

ORDINANCE NO. 12-13

AN ORDINANCE TO REGULATE UTILITY OPERATORS WHO PLACE FACILITIES IN CITY RIGHTS-OF-WAY.

THE CITY OF ASTORIA ORDAINS AS FOLLOWS:

Section 1. Title. Astoria Code Sections 2.700 through 2.755 are added to Astoria City Code Chapter 2 – Local Improvements, and titled “Facilities Within Rights-of-Way” as follows:

“FACILITIES WITHIN RIGHTS-OF-WAY

2.700 Purpose and Intent. The intent of this Chapter is to:

- A. Manage access to the rights-of-way of the City for utility and other purposes consistent with applicable state and federal law;
- B. Assure that the City’s costs of regulating the use of these rights-of-way are fully compensated by the persons seeking such access and causing such costs;
- C. Secure reasonable compensation to the City for permitting use of City owned rights-of-way;
- D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the City register and comply with the ordinances, rules and regulations of the City;
- E. Encourage advanced and competitive utility services to businesses and residents of the City.

2.705 Regulatory Fees and Compensation.

- A. Except as provided in ORS 221.515, the fees provided for in this Chapter are separate from, and in addition to, all other City charges, franchise fees or contractual obligations as may be due from a utility operator.
- B. The City has determined that the fees provided for by this Chapter are not imposed on property or property owners and are not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution.

2.710 Definitions.

As used in this Chapter the following terms shall have the following meanings.

"Cable service" is used consistent with federal laws and means the one-way transmission to subscribers of: (i) video programming, or (ii) other programming service; and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

"City" means the City of Astoria.

"City Council" means the Common Council of the City of Astoria Oregon.

"City facilities" means City or publicly owned structures or equipment located within the right-of-way or public easement used for governmental purposes.

"Communications services" means any service provided for the transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. Communications service does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) private communications system services provided without using the public rights-of-way; (4) 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 (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

"Director" means the acting head of the Astoria Public Works Department

"Emergency" means a circumstance in which immediate repair to damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.

"Person" means and includes any individual, firm, sole proprietorship, corporation, company, partnership, co-partnership, joint-stock company, trust, limited liability company, association or other organization, including any natural person or any other legal entity.

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

"Public utility easement" means the space in, upon, above, along, across, over or under an easement dedicated to the City or the Public for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of utilities facilities. "Public utility easement" does not include an easement solely for the constructing, reconstructing, operating, maintaining, inspecting, and repairing of City facilities.

“Right-of-way” includes, but is not limited to, the space in, upon, above, along, across, over or under the public streets, roads, highways, lanes, courts, ways, alleys, bridges, trails, sidewalks, bicycle lanes, public utility easements and all other public ways or areas, including the subsurface under and air space over these areas, but does not include parks, or other City property not generally open to the public for travel.

“State” means the state of Oregon.

“Utility facility” or “facility” means any physical component of a system, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, transmitters, plant, equipment and other facilities, located within, under or above the rights-of-way, any portion of which is used or designed to be used to deliver, transmit or otherwise provide utility service.

“Utility operator” or “operator” means any person who owns, places, operates or maintains a utility facility within the City.

“Utility service” means the provision, by means of utility facilities permanently located within, under or above the rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, telecommunications services, cable services, water, sewer, and/or storm sewer to or from customers within the corporate boundaries of the City, and/or the transmission of any of these services through the City whether or not customers within the City are served by those transmissions.

“Work” means the construction, demolition, installation, replacement, repair, maintenance or relocation of any utility facility, including but not limited to any excavation and restoration required in association with such construction, demolition, installation, replacement, repair, maintenance or relocation. Work does not include routine repairs, maintenance or minor construction activities so long as such activities: (i) do not impact vehicular, pedestrian, or bicycle traffic by closing, blocking or partially obstructing a lane of travel; and (ii) do not require cutting, breaking or excavating a Right-of-way.

2.715 Annual Utility Permits.

- A. No person may perform work on utility facilities within the rights-of-way without first obtaining a Utility Permit.
- B. Utility Permits shall be issued annually to franchised utility operators. Permit fees shall be set by the Director and designed to reimburse the city for its costs of inspection, supervision, and regulation in regulating utility work within city rights-of-way. Applications for permits to construct utility facilities shall be submitted upon forms provided by the City.
- C. Utility Permit shall require:

1. That all construction will be done in accordance with applicable laws and regulations.
2. That, except in the case of an emergency, at least 7 days prior to the commencement of any work in a city right-of-way that notice be given the director of the location and construction schedule.
3. That within 30 days of completion of any work "as built" engineered plans be provided to the Director in an acceptable digital form City showing the location of the utility facilities that were installed, replaced, repaired, or relocated.
4. That utility operators make a good faith effort to both cooperate with and coordinate their construction schedules with those of the City and other users of the rights-of-way.
5. That prior to January 1st of each year, utility operators provide the Director with a schedule of known proposed construction activities for that year in, around or that may affect the rights-of-way.
6. That construction locations, activities and schedules within the rights-of-way be coordinated as ordered by the Director to minimize public inconvenience, disruption, or damage.

D. Utility Permit may require:

1. That the utility operator provide a performance bond or other form of surety acceptable to the City equal to at least one hundred percent (100%) of the estimated cost of the work within the rights-of-way of the City, which shall be provided before construction is commenced.
2. The performance bond or other form of surety acceptable to the City shall remain in force for the period of the permit.
3. The performance bond or other form of surety acceptable to the City shall guarantee, to the satisfaction of the City:
 - a. Timely completion of the work;
 - b. That the work is performed 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 rights-of-way and other property affected by the work; and
 - e. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

2.720 Construction and Restoration.

- A. Construction Codes. Utility facilities shall be constructed, installed, operated and maintained in accordance with all applicable laws and regulations. When a utility operator, or any person acting on its behalf, does any work in or affecting the rights-of-way, the utility operator shall promptly restore the rights-of-way as reasonably directed by the Director. A utility operator or other person acting on its behalf shall use suitable measures for the safety of the general public and to prevent injury or damage to persons or property by reason of such work.
- B. Injury to Persons or Property. A utility operator shall use reasonable efforts to preserve and protect from injury or damage other utility operators' facilities in the rights-of-way, the public using the rights-of-way and any adjoining property, and take other reasonably necessary measures to protect life and property, including but not limited to buildings, walls, fences, trees or facilities that may be subject to damage from the permitted work.
- C. Restoration.
 - 1. When a utility operator, or any person acting on its behalf, does any work in or affecting any rights-of-way, it shall, at its own expense, promptly restore such ways or property to the same or better condition as existed before the work was undertaken, in accordance with applicable federal, state and local laws, codes, ordinances, rules and regulations, unless otherwise directed by the City and as determined by the Director.
 - 2. If conditions beyond the operator's control prevent restoration as required by the City, the operator shall temporarily restore the affected rights-of-way or property. Such temporary restoration shall be at the utility operator's sole expense and the utility operator shall promptly undertake and complete the required permanent restoration when the conditions no longer prevent permanent restoration. Any corresponding modification to the construction schedule shall be subject to City approval.
 - 3. If the operator fails to complete the required restoration, the City shall give the utility operator written notice and provide the utility operator a reasonable period of time not less than ten (10) days and not more than thirty (30) days to restore the rights-of-way or property, unless an emergency or threat to public safety is deemed to exist. If the utility operator fails to restore the rights-of-way or property as required, the City may cause such restoration to be made at the expense of the operator.

- D. Inspection. Every utility operator's facilities shall be subject to the right of periodic inspection by the City to determine compliance with the provisions of this Chapter and all other applicable state and City codes, ordinances, rules and regulations. Every utility operator shall cooperate with the City in permitting the inspection of utility facilities upon request of the City. The utility operator shall perform all testing, or permit the City to perform any testing at the utility operator's expense, required by the City to determine that the installation of the utility operator's facilities and the restoration of the right-of-way comply with the terms of this Chapter and applicable state and City codes, ordinances, rules and regulations.

2.725 Location of Facilities.

- A. Unless otherwise agreed to in writing, a utility operator shall, at its own expense, locate all new facilities underground within the district described in the Code of Astoria §9.215. In other neighborhoods where existing utilities are located underground in City rights-of-way, new facilities shall be located underground if commercially reasonable to do so.
- B. No person may locate or maintain facilities so as to unreasonably interfere with the use of City rights-of-way, by the general public or by others authorized to use the rights-of-way.
- C. Relocation of Utility Facilities.
1. A utility operator shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any utility facility within a right-of-way, including relocation of aerial facilities underground, when requested to do so in writing by the City for public safety or public convenience.
 2. Nothing herein shall be deemed to preclude the utility operator, subject to OAR 860-022-0046 or other applicable agreement, franchise, law or regulation, from requiring reimbursement or compensation from a third party whose project is the reason for relocating utilities.
 3. The City shall provide written notice of the time by which the utility operator must remove, relocate, change, alter or underground its facilities. Prior to providing such notice, the Director shall meet with the utility operator to establish a reasonable timeline for such action. If a utility operator fails to remove, relocate, alter or underground any utility facility as requested by the City and by the reasonable date established by the City, the utility operator 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 utility facility to be removed, relocated, altered or undergrounded at the utility operator's sole expense. Upon receipt of a detailed invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

D. Removal of Utility Facilities.

1. Except as prescribed by law or otherwise agreed in writing by the Director, within thirty (30) days following written notice, a utility operator and any other person that owns, controls, or maintains any abandoned or unauthorized utility facility within a right-of-way shall, at its own expense, remove the facility and restore the right-of-way.
2. A utility system or facility is unauthorized under any of the following circumstances:
 - a. The utility facility is outside the scope of authority granted under a license, franchise or other written agreement. This includes facilities that were never licensed or franchised and facilities that were once licensed or franchised but for which the license or franchise has expired or been terminated. This does not include any facility for which the City has provided written authorization for abandonment in place.
 - b. The facility has been abandoned and the City has not provided written authorization for abandonment in place. A facility is abandoned if it is not in use and is not planned for further use. A facility will be presumed abandoned if it is not used for a period of one (1) year. A utility operator may overcome this presumption by presenting plans for future use of the facility.
 - c. The utility facility is unlawfully or improperly constructed or installed or is in a location not permitted by a construction permit, license, franchise or this Chapter.
 - d. The utility operator is in violation of a material provision of this Chapter and fails to cure such violation within thirty (30) days of the City sending written notice of such violation, unless the City extends such time period in writing.
3. If the utility operator fails to remove any facility, without reasonable cause, when required to do so, the City may remove the facility, and the expense of the utility operator. Within thirty (30) days of the receipt of an invoice from the City, a utility operator shall reimburse the City for its costs of removal. This obligation to remove shall survive termination of any license or franchise agreement.
4. The City may cut or move any facilities located within City rights-of-way, without notice, as the City may determine to be necessary, appropriate or useful in response to an immediate public health or safety emergency. The City shall promptly notify the utility of such action.

5. The City is not liable to any utility operator for damage to utility facilities, or for consequential losses resulting from removing, relocating or altering utility facilities, except to the extent such damage arises directly from the City's negligence or willful misconduct.

E. At the Director's request a utility operator shall provide the City with two complete sets of engineered plans in a digital format reasonably acceptable to both parties showing the location of its utility facilities in the rights-of-way.

2.730 Leased Capacity. No utility operator may lease capacity upon the system of the utility operator to another person or entity for the purpose of providing utility services in the City unless that person or entity possesses a franchise from the City and is operating in compliance with the charter and regulations of the City. Utility Operator shall include a provision in its leases requiring that such lessee comply with all City laws, regulations and policies as set forth herein.

2.735 Maintenance. Every utility operator must install and maintain its facilities in compliance with all applicable laws, regulations and policies. If, after reasonable written notice, a utility operator fails to repair and maintain facilities as requested by the City, the City may perform such repair or maintenance at the utility operator's expense. Upon receipt of an invoice from the City, the utility operator shall reimburse the City for the costs the City incurred within thirty (30) days.

2.740 Vacation. If the City vacates a right-of-way, or portion thereof, a utility operator must remove its facilities from the right-of-way unless the utility operator obtains an easement for its facilities. If the utility operator is unable to reserve or obtain an easement for its existing facilities the city will make reasonable efforts to provide another location for the utilities in a public right-of-way.

2.745 Audits.

A. Within sixty (60) days of a written request from the City, or as otherwise agreed to in writing by the City:

1. Every provider of utility service shall furnish the City with information sufficient to demonstrate that the provider is in compliance with all the requirements of this Chapter and its franchise agreement, if any, including but not limited to payment of any applicable fees.
2. Every utility operator shall make available for inspection by the City at reasonable times, after no less than 60 days notice, and upon reasonable intervals, all maps, records, books, diagrams, plans and other documents, maintained by the operator with respect to its facilities within the rights-of-way or public utility easements. Access shall be provided within the City unless prior arrangement for access elsewhere has been made with the City.

- B. If the City's audit of the books, records and other documents or information of the utility operator or utility service provider demonstrate that the utility operator or provider has underpaid the privilege tax or franchise fee by five percent (5%) or more in any one (1) year, the utility operator shall reimburse the City for the cost of the audit, in addition to interest at the legal rate or as specified in a franchise.
- C. Any underpayment, including any interest or audit cost reimbursement, shall be paid within sixty (60) days of the City's notice to the utility service provider of such underpayment.
- D. The City's audit shall be limited to payments which occurred during a period of thirty-six (36) months prior to the date the City requests an audit review

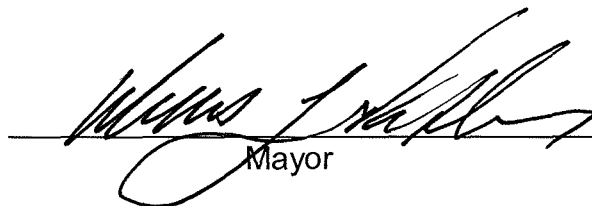
2.750 Penalties. Any person found guilty of violating any of the provisions of this Chapter shall be subject to a penalty of not less than One Hundred Dollars (\$100.00) nor more than one thousand dollars (\$1,000.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues. Nothing in this Chapter shall be construed as limiting judicial or other remedies the City may have for enforcement of this Chapter.

2.755 Severability and Preemption. The provisions of this Chapter are intended to be consistent with applicable federal and state law, and, to the extent possible, to cover only matters not preempted by federal or state law. If any part of this Chapter is held to be unenforceable by a court of competent jurisdiction or is superseded by any state or federal legislation, rule, regulation or decision, the remainder of this Chapter shall not be affected but shall be deemed as a separate, and independent provision. If any federal or state law resulting in preemption is later repealed or otherwise changed to end the preemption, such provision shall thereupon return to full force and effect and shall thereafter be binding without further action by the City."

Section 2. Effective Date. This ordinance will be effective 30 days following the date of its passage by the City Council.

ADOPTED BY THE CITY COUNCIL THIS 17TH DAY OF DECEMBER, 2012.

APPROVED BY THE MAYOR THIS 17TH DAY OF DECEMBER, 2012.


Mayor

ATTEST:


City Manager

ROLL CALL ON ADOPTION	YEA	NAY	ABSENT
Councilor LaMear	X		
Roscoe	X		
Mellin	X		
Warr	X		
Mayor Van Dusen	X		