinance and franchise agreements for use of the public right of way for communications services.

K. Confidentiality. The City agrees to use its best efforts to preserve the confidentiality of information as requested by a grantee, to the extent permitted by the Oregon Public Records Law, provided that documents are clearly marked as confidential by the grantee at the time of disclosure to the City. The City shall not be required to incur any costs to protect the confidentiality of such document, other than the City's routine internal procedures for complying with the Oregon Public Records Law.

First Reading: _____ Passage: _____
Second Reading: _____ Effective Date: _____

Signed by me in authentication of its passage this _____, day of _____, 2015

ATTEST:

Mayor Ron Hedenskog

City Recorder Joyce Heffington



Legal

Publish: Wednesday, July 22, 2015

Public Notice

NOTICE IS HEREBY GIVEN that on Monday, July 27, 2015, at 7:00pm in City Hall Council Chambers, 898 Elk Drive, during a regular Common Council meeting, Brookings City Council will consider for adoption, by title only, the following:

- In the matter of Ordinance 15-O-745, an ordinance naming Brookings Municipal Code Title 4 “Franchises,” and adding Chapter 4.05, Communications Infrastructure, to Title 4.

All persons wishing to address these matters may do so in person at the meeting, or by submitting written evidence to the City Manager, Brookings City Hall, 898 Elk Drive, Brookings, 97415, prior to the meeting. Copies of the ordinance and associated staff report are available for inspection at City Hall, on the City’s website at www.brookings.or.us, and at the Chetco Community Public library. Copies of the documents may also be purchased.

All public meetings are held in accessible locations. Auxiliary aids will be provided upon request with at least 10 days advance notification. Please contact 469-1102 if you have any questions regarding this notice.