**ORDINANCE NO. ____**

**AN ORDINANCE OF THE CITY OF GARIBALDI, OREGON, GOVERNING THE USE AND OCCUPATION OF THE PUBLIC RIGHT OF WAY AND ESTABLISHING AN APPLICATION PROCESS, FEES, AND TERMS FOR SUCH USE**

**Section 1. Short Title.** This Ordinance shall be referred to as the "Right of Way Management Ordinance."

**Section 2. Jurisdiction and Management of the Public Rights of Way.**

A. The City has jurisdiction and exercises regulatory management authority over all City Public Rights of Way pursuant to the City Charter and State law. The City's purpose for exerting its management authority over the Public Rights of Way is to protect and efficiently manage the public's resources and to ensure fair and non-discriminatory access to the Public Right of Way.

B. 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.

C. 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 through Franchise Agreements and Construction permits.

D. 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.

E. The City retains the right and privilege to cut or move any Communications Facilities located within the Public Rights of Way as the City may determine to be necessary, appropriate or useful in response to a public health or safety Emergency.

**Section 3. Regulatory Fees and Compensation Not a Tax.**

A. The fees and costs addressed in this Ordinance, and any compensation charged and paid for regarding the use of the Public Rights of Way addressed in this Ordinance, are separate from and in addition to any and all other federal, State, local, and City fees, taxes, or charges as may be levied, imposed, or due from a Provider, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of Services.

B. The City has determined that any fee established by this Ordinance is not subject to the property tax limitations of Article XI, Sections11 and 11b of the Oregon Constitution. These fees are not imposed on property or property owners.

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C. The fees and costs provided for in this Ordinance are subject to applicable federal and State laws.

## DEFINITIONS

**Section 4. Definitions.** For the purpose of this Ordinance 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.*

**Cable Service** - is to be interpreted consistent with federal law and means the one-way transmission to subscribers of video programming or other programming service and subscriber interaction, if any, required for the selection or use of such video programming or other programming service.

**Cable Service Provider -** means any Person providing Cable Service. For the purpose of this Ordinance, Cable Service Providers are also "Providers".

**City** - means the City of Garibaldi, 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 Garibaldi, Oregon.

**Control** - means actual working control in whatever manner exercised.

**City Property** - means and includes all real property owned by the City and all property held in a proprietary capacity by the City but does not include Public Rights of Way and Utility Easements as defined herein.

**Communications Service Provider** - means any Person providing Communications Services and includes, but is not limited to: every Person who directly or indirectly owns, controls, operates or manages Communications Facilities within the City. For the purpose of this Ordinance, Communications Service Providers are also "Providers".

**Communications Service(s)** - 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 whether or not the transmission medium is wireline. Communications Services includes all forms of telephone services and voice, video, data or information transport and includes Cable Service offered by a Cable Service Provider, but does not include: (1) open video system service, as defined in 47 C.F.R. 76; (2) private Communications System services provided without using the Public Rights of Way; (3) over-the-air radio or television broadcasting to the public-at-large from Facilities licensed by the Federal Communications Commission or any

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successor thereto; and (4) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act.

**Conduit -** means any structure, or portion thereof, containing one or more Ducts, Conduits, manholes, bolts, cables, fiber, or other infrastructure used by or for any telegraph, telephone, electrical utility, conductors.

**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.

**Duct -** means a single enclosed raceway for conductors or cable.

**Emergency -** has the meaning provided for in ORS 401.025.

**Facilities –** means all plant, equipment and property, including but not limited to the poles, pipes, mains, Conduits, Ducts, cable, and wires located under, on, or above the surface of the ground within the Public Right of Way and used or proposed to be used for the purpose of providing Utility Services, Cable Services or Communications Services.

**Federal Communications Commission -** means the federal administrative agency, or its lawful successor, authorized to regulate and oversee Communications or Cable Service Providers on a national level.

**Franchise or Franchise Agreement -** means an agreement between the City and a Provider which grants a privilege to use Public Right of Way within the City for a limited, dedicated purpose and in return for specific compensation.

**Franchisee –** means a Provider who is a party to a valid Franchise Agreement with the City.

**OPUC -** means the statutorily created State agency in the State of Oregon responsible for licensing and regulation of certain Utilities as set forth in Oregon law, or its lawful successor.

**Overhead Facilities -** means all Facilities above the surface of the ground, including the underground supports and foundations for such Facilities.

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

**Provider(s) -** means any Person applying to use or occupy or using or occupying the Public Rights of Way for the purpose of providing Utility Services, Communications Services, or Cable Services to residents or locations inside or outside of City boundaries. Communications Service Providers, Cable Service Providers, and Utility Service Providers are all “Providers” as defined herein.

**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 own use and not for resale, directly or

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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: City streets, roads, highways, bridges, alleys, sidewalks, public easements, and other public ways generally open to travel, including the subsurface under and air space over these ways; but does not include parks, parkland or other City Property not generally open to the public for travel. A Public Right of Way shall exist only to the extent of the City's right, title, interest or authority to grant a Franchise to occupy and use such areas. "Public Rights of Way or Right of Way" shall also include Utility Easements as defined below.

**Right of Way Use Fee**- means the fee imposed upon a Provider for its occupation of or use of the City's Public Right of Way without a valid Franchise Agreement which provides a valid Franchise Fee.

**Services**- means Utility Services, Communications Services, or Cable Services as the terms defined herein.

**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*.

**Underground Facilities -** means Facilities located under the surface of the ground, but does not include underground foundations or supports for "Overhead Facilities."

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

**Utility or Utility Service(s)-** is to be interpreted consistent with state law and means any service for the transmission, generation, supply or distribution of electric energy, gas, or water.

**Utility Service Provider(s)-**means a Person providing Utility Services. For the purposes of this Ordinance, Utility Service Providers are also "Providers".

## REGISTRATION OF PROVIDERS

**Section 5. Purpose.** The purpose of registration is:

A. To assure that all Providers who have Facilities within the City and/or who provide Services within the City by using or occupying the Public Right of Way comply with the ordinances, rules and regulations of the City.

B. To provide the City with accurate and current information concerning Providers who offer Services within the City or who own or operate Facilities within the City.

C. To assist the City in the enforcement of this Ordinance and the collection of any City Franchise fees or Right of Way Use Fees or charges.

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**Section 6. Registration Required.**

A. Unless exempted in this Section 6, all Providers who own, operate or use Facilities within the City's Public Right of Way and all Providers who provide Services to any customer within the City, shall register with the City on a form provided by the City, within forty-five (45) Days of the effective date of this Ordinance. Any prospective Providers who want to install or use Facilities within the City's Public Right of Way or want to provide Services within the City after the effective date of this Ordinance shall register with the City on a form provided by the City prior to installing Facilities or providing Services.

B. After registering with the City pursuant to subsection 6.A of this Section, the Provider shall, by December 31st of each year, file with the City a new registration form if it intends to maintain Facilities or provide Services at any time in the following calendar year. Providers who file an initial registration pursuant to subsection 6.A on or after September 30th shall not be required to file an annual registration until December 31st of the following year.

C. In lieu of filing the City's registration form, a Provider may submit to the City a copy of its application and approved license from either: a) the Oregon Public Utility Commission (PUC); or b) the Federal Communications Commission. To the extent not included in the application and license materials submitted pursuant to this subsection 6.C, registrants also shall provide the following information:

1. 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.

2. The name, address, and telephone number for the duly authorized officer, agent, or employee to be contacted in case of an Emergency.

3. A description of the registrant's existing or proposed Facilities within the City, a description of the Facilities that the registrant intends to construct, and a description of the Services that the registrant intends to offer or provide to Persons, firms, businesses, or institutions within the City or outside of the City.

**Section 7. Registration Fee.** Each registration form shall be accompanied by a nonrefundable registration fee in an amount to be determined by resolution of the City Council. The registration fee required by this Section shall be subject to all applicable limitations imposed by federal or State law.

**Section 8. Exceptions to Registration.** The following Providers and Facilities are exempted from registration:

A. Communications Facilities owned and operated exclusively by the State or a political subdivision of this State, for their own public purpose use.

B. A Private Communications Network, provided in a manner that does not occupy any Public Rights of Way.

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## CONSTRUCTION STANDARDS

**Section 9. General.** No Person shall commence or continue with the Construction, installation or operation of Facilities within a Public Right of Way except as provided in Sections 12 through 28 of this Ordinance and in compliance with all applicable City and State codes, rules, and regulations.

**Section 10. Construction Codes.** 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 Safety Code.

**Section 11. Construction Permits Requests.** Except in the event of an emergency, no Person shall construct or install any Facilities within a Public Right of Way without first obtaining a Construction permit and paying the Construction permit fee as established in §13.30 of the Garibaldi Municipal Code. No permit shall be issued for the Construction or installation of Communications Facilities within a Public Right of Way unless:

A. The requestor has first filed a registration form with the City as required by Sections 5 through 8 of this Ordinance; and

B. The requestor has applied for and received a Franchise pursuant to this Ordinance.

In the event of an emergency and in compliance with City Code, a permittee or its contractor may perform work on its Facilities to address the emergency without first obtaining a permit from the City provided 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 any applicable permit fee as soon as reasonably practicable. As used in this Section 11, "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.

**Section 12. Construction Permits.** Requests for permits to construct 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:

A. That the Facilities will be constructed in accordance with all Federal, State, and City applicable codes, rules and regulations.

B. That the Facilities will be constructed in accordance with any applicable Franchise Agreement.

C. The location and route of all Facilities to be installed aboveground or on existing poles.

D. The location and route of all 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 within the City. Existing Facilities shall be differentiated on the plans from new Construction. If requested, a cross section shall be provided showing new or existing Facilities in relation to the street, curb, sidewalk or Right of Way.

E. 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.

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**Section 13. Verification.** All Construction permit requests shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative affirming that the drawings, plans and specifications submitted comply with applicable technical codes, rules and regulations.

**Section 14. Construction Schedule.** All Construction permit applications shall be accompanied by a written Construction schedule, which shall include an estimated date for completion of Construction. The Construction schedule is subject to approval by the Public Works Director.

**Section 15. Construction Permit Fee.** Unless otherwise provided a Franchise Agreement, prior to issuance of a Construction permit, the requestor shall pay a permit fee in an amount to established by the City. Such fee shall be designed to defray the actual costs of City administration of the requirements of this Ordinance.

**Section 16. Issuance of Permit.** If satisfied that the plans and documents submitted comply with all requirements of this Ordinance and with any applicable Franchise Agreement, the Public Works Director or his or her designee shall issue a permit authorizing Construction of the Facilities, subject to such further conditions affecting the time, place and manner of performing the work.

**Section 17. Notice of Construction.** Except in the case of an Emergency, the permittee shall notify the Public Works Director not less than two (2) working Days in advance of any excavation or Construction in the Public Rights of Way.

**Section 18. Compliance with Permit.** All Construction practices and activities shall be in accordance with the permit and the approved final plans and specifications for the Facilities. The Public Works Director and representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.

**Section 19. Noncomplying Work.** Subject to the notice requirements in Section 27, all work which does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this Ordinance, 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 Ordinance.

**Section 20. Completion of Construction.** The permittee shall promptly complete all Construction activities so as to minimize disruption of the Public Rights of Way and other public and private property. All Construction work within Public 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 appropriate City official.

**Section 21. As-Built Drawings.** If requested by the City, the permittee shall furnish the City with up to two (2) complete sets of plans drawn to scale and accurately depicting the location of all Facilities constructed pursuant to the permit. These plans shall be submitted to the City Engineer or designee within sixty (60) Days after completion of Construction, in a format acceptable to the City.

**Section 22. Restoration of Public Rights of Way and City Property.**

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A. When a permittee performs or directs any work in or affecting any Public Rights of Way or upon City Property, it shall at its own expense promptly restore such ways or property to as good an order and condition as existed prior to the work, unless otherwise directed by the City.

B. If weather or other conditions do not permit the complete restoration required by this Section, the permittee shall temporarily restore the affected Rights of Way or property. 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.

C. 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 notice, the permittee fails to restore the Rights of Way or property to as good an order and condition as existed before the work was undertaken, the City shall cause such restoration to be made at the expense of the permittee.

D. A permittee 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 such Rights of Way or property.

**Section 23. 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 permittee's Facilities within the Public Rights of Way of the City shall be provided to the City before Construction is commenced.

A. 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.

B. The surety shall guarantee, to the satisfaction of the City:

1. Timely completion of Construction;

2. Construction in compliance with applicable plans, permits, technical codes and standards;

3. Proper location of the Facilities as specified by the City;

4. Restoration of the Public Rights of Way and other property affected by the Construction; and

5. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

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## LOCATION OF FACILITIES

**Section 24. 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 Construction permit and approved final plans and specifications for the Facilities, and all applicable City codes, rules and regulations. Unless otherwise specified in a Franchise Agreement, whenever any existing electric utilities or electric Facilities are within a Public Right of Way and are required by the City to be located underground, a Provider occupying or proposing to occupy the same Public Right of Way must also locate its Facilities underground at its own expense.

**Section 25. Interference with the Public Rights of Way.** No Provider may locate or maintain its Facilities so as to interfere with the City's use of the Public Rights of Way or to unreasonably interfere with use by the general public or by other Persons authorized to use or occupy the Public Rights of Way. All use of Public Rights of Way shall be consistent with City codes, ordinances and regulations.

**Section 26. Relocation or Removal of Facilities.**

A. A Provider shall, at no cost to the City, temporarily or permanently remove, relocate, change or alter the position of any Facilities within the Public Rights of Way, including relocation of aerial Facilities underground, when requested to do so in writing by the City. No Franchise Agreement shall preempt or otherwise affect this relocation and removal requirement.

B. Nothing in this Section 26 precludes a Provider from requesting reimbursement or compensation from a third party, pursuant to applicable laws, regulations, tariffs or agreements. Provider shall timely comply with the requirements of this Section regardless of whether or not it has requested or received such reimbursement or compensation.

C. The City shall provide at least 30 days written notice of the time by which the Provider must remove, relocate, change, alter or underground its Facilities. The City may grant extensions upon the Provider's request. If a Provider fails to remove, relocate, alter or underground any Facility as requested by the City, the Provider shall pay all costs incurred by the City due to such failure, including but not limited to costs related to project delays. Upon such failure, the City may cause the Facility to be removed, relocated, altered or undergrounded at the Provider's sole expense and shall use qualified personnel or contractors consistent with applicable State and federal safety laws and regulations. Upon receipt of a detailed invoice from the City, the Provider shall reimburse the City for the costs the City incurred within thirty (30) Days.

**Section 27. Removal of Unauthorized Facilities.** Within thirty (30) Days following written notice from the City or at a later date agreed upon by the parties, any Provider or Person who owns, controls or maintains any Facilities within the Public Rights of Way shall, at its own expense, remove such Facilities. A Facility is subject to removal under this Section in the following circumstances:

A. One (1) year after the expiration or termination of the Provider's Franchise Agreement, unless the City has provided written authorization for abandonment in place.

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B. Upon abandonment of a Facility within the Public Rights of Way. A 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 Facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the Facility is being replaced. The City shall contact the Provider before concluding that a Facility is abandoned. A Facility may be abandoned in place and not removed if the City authorizes such abandonment and non-removal in writing and there is no apparent risk to the public safety, health, or welfare.

C. If the Facility was Constructed or installed without the appropriate prior authority at the time of Construction or installation.

D. If the Facility was Constructed or installed at a location not authorized by the Provider's Franchise or other legally sufficient permit.

**Section 28. Coordination of Construction Activities.** A Provider is required to make a good faith effort to cooperate with the City in coordinating construction activities.

A. By January 1 of each year, a Provider shall provide the City with a schedule of their known proposed Construction activities in or near or affecting the Right of Way.

B. If requested by the City, a Provider shall meet with the City to schedule and coordinate Construction in the Public Rights of Way.

C. All Construction locations, activities and schedules shall be coordinated, as ordered by the City Engineer or designee, to minimize public inconvenience, disruption or damages.

## FRANCHISE AGREEMENTS REQUIRED

**Section 29. Registration, Franchise Application, and Franchise Agreement Required.**

A. Prior to occupying City Public Rights of Way, all Providers shall first register with the City pursuant to Section 6, shall file a Franchise Application with the City pursuant to Section 30 below, and shall enter into a Franchise Agreement with the City.

B. Any Person whose Facilities occupy the Public Right of Way, with or without a valid Franchise Agreement from the City, must comply with all provisions of this Ordinance, specifically including payment of right of way fees pursuant to Section 36.

**Section 30. Franchise Application.**

A. Any Person who desires a Franchise Agreement with the City must first file a Franchise application with the City Manager or his or her designee. The purpose of a Franchise Application is to provide the City with necessary information regarding the Provider's Services and Public Right of Way needs. The Franchise Application shall include, at minimum, the following information:

1. The identity of the applicant.

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2. A description of the services to be offered or provided by the applicant over its Facilities, including an indication of whether the applicant will provide solely Cable Service.

3. Engineering plans, specifications, and a network map in a form customarily used by the applicant of the 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 Facilities.

4. 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, including an indication of the number of current customers with the City boundaries.

5. Information to establish that the applicant has obtained all other governmental approvals and permits to construct and operate the Facilities and to offer or provide the Service proposed.

6. An accurate map showing the location of any existing Facilities in the City that applicant intends to use or lease.

B. Any Provider occupying the Public Rights of Way without a Franchise Agreement as of the effective date of this Ordinance shall file a Franchise Application pursuant to this Section within forty-five (45) Days of the effective date of this Ordinance.

**Section 32. Determination by the City.** The City shall issue a written preliminary determination granting or denying the Franchise application in whole or in part. If the Franchise Application is denied, the written determination shall include the reasons for denial. The City shall evaluate the Franchise Application based upon: the continuing capacity of the Public Rights of Way to accommodate the prospective Franchisee's proposed Facilities; the prospective Franchisee's legal, technical and financial ability to comply with the provisions of this Ordinance; and the prospective Franchisee's compliance with applicable Federal, State and local laws, rules, contractual obligations and regulations.

**Section 33. Scope of Franchise Agreement; Effect of Ordinance on Franchise Agreement.**

A. No Franchise granted pursuant to this Ordinance shall convey any right, title or interest in the Public Rights of Way, but shall provide a non-exclusive grant to use and occupy the Public Rights of Way for the limited purposes, terms, and conditions provided in the Franchise Agreement.

B. The rights granted by any Franchise Agreement are limited to the right to use the Public Rights of Way for the provision of 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 infrastructure or establishing any other public work, or improvement of any kind, including repairs, replacement or removal of any City infrastructure. If a Franchisee's Facilities interfere with the Construction, repair, replacement, alteration or removal of any Public Rights of Way, public work, City improvement or City infrastructure, except those used to provide competing Services, such Facilities shall be removed or relocated as provided in this Ordinance, in a manner acceptable to the City and consistent with industry standard engineering and safety codes.

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C. A Franchise Agreement granted hereunder shall at all times comply with the requirements of this Ordinance unless this Ordinance expressly authorizes different Franchise Agreement terms. In this Ordinance, such authorization is indicated by the introductory phrase, "Unless otherwise specified in a Franchise Agreement…" In the event of a conflict between this Ordinance and a Franchise Agreement which contains unauthorized, conflicting terms, this Ordinance shall prevail.

**Section 34. Term of Grant.** Unless otherwise specified in a Franchise Agreement, a Franchise granted hereunder shall be in effect for an initial term of five (5) years and may be renewed subject to Sections 38 and 39 of this Ordinance.

**Section 35. 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 Franchisee and the Public Rights of Way necessary to serve such areas and may include the entire City.

**Section 36. Franchise Fee and Right of Way Use Fee.**

A. A Franchise Agreement granted hereunder shall require the Franchisee to pay a Franchise Fee in an amount determined by resolution of the City Council.

B. Every Provider occupying or using the Public Rights of Way without a Franchise Agreement, whether or not the Provider owns the Facilities used to provide its Services, shall pay a Right of Way Use Fee in the amount of the Franchise Fee determined by resolution of the City Council.

C. If the Provider's sole use of the Public Right of Way is to place wireless Facilities above the ground on existing poles or similar structures in the Public Right of Way and the Provider does not install or use lines, wires or cables, a Provider is not required to pay a Right of Way use fee or a Franchise fee under this Section. Such a wireless Provider must, however, comply with all other applicable requirements of this Ordinance and all other applicable City codes, regulations and rules. Nothing in this Subsection C limits the City's authority to charge reasonable rental or pole attachment rates for the private use of City property.

C. Unless otherwise specified in a Franchise Agreement, the Franchise fees required by this Section 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 Franchisee shall pay interest at the rate of nine percent (9%) per year for any payment made after the due date.

D. The Franchise Fee or Right of Way use fee required in this Section remains subject to all applicable limitations imposed by federal or State statutes.

**Section 37. New Facilities or Services.**

A. A new Franchise shall be required of any Franchisee who desires to extend or locate its Facilities within Public Rights of Way of the City if such Facilities are not included in a non-expired, valid Franchise Agreement with the City.

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B. A new Franchise shall be required of any Franchisee who desires to provide an additional Utility Service, Communication Services or Cable Service which was not previously included in a non-expired, valid Franchise Agreement with the City.

**Section 38. Franchise Term Renewals.** Unless otherwise specified in a Franchise Agreement, a Franchise, if renewed, shall be renewed in the following manner.

A. Franchisees who desire to renew a non-expired, valid Franchise under this Ordinance shall, not less than one hundred eighty (180) Days before expiration of the current Franchise Agreement, file a request for renewal with the City, which shall include the following information:

B. The information required pursuant to Section 30 of this Ordinance.

C. Any additional information required pursuant to the existing Franchise Agreement between the City and the Franchisee.

D. Any desired amendments to the existing Franchise Agreement, including the desired renewal term, provided that such amendments do not violate or conflict with this Ordinance.

E. Confirmation that the Franchise does not owe any fines, fees, or unpaid debts to the City.

**Section 39. Renewal Determinations.** Within ninety (90) Days after receiving a complete renewal request, the City shall issue a written determination granting or denying the renewal request in whole or in part. Such renewal shall be for a renewal term or terms to be mutually decided on by the parties. If the renewal request is denied, the written determination shall provide the reasons for non-renewal. The City shall evaluate the renewal based upon the capacity of the Rights of Way to accommodate the Franchisee's Facilities; the Franchisee's legal, technical and financial ability to comply with the provisions of this Ordinance; and Franchisee's compliance with any applicable federal, State and local laws, contractual obligations, rules, or regulations.

**Section 40. Obligation to Cure As a Condition of Renewal.** The City shall not renew a Franchise Agreement unless the Franchise has cured any violations or defaults in the Franchisee's performance of the Franchise Agreement, or of the requirements of this Ordinance or has provided the City with a City-approved plan detailing the corrective action to be taken.

**Section 41. Assignments or Transfers of Franchise.** A Franchise granted under this Ordinance may not be directly or indirectly transferred, assigned or disposed of by sale, lease, merger, consolidation or by other act of the Franchisee, by operation of law or otherwise, without the prior written consent of the City. City consent conditions may include, but shall not be limited to:

A. The Franchisee and the proposed assignee or transferee of the Franchise shall agree in writing to assume and abide by all of the provisions of the Franchise Agreement.

B. 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 Ordinance and applicable Federal, State and local laws, rules, regulations.

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C. Unless otherwise specified in an unexpired, valid Franchise Agreement, the Franchisee 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 Franchise.

D. Any transfer or assignment of a Franchise, system or integral part of a system without prior City approval or without a valid Franchise Agreement shall be void and is cause for revocation of the Franchise.

**Section 42. Termination of Franchise Agreement.** A Franchise Agreement to use or occupy Public Rights of Way may be terminated by the City for the following reasons:

A. Construction or operation in the City or in the Public Rights of Way without a Construction permit.

B. Construction or operation at an unauthorized location or in violation of City approvals or permits.

C. Failure to comply with Section 41 herein with respect to sale, transfer or assignment of a system or Franchise.

D. Misrepresentation by or on behalf of a Franchisee to the City in any Registration request or Franchise Application or Franchise renewal request.

E. Unauthorized abandonment of Facilities in the Public Rights of Way.

F. Failure to relocate or remove Facilities as required in this Ordinance.

G. Failure to pay taxes, compensation, fees or costs when and as due the City under this Ordinance or under an applicable Franchise Agreement.

H. Insolvency or bankruptcy of the Franchisee.

I. Violation of material provisions of this Ordinance.

J. Violation of the material terms of a Franchise Agreement.

**Section 43. Notice and Duty to Cure.** In the event that the City believes that grounds exist for termination of a Franchise Agreement, the City shall give the Franchisee written notice of the alleged violation and shall provide a short and concise statement of the nature and general facts of the violation. City shall provide the Franchisee a reasonable period of time, not exceeding thirty (30) Days, to furnish evidence that:

A. Corrective action has been or is being expeditiously pursued to remedy the violation;

B. Rebuts the alleged violation; and/or

C. Explains why it would be in the public interest to impose a penalty or sanction less than termination.

**Section 44. Public Hearing.** In the event that a Franchisee fails to provide evidence reasonably satisfactory to the City as provided in Section 43, the City Manager shall refer the

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alleged violation to the City Council. The City Council shall provide the Franchisee with reasonable notice and a reasonable opportunity to be heard concerning the matter.

**Section 45. Standards for Franchise Termination or Lesser Sanctions.** If persuaded that the Franchisee has violated a material provision of this Ordinance or of a Franchise Agreement, the City Council may terminate the Franchise or may establish some lesser sanction and cure, including but not limited to the assessment of penalties pursuant to Section 60. In doing so, the City Council shall consider the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors, whether:

A. The violation was egregious.

B. Substantial harm resulted.

C. The violation was intentional or repeated.

D. There is a history of prior violations of the same or other requirements.

E. There is a history of overall compliance.

F. The violation was voluntarily disclosed, admitted or cured.

**Section 46. Other City Costs.** All Franchisees or Providers shall, within thirty (30) Days after City's 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 statutes.

**Section 47. Damage to Provider's Facilities.** Unless directly caused by the City's negligent, intentional or malicious acts, and at all times limited by Oregon statutory and constitutional tort claim limits without exception, the City shall not be liable for any damage or injury to or loss of any Facility, property, or Person as a result of or in connection with any City 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.

**Section 48. Duty to Provide Information.**

A. Except in Emergencies, within sixty (60) Days of the City's written request, a Provider shall provide the City with the following:

   1. Information sufficient to demonstrate that Provider has complied with all requirements of this Ordinance and any applicable Franchise Agreement, including but not limited to the Franchise fee or Right of Way use fee payments required by Section 36.

   2. All books, records, maps, and other documents, maintained by the Provider with respect to its Facilities within the Public Rights of Way.

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C. If the City's audit or review of the Provider's books, records and other documents or information demonstrates that the Provider has underpaid the applicable Franchise fee or the Right of Way use fee by three percent (3%) or more in any one year, the Provider shall reimburse the City for the cost of the audit or review, in addition to correcting the underpayment and paying any interest or penalties owed. Any underpayment, including any interest or audit cost reimbursement, shall be paid within thirty (30) Days of the City's notice to Provider of such underpayment, or as otherwise specified in a Franchise Agreement or other written agreement between the parties.

**Section 49. City Use of Provider's Services or Facilities.** If the City contracts for the use of a Provider's Facilities, services, installation, or maintenance, and the City provides written permission, the Provider may deduct the applicable charges from Franchise fee or Right of Way Use Fee payments. The terms and conditions of the City's use of such services or facilities shall be specified in a written Franchise Agreement or other agreement between the City and the Provider.

**Section 50. Compensation for City Property.** If any right is granted by lease, Franchise Agreement, or other manner, to use and occupy City Property for the installation of Facilities or other infrastructure, the compensation to be paid for such right and use shall be fixed by the City through a separate agreement with the Provider.

**Section 51. Cable Franchise.** Cable Service Providers shall be subject to this Ordinance and shall also enter into a Cable Franchise Agreement with the City, subject to all applicable provisions of State and federal law, including the Cable Act.

**Section 52. Leased Capacity.** A Provider may, without prior City approval, offer or provide capacity or bandwidth to its customers by lease, use agreements or otherwise, provided that the Provider shall notify the City of the following: that such lease or use agreement has been granted and the type or nature of the use or lease granted.

**Section 53. Insurance.** Unless otherwise specified in a Franchise Agreement, each Provider shall, as a condition of the grant, secure and maintain liability insurance policies in amounts and types satisfactory to the City which insure both the Provider and the City and its elected and appointed officers, officials, agents and employees as additional insured. The liability insurance policies required by this Section shall be maintained by the Provider throughout the term of the Franchise Agreement, and any such other period of time during which the Provider is operating or has Facilities within the Public Rights of Way. Each Provider shall maintain continuous uninterrupted coverage and shall provide such policies upon City's request. As an alternative to the insurance requirements contained herein, a Provider may provide evidence of self-insurance, subject to acceptance by the City.

**Section 54. General Indemnification.** Each Franchise Agreement shall include, to the extent permitted by law, Franchisee's express promise 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 attorneys' fees and costs of suit or defense, arising out of, relating to, resulting from or alleged to arise out of, relate to or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Franchisee or its affiliates, officers, employees, agents, contractors or subcontractors in the Construction, operation, maintenance, repair or removal of its Facilities or related to the Provider's provision of Services over the Facilities, whether or not such acts or omissions are authorized, allowed or prohibited by this Ordinance or by a Franchise Agreement.

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**Section 55. Performance Surety.** Before a Franchise granted pursuant to this Ordinance is effective, and as necessary thereafter, the Provider 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 Ordinance, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the Franchisee to comply with the City Code, ordinances, rules, regulations or permits. This obligation is in addition to the performance surety required by Section 23 for Construction of Facilities.

## GENERAL PROVISIONS

**Section 56. Governing Law.** Any Franchise Agreement granted under this Ordinance is subject to the provisions of the constitutions and laws of the United States and the State of Oregon and the ordinances and Charter of the City.

**Section 57. Written Agreement.** No Franchise Agreement shall be granted hereunder except by a writing duly executed by the Franchisee and the City.

**Section 58. Nonexclusive Grant.** No Franchise Agreement granted under this Ordinance shall confer any exclusive right, privilege, license or Franchise to occupy or use the Public Rights of Way.

**Section 59. Severability and Preemption.** If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this Ordinance is for any reason held to be invalid or unenforceable by a court of competent jurisdiction, or is superseded by State or federal legislation, rules, regulations or decision, the remainder of the Ordinance 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 of the Ordinance, and each remaining section, subsection, sentence, clause, phrase, provision, condition, covenant and portion of this Ordinance 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 Ordinance, 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.

**Section 60. Penalties.** Any Person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Ordinance or a valid Franchise Agreement shall, pursuant to § 1.10 of the Garibaldi Municipal Code be subject to a penalty of not less than Five Hundred Dollars ($500.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs.

**Section 61. Other Remedies.** Nothing in this Ordinance shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Ordinance.

**Section 62. Captions.** The captions to sections throughout this Ordinance 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 Ordinance.

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**Section 63. Compliance with Laws.** Any Provider under this Ordinance 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 Ordinance which relate to the Construction, maintenance and operation of Facilities.

**Section 64. Application to Existing Ordinances and Franchise Agreements.** To the extent that this Ordinance is not in conflict with and can be implemented consistent with existing ordinances and existing Franchise Agreements, this Ordinance shall apply to all existing ordinances and existing Franchise Agreements governing the use of the Public Right of Way for Services. In the event of a conflict between this Ordinance and the terms of a valid, non-expired Franchise Agreement adopted after the Effective Date of this Ordinance, the terms of this Ordinance shall prevail.

**FIRST READING** by the Council this _____ day of _____, 2016.
**SECOND READING** by the Council this _____ day of _____, 2016.
**ADOPTED** by the Common Council this _____ day of _____, 2016.
**APPROVED** by the Mayor this _____ day of _____, 20____

ATTEST:

_____ _____
Recorder

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