



Home of the Tualatin River National Wildlife Refuge

ORDINANCE 2018-010

AMENDING CHAPTER 12.16 OF THE SHERWOOD MUNICIPAL CODE REGARDING UTILITY FACILITIES IN PUBLIC RIGHT-OF-WAY

WHEREAS, the public right-of-way (ROW) is an important public asset held in trust by the City, with limited physical capacity; and

WHEREAS, with increasing demand for use of the public ROW, it is becoming increasingly important for the City to encourage the most efficient use of the public ROW, and to conserve its limited physical capacity, while also permitting and managing reasonable access to the public ROW for utility purposes; and

WHEREAS, the City therefore finds it necessary and appropriate to amend its municipal code regarding utility facilities in the public right-of-way in order to ensure the proper management of this public asset; and

WHEREAS, the City Council held public hearings on the proposed amendments on November 6, 2018, November 20, 2018, and December 4, 2018.

NOW, THEREFORE, THE CITY OF SHERWOOD ORDAINS AS FOLLOWS:

Section 1. Findings After full and due consideration of the information presented at the public hearings, the City Council finds that the text of Chapter 12.16 of the Sherwood Municipal Code should be amended as set forth in Exhibit 1, attached hereto.

Section 2. Approval The proposed amendments to the Sherwood Municipal Code identified in Exhibit 1 are hereby **APPROVED**.

Section 3. Manager Authorized The City Manager is hereby directed and authorized to adopt rules and to take such other actions as may be necessary to implement this Ordinance, including necessary updates to the Municipal Code.

Section 4. Effective Date This ordinance shall become effective the 30th day after its enactment by the City Council and approval by the Mayor.

Duly passed by the City Council this 4th of December, 2018.



Keith Mays, Mayor

12/4/2018

Date

Attest:


Sylvia Murphy, MMC, City Recorder

	<u>AYE</u>	<u>NAY</u>
Rosener	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Griffin	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Brouse	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Young	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Kuiper	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Garland	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Mays	<input checked="" type="checkbox"/>	<input type="checkbox"/>

Exhibit 1

Chapter 12.16 - UTILITY FACILITIES IN PUBLIC RIGHT-OF-WAY

Sections:

12.16.010 - Title.

The ordinance codified in this chapter shall be known, and may be pleaded as the city of Sherwood utility facilities in public rights-of-way ordinance.

(Ord. 08-011 § 1 (part))

12.16.020 - Purpose and intent.

The purpose and intent of this chapter is to:

- A. Permit and manage reasonable access to the public ROW of the city for utility purposes, encourage the most efficient use of the public ROW, and conserve the limited physical capacity of those public ROW held in trust by the city consistent with applicable state and federal law;
- B. Assure that the city's current and ongoing costs of granting and regulating access to and the use of the public ROW are fully compensated by the persons seeking such access and causing such costs;
- C. Secure fair and reasonable compensation to the city and its residents for permitting use of the public ROW;
- D. Assure that all utility companies, persons and other entities owning or operating facilities and/or providing services within the city comply with the ordinances, rules and regulations of the city;
- E. Assure that the city can continue to fairly and responsibly protect the public health, safety and welfare of its citizens;
- F. Encourage the provision of advanced and competitive utility services on the widest possible basis to businesses and residents of the city on a competitively neutral basis; and
- G. Comply with applicable provisions of state and federal law.

(Ord. 08-011 § 1 (part))

12.16.030 - Jurisdiction and management of the public ROW.

- A. The city has jurisdiction and exercises regulatory management over all public ROW within the city under authority of the city charter and state law.
- B. The city has jurisdiction and exercises regulatory management over each public ROW whether the city has a fee, easement, or other legal interest in the ROW, and whether the legal interest in the ROW was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
- C. The exercise of jurisdiction and regulatory management of a public ROW by the city is not official acceptance of the ROW, and does not obligate the city to maintain or repair any part of the ROW.
- D. The provisions of this chapter are subject to and will be applied consistent with applicable state and federal laws, rules and regulations, and, to the extent possible, shall be interpreted to be consistent with such laws, rules and regulations.

(Ord. 08-011 § 1 (part))

12.16.040 - Regulatory fees and compensation not a tax.

- A. The fees and costs provided for in this chapter, and any compensation charged and paid for use of the public ROW provided for in this chapter, are separate from, and in addition to, any and all federal, state, local, and city charges as may be levied, imposed, or due from a utility operator, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.
- B. The city has determined that any fee 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 are not imposed on property or property owners.
- C. The fees and costs provided for in this chapter are subject to applicable federal and state laws.
- D. The city reserves the right to waive fees for city facilities occupying the ROW.

(Ord. 08-011 § 1 (part))

12.16.050 - 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.

"Cable service" is to be defined 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 Sherwood, 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 Sherwood, Oregon.

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

"License" means the authorization granted by the city to a utility operator pursuant to this chapter.

"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 which 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 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" or "ROW" means and 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, boulevards, bridges, trails, paths, 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 parkland. This definition applies only to the extent of the city's right, title, interest and authority to grant a license to occupy and use such areas for utility facilities.

"State" means the state of Oregon.

"Telecommunications services" means the transmission for hire, of information in electromagnetic frequency, electronic or optical form, including, but not limited to, voice, video or data, whether or not the transmission medium is owned by the provider itself and whether or not the transmission medium is wireline. Telecommunications service includes all forms of telephone services and voice, data and video transport, but does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) private communications system services; (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 of 1996.

"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 ROW, 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 ROW, 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.

(Ord. 08-011 § 1 (part))

12.16.060 - Licenses.

A. License Required.

1. Except those utility operators with a valid franchise agreement from the city, every person shall obtain a license from the city prior to constructing, placing or locating any utility facilities in the ROW.
2. Every person that owns or controls utility facilities in the ROW as of the effective date of this chapter shall apply for a license from the city within forty-five (45) days of the later of: (1) the effective date of this chapter, or (2) the expiration of a valid franchise from the city, unless a new franchise is granted by the city prior to the expiration date or other date agreed to in writing by the city.

B. License Application. The license application shall be on a form provided by the city, and shall be accompanied by any additional documents required by the application to identify the applicant, its legal status, including its authorization to do business in Oregon, a description of the type of utility service provided or to be provided by the applicant, and the facilities over which the utility service will be provided, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this chapter.

C. License Application Fee. The application shall be accompanied by a nonrefundable application fee or deposit set by resolution of the city council in an amount sufficient to fully recover all of the city's costs related to processing the application for the license.

- D. Determination by City. The city shall issue, within a reasonable period of time, a written determination granting or denying the license in whole or in part. If the license is denied, the written determination shall include the reasons for denial. The license shall be evaluated based upon the provisions of this chapter, the continuing capacity of the ROW to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.
- E. Franchise Agreements. If the public interest warrants, the city and utility operator may enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this chapter, consistent with applicable state and federal law. The franchise may conflict with the terms of this chapter with the review and approval of city council. The franchisee shall be subject to the provisions of this chapter to the extent such provisions are not in conflict with the franchise.
- F. Rights Granted.
1. The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the Municipal Code and other applicable provisions of state or federal law, to construct, place, maintain and operate utility facilities in the ROW for the term of the license.
 2. The license granted pursuant to this chapter shall not convey equitable or legal title in the ROW, and may not be assigned or transferred except as permitted in subsection K of this section.
 3. Neither the issuance of the license nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, police power or regulatory power of the city as may exist at the time the license is issued or thereafter obtained.
- G. Term. Subject to the termination provisions in subsection M of this section, the license granted pursuant to this chapter will remain in effect for a term of five years.
- H. License Nonexclusive. No license granted pursuant to this section shall confer any exclusive right, privilege, license or franchise to occupy or use the ROW for delivery of utility services or any other purpose. The city expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the city's right to use the ROW, for similar or different purposes. The license is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances, and claims of title of record that may affect the ROW. Nothing in the license shall be deemed to grant, convey, create, or vest in licensee a real property interest in land, including any fee, leasehold interest or easement.
- I. Reservation of City Rights. Nothing in the license shall be construed to prevent the city from grading, paving, repairing and/or altering any ROW, constructing, laying down, repairing, relocating or removing city water or sewer 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 licensee's utility facilities interfere with the construction, repair, replacement, alteration or removal of any ROW, public work, city utility, city improvement or city facility, except those providing utility services in competition with a licensee, licensee's facilities shall be removed or relocated as provided in Section 12.16.080(C), (D) and (E) of this chapter, in a manner acceptable to the city, and subject to industry standard engineering and safety codes.
- J. Multiple Services.
1. A utility operator that provides or transmits or allows the provision or transmission of utility services and other services over its facilities is subject to the license and privilege tax requirements of this chapter for the portion of the facilities and extent of utility services delivered over those facilities.
 2. A utility operator that provides or transmits more than one utility service over its facilities is not required to obtain a separate license for each utility service, provided that it gives notice to the city of each utility service provided or transmitted and pays the applicable privilege tax for each utility service.

- K. **Transfer or Assignment.** To the extent permitted by applicable state and federal laws, the licensee shall obtain the written consent of the city prior to the transfer or assignment of the license. The license shall not be transferred or assigned unless the proposed transferee or assignee is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under federal and state laws to approve such transfer or assignment. If a license is transferred or assigned, the transferee or assignee shall become responsible for all facilities of the licensee at the time of transfer or assignment. A transfer or assignment of a license does not extend the term of the license.
- L. **Renewal.** At least ninety (90), but no more than one hundred eighty (180), days prior to the expiration of a license granted pursuant to this section, a licensee seeking renewal of its license shall submit a license application to the city, including all information required in subsection B of this section and the application fee required in subsection C of this section. The city shall review the application as required by subsection D of this section and grant or deny the license within ninety (90) days of submission of the application. If the city determines that the licensee is in violation of the terms of this chapter at the time it submits its application, the city may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the city, before the city will consider the application and/or grant the license. If the city requires the licensee to cure or submit a plan to cure a violation, the city will grant or deny the license application within ninety (90) days of confirming that the violation has been cured or of accepting the licensee's plan to cure the violation.
- M. **Termination.**
1. **Revocation or Termination of a License.** The city council may terminate or revoke the license granted pursuant to this chapter for any of the following reasons:
 - a. Violation of any of the provisions of this chapter;
 - b. Violation of any provision of the license;
 - c. Misrepresentation in a license application;
 - d. Failure to pay taxes, compensation, fees or costs due the city after final determination of the taxes, compensation, fees or costs;
 - e. Failure to restore the ROW after construction as required by this chapter or other applicable state and local laws, ordinances, rules and regulations;
 - f. Failure to comply with technical, safety and engineering standards related to work in the ROW; or
 - g. Failure to obtain or maintain any and all licenses, permits, certifications and other authorizations required by state or federal law for the placement, maintenance and/or operation of the utility facilities.
 2. **Standards for Revocation or Termination.** In determining whether termination, revocation or some other sanction is appropriate, the following factors shall be considered:
 - a. The egregiousness of the misconduct;
 - b. The harm that resulted;
 - c. Whether the violation was intentional;
 - d. The utility operator's history of compliance; and/or
 - e. The utility operator's cooperation in discovering, admitting and/or curing the violation.
 3. **Notice and Cure.** The city shall give the utility operator written notice of any apparent violations before terminating a license. The notice shall include a short and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time (no less than twenty (20) and no more than forty (40) days) for the utility operator to demonstrate that the utility operator has remained in compliance, that the utility operator has cured or is in

the process of curing any violation or noncompliance, or that it would be in the public interest to impose a penalty or sanction less than termination or revocation. If the utility operator is in the process of curing a violation or noncompliance, the utility operator must demonstrate that it acted promptly and continues to actively work on compliance. If the utility operator does not respond or if the city manager or designee determines that the utility operator's response is inadequate, the city manager or designee shall refer the matter to the city council, which shall provide a duly noticed public hearing to determine whether the license shall be terminated or revoked.

(Ord. 08-011 § 1 (part))

12.16.070 - Construction and restoration.

- A. **Construction Codes.** Utility 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.
- B. **Construction Permits.** No person shall construct, install, or perform any work on utility facilities within the ROW without first obtaining all required permits, including the ROW permit required in Chapter 12.02 of this title, except in the event of an emergency or other exemption consistent with Chapter 12.02. The city shall not issue a permit for the construction, installation, maintenance or repair of utility facilities unless the utility operator of the facilities has applied for and received the license required by this chapter, or has a current franchise with the city, and all applicable fees have been paid.
- C. **Street Excavations and Restoration.** Open cutting of pavement shall only be allowed in areas specifically approved by the city engineer or designee. When a utility operator, or any person acting on its behalf, does any work in or affecting any public ROW, it shall, at its own expense, promptly restore the public ROW as required by the permit or as otherwise directed by the city engineer or designee.
- D. A utility operator shall preserve and protect from injury other utility operators' facilities in the ROW, the public using the ROW and any adjoining property, and take other necessary measures to protect life and property, including but not limited to buildings, walls, fences, trees or utilities that may be subject to damage from the permitted work. A utility operator shall be responsible for all damage to public or private property resulting from its failure to properly protect people and property and to carry out the work.
- E. **Inspection.** Every utility operator's facilities shall be subject to the right of periodic inspection and testing 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.
- F. **Coordination of Construction.** All utility operators are required to make a good faith effort to both cooperate with and coordinate their construction schedules with those of the city and other users of the ROW.
 - 1. Prior to January 1st of each year, utility operators shall provide the city with a schedule of known proposed construction activities for that year in, around or that may affect the ROW.
 - 2. Utility operators shall meet with the city annually, or as determined by the city, to schedule and coordinate construction in the ROW.
 - 3. All construction locations, activities and schedules within the ROW shall be coordinated as ordered by the city manager or designee, to minimize public inconvenience, disruption, or damages.

G. **New Telecommunications and Cable Facilities.** A utility operator proposing to install new telecommunications or cable facilities, other than poles, pole attachments, and other similar non-linear

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facilities, in the public ROW in the city after January 3, 2019 must notify the city in writing prior to applying for any permits required for such installation. Such notification must describe the facilities proposed to be installed and specify the location of the proposed installation. The city may, if the city determines that it would further the purposes of this chapter, require the utility operator to install additional infrastructure to accommodate future utility facilities. If city determines to require such infrastructure installation, city shall so notify the utility operator within forty-five (45) days after receipt by the city of the notice from the utility operator; city shall be responsible for providing the required materials for such additional infrastructure and for any net additional costs documented and actually and reasonably incurred by the utility operator as a direct result of the required installation of such additional infrastructure; and city shall be the owner of the infrastructure so installed.

(Ord. 08-011 § 1 (part))

12.16.080 - Location of facilities.

- A. Location of Facilities. Unless otherwise agreed to in writing by the city, whenever any existing electric utilities, cable facilities or telecommunications facilities are located underground within a ROW of the city, the utility operator with permission to occupy the same ROW shall locate its facilities underground. This requirement shall not apply to facilities used for transmission of electric energy at nominal voltages in excess of thirty-five thousand (35,000) volts or to pedestals, cabinets or other above-ground equipment of any utility operator. The city reserves the right to require written approval of the location of any such above-ground equipment in the ROW.
- B. Interference with the ROW. No utility operator or other person may locate or maintain its facilities so as to unreasonably interfere with the use of the ROW by the city, by the general public or by other persons authorized to use or be present in or upon the ROW. All use of the ROW shall be consistent with city codes, ordinances and regulations.
- C. Relocation of Utility Facilities.
 - 1. A utility operator shall, at no cost to the city, relocate its aerial utility facilities underground when requested to do so in writing by the city, consistent with applicable state and federal law.
 - 2. 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 ROW when requested to do so in writing by the city. Nothing herein shall be deemed to preclude the utility operator from requiring or requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs, agreements or otherwise, provided that such reimbursement or compensation shall not delay the utility operator's obligation to comply with this section in a timely manner.
 - 3. The city shall provide written notice of the amount of time for removal, relocation, change, alteration or undergrounding. If a utility operator fails to remove, relocate, alter or underground any utility facility as requested by the city and by the date reasonably established by the city, the utility operator shall pay all costs incurred by the city due to such failure, including but not limited 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 Unauthorized Facilities.
 - 1. Unless otherwise agreed to in writing by the city manager or designee, within thirty (30) days following written notice from the city, a utility operator and any other person that owns, controls, or maintains any abandoned or unauthorized utility facility within a ROW shall, at its own expense, remove the facility and restore the ROW.

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 by the city under the 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 year. A utility operator may overcome this presumption by presenting plans for future use of the facility.
 - c. The utility facility is improperly constructed or installed or is in a location not permitted by the 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.
- E. Removal by City.
1. The city retains the right and privilege to cut or move the facilities of any utility operator or similar entity located within the public ROW of the city, without notice, as the city may determine to be necessary, appropriate or useful in response to a public health or safety emergency.
 2. If the utility operator fails to remove any facility when required to do so under this chapter, the city may remove the facility using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations, and the utility operator shall be responsible for paying the full cost of the removal and any administrative costs incurred by the city in removing the facility and obtaining reimbursement. 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. The obligation to remove shall survive the termination of the license or franchise.
 3. The city shall not be liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly therefrom, by the city or its contractor in removing, relocating or altering the facilities pursuant to subsection B, C or D of this section or undergrounding its facilities as required by subsection A of this section, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by those subsections.
- F. As Built Drawings. The utility operator shall provide the city with two complete sets of engineered plans in a form acceptable to the city showing the location of all its utility facilities in the ROW after initial construction and shall provide two updated complete sets of as built plans annually, upon request of the city.

(Ord. 08-011 § 1 (part))

12.16.090 - Leased capacity.

A utility operator may lease capacity on or in its systems to others, provided that, upon request, the utility operator provides the city with the name and business address of any lessee.

(Ord. 08-011 § 1 (part))

12.16.100 - Maintenance.

Every utility operator shall install and maintain all facilities in a manner that prevents injury to the ROW or public utility easements, the city's property or the property belonging to another person. The utility operator shall, at its own expense, repair and maintain facilities from time to time as may be necessary to accomplish this purpose.

(Ord. 08-011 § 1 (part))

12.16.110 - Vacation.

If the city vacates any ROW, or portion thereof, that a utility operator uses, the utility operator shall, at its own expense, remove its facilities from the ROW unless the city reserves a public utility easement, which the city shall make a reasonable effort to do provided that there is no cost or expense to the city, or the utility operator obtains an easement for its facilities. If the utility operator fails to remove its facilities within thirty (30) days after a ROW is vacated, or as otherwise directed or agreed to in writing by the city, the city may remove the facilities at the utility operator's sole 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.

(Ord. 08-011 § 1 (part))

12.16.120 - Privilege tax.

- A. Every utility operator shall pay the privilege tax set by resolution of the city council.
1. For utility operators providing utility service to customers within the city, the privilege tax shall be a percentage of gross revenues earned from the provision of service within the city. "Gross revenues" means any and all revenue, of any kind, nature or form, without deduction for expense, less net uncollectibles, unless the council, by resolution, determines otherwise.
 2. For utility operators that do not provide utility service to customers within the city, the privilege tax shall be a flat fee per lineal foot of utility facilities in the city or such other fee determined by the city council.
 3. For utility operators with no facilities in the ROW other than facilities mounted on structures within the right-of-way, which structures are owned by another person, and with no facilities strung between such structures or otherwise within, under or above the ROW, the privilege tax shall be a flat fee per structure or such other fee determined by the city council.
 4. For utility operators subject to subsections (A)(1) or (A)(2) of this section, the privilege tax shall also include, in addition to the privilege taxes described in subsections (A)(1) and (A)(2) of this section, for all new facilities installed after January 3, 2019, a flat fee per lineal foot of such new utility facilities in the public ROW in the city or such other fee determined by the city council. Such fees will be set by the city council by resolution and may vary based on location, facility type, and other factors, in order to effectuate the purposes of this chapter.
- B. Privilege tax payments required by this section shall be reduced by any franchise fee payments received by the city, but in no case will be less than zero dollar.
- C. Unless otherwise agreed to in writing by the city, the tax set forth in subsection (A)(1) of this section shall be paid quarterly, in arrears, for each quarter during the term of the license within thirty (30) days after the end of each calendar quarter, and shall be accompanied by an accounting of gross revenues, if applicable, and a calculation of the amount payable. The tax set forth in subsections (A)(2), ~~(A)(3)~~, and (A)~~(34)~~ of this section shall be paid annually, in arrears, for each year during the term of this license within thirty (30) days after the end of each calendar year, and shall be accompanied by a statement of the length of facilities in the ROW or number of structures occupied in the ROW, ~~if as~~ applicable, and a calculation of the amount payable. The utility shall pay interest at the rate of nine percent per year for any payment made after the due date.

- D. The calculation of the privilege tax required by this section shall be subject to all applicable limitations imposed by federal or state law.

(Ord. 08-011 § 1 (part))

12.16.130 - Audits.

- A. Within thirty (30) days of a written request from the city, or as otherwise agreed to in writing by the city, the provider of utility service shall:
1. Furnish the city with information sufficient to demonstrate that the utility operator is in compliance with all the requirements of this chapter and its franchise agreement, if any, including but not limited to the privilege tax payments required by Section 12.16.120 and the franchise fee required in any franchise.
 2. Make available for inspection by the city at reasonable times and intervals all maps, records, books, diagrams, plans and other documents, maintained by the utility operator with respect to its facilities within the public ROW or public utility easements. Access shall be provided within the Portland, Oregon metropolitan area 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 demonstrate that the utility operator has underpaid the privilege tax or franchise fee by five percent or more in any one year, the utility operator shall reimburse the city for the cost of the audit, in addition to any interest owed pursuant to Section 12.16.120(C) of this chapter or as specified in a franchise.
- C. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) days of the city's notice to the utility service provider of such underpayment.

(Ord. 08-011 § 1 (part))

12.16.140 - Insurance and indemnification.

- A. Insurance.
1. All utility operators shall maintain in full force and effect the following liability insurance policies that protect the utility operator and the city, as well as the city's officers, agents, and employees:
 - a. Comprehensive general liability insurance with limits not less than:
 - i. Two million dollars (\$2,000,000.00) for bodily injury or death to each person;
 - ii. Two million dollars (\$2,000,000.00) for property damage resulting from any one accident; and
 - iii. Two million dollars (\$2,000,000.00) for all other types of liability.
 - b. Motor vehicle liability insurance for owned, nonowned and hired vehicles with a limit of one million dollars (\$1,000,000.00) for each person and two million dollars (\$2,000,000.00) for each accident.
 - c. Worker's compensation within statutory limits and employer's liability with limits of not less than one million dollars (\$1,000,000.00).
 - d. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than two million dollars (\$2,000,000.00).

2. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the state of Oregon. The insurance shall be without prejudice to coverage otherwise existing and shall name, or the certificate of insurance shall name, as additional insureds the city and its officers, agents, and employees. The coverage must apply as to claims between insureds on the policy. The certificate of insurance shall provide that the insurance shall not be canceled or materially altered without thirty (30) days prior written notice first being given to the city. If the insurance is canceled or materially altered, the utility operator shall provide a replacement policy with the terms as outlined in this section. The utility operator shall maintain continuous uninterrupted coverage, in the terms and amounts required. The utility operator may self insure, or keep in force a self-insured retention plus insurance, for any or all of the above coverage.
 3. The utility operator shall maintain on file with the city a certificate of insurance, or proof of self-insurance acceptable to the city, certifying the coverage required above.
- B. Financial Assurance. Unless otherwise agreed to in writing by the city, before a franchise granted or license issued pursuant to this chapter is effective, and as necessary thereafter, the utility operator shall provide a performance bond or other financial security, in a form acceptable to the city, as security for the full and complete performance of the franchise, if applicable, and compliance with the terms of this chapter, including any costs, expenses, damages or loss the city pays or incurs because of any failure attributable to the utility operator to comply with the codes, ordinances, rules, regulations or permits of the city.
- C. Indemnification.
1. Each utility operator shall defend, indemnify and hold the city and its officers, employees, agents and representatives harmless from and against any and all liability, causes of action, claims, damages, losses, judgments and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, or removal of its facilities, and in providing or offering utility services over the facilities, whether such acts or omissions are authorized, allowed, or prohibited by this chapter or by a franchise agreement. The acceptance of a license under Section 12.16.060 shall constitute such an agreement by the applicant whether the same is expressed or not. Upon notification of any such claim the city shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim.
 2. Every utility operator shall also indemnify the city for any damages, claims, additional costs or expenses assessed against or payable by the city arising out of or resulting, directly or indirectly, from the utility operator's failure to remove or relocate any of its facilities in the ROW or easements in a timely manner, unless the utility operator's failure arises directly from the city's negligence or willful misconduct.

(Ord. 08-011 § 1 (part))

12.16.150 - Compliance.

Every utility operator shall comply with all federal and state laws and regulations, including regulations of any administrative agency thereof, as well as all applicable ordinances, resolutions, rules and regulations of the city, heretofore or hereafter adopted or established during the entire term of any license granted under this chapter.

(Ord. 08-011 § 1 (part))

12.16.160 - Confidential/proprietary information.

If any utility operator is required by this chapter to provide books, records, maps or information to the city that utility operator reasonably believes to be confidential or proprietary, the city shall take reasonable steps to protect the confidential or proprietary nature of the books, records or information, to the extent permitted by Oregon public records laws, provided that they are clearly designated as such by the utility operator at the time of disclosure to the city. The city shall not be required to incur any costs to protect such document, except as to the city's routine internal procedures for complying with Oregon public records law.

(Ord. 08-011 § 1 (part))

12.16.170 - Penalties.

- A. Any person found guilty of violating any of the provisions of this chapter shall be fined not more than one thousand dollars (\$1,000.00). A separate and distinct offense shall be deemed committed each day on which a violation occurs.
- B. Nothing in this chapter shall be construed as limiting any judicial or other remedies the city may have at law or in equity, for enforcement of this chapter.

(Ord. 08-011 § 1 (part))

12.16.180 - Severability and preemption.

- A. The provisions of this chapter shall be interpreted to be consistent with applicable federal and state law, and shall be interpreted, to the extent possible, to cover only matters not preempted by federal or state law.
- B. If any article, section, subsection, sentence, clause, phrase, term, provision, condition or portion of this chapter is for any reason declared or 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 this 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, clause, phrase, term, provision, condition, covenant and portion of this chapter shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state laws, rules or regulations, the provision shall be preempted only to the extent required by law and any portion not preempted shall survive. If any federal or state law resulting in preemption is later repealed, rescinded, amended 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.

(Ord. 08-011 § 1 (part))

12.16.190 - Application to existing agreements.

To the extent that this chapter is not in conflict with and can be implemented consistent with existing franchise agreements, this chapter shall apply to all existing franchise agreements granted to utility operators by the city.

(Ord. 08-011 § 1 (part))