

## Chapter 11.14

### TELECOMMUNICATIONS FACILITIES WITHIN RIGHTS-OF-WAY

#### Sections:

- 11.14.010 General Provisions.
- 11.14.020 Definitions.
- 11.14.030 Occupation License Required.
- 11.14.040 Right-of-Way License Required for Private Telecommunications System.
- 11.14.050 Master Permit Required for Telecommunications Service.
- 11.14.060 Persons Asserting an Existing State-Wide Grant.
- 11.14.070 Facilities Lease Required.
- 11.14.080 Use Permits Required.
- 11.14.090 Transitional Provisions.
- 11.14.100 Administrative Provisions.
- 11.14.110 Fees and Compensation.
- 11.14.120 Conditions of Licenses, Master Permits and Leases.
- 11.14.130 Compliance.

#### **11.14.010 General Provisions.**

##### A. Findings and Purpose.

1. The City Council finds that it is in the public interest to permit use of the City's rights-of-way and to establish standards for use of the rights-of-way for service providers and other operators of telecommunications systems, in a manner which:
  - a. Encourages competition by establishing non-discriminatory terms and conditions under which service providers and other operators of telecommunications systems may use valuable public property to serve the public.
  - b. Protects the public interest in the use of the limited physical capacity of the public rights-of-way.
  - c. Protects the public and the City from any harm resulting from such private use of rights-of-way and preserves and improves the aesthetics of the community.
  - d. Protects and carries out the regulatory authority of the City and recovers administrative costs, in a manner consistent with federal and state law.
2. The City Council finds that the City's rights-of-way, other City property, and utility facilities such as its poles and conduits within the City constitute valuable public property:
  - a. That can be partially occupied by private companies and other entities for facilities used in the delivery, conveyance, and transmission of

telecommunications, utility and public services rendered for profit, to the enhancement of the health, welfare, and general economic well being of the City and its citizens; and

- b. That are a unique resource so that proper management by the City is necessary, to maximize the efficiency and minimize the costs to the taxpayers of the foregoing uses and to minimize the inconvenience and negative effects, including degradation, upon the public from such facilities' construction, emplacement, relocation, and maintenance in the rights-of-way.
3. Therefore, the purpose and intent of this Chapter is to:
- a. Permit and manage reasonable access to the limited physical capacity of the available public rights-of-way of the City for telecommunications purposes in a non-discriminatory, competitively neutral, and non-exclusive way to the extent required under applicable law.
  - b. Encourage open competition and the provision of advanced and high quality telecommunications services on the widest possible basis to the businesses, institutions, and residents of the City, while eliminating unnecessary local regulation of telecommunications service providers and services.
  - c. Promote and encourage competition for voice, data, video, and video programming services that make the latest and best technology available and keep service prices affordable for all City residents and businesses.
  - d. Encourage universal access to telecommunications and video programming services for all residents and businesses.
  - e. Encourage investments by telecommunications service providers to enhance economic development programs and provide jobs, opportunities, and choices for its citizens.
  - f. Encourage economic development while preserving aesthetic and other community values and preventing proliferation of aboveground facilities.
  - g. Enable the City to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition, and technological development.
  - h. Recover the City's current and ongoing costs of granting and regulating private access to and use of the public rights-of-way from the persons and businesses seeking such access and causing such costs, in a non-discriminatory manner. (Ord. 763, June 2003.)

**11.14.020 Definitions.**

For the purpose of this Chapter, and the interpretation and enforcement thereof, the following words and phrases shall have the meanings given herein, unless the context of the sentence in which they are used shall indicate otherwise. When not inconsistent with the context, words used in the present tense include the future

tense; words in the plural number include the singular number; and words in the singular number include the plural number; and the masculine gender includes the feminine gender. The words "shall" and "will" are mandatory, and "may" is permissive. Unless otherwise expressly stated, words not defined in this Chapter shall be construed consistent with Title 47 of the United States Code and Title 35 of the Revised Code of Washington, and, if not defined therein, their common and ordinary meaning. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

- A. "Affiliate" means a person, who (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.
- B. "Applicant" means any person or entity that applies for any right-of-way license, franchise, lease, or other permit pursuant to this Chapter.
- C. "Application Fee" means the charge specified in Section 11.14.030 herein, and designed to recover the City's actual administrative costs in processing applications for any right-of-way license, franchise, lease or other permit pursuant to this Chapter, including applications for the transfer thereof.
- D. "Cable Act" means the Cable Communications Policy Act of 1984, 47 U.S.C.521 et seq., as amended by the Cable Television Consumer Protection and Competition Act of 1992, as further amended by the Telecommunications Act of 1996, and as may be further amended from time to time.
- E. "Cable Facilities" See "Cable System."
- F. "Cable Television Service" for the purpose of this Chapter shall have the same meaning provided by the Cable Act and to the extent applicable RCW 35.99.010.
- G. "Cable System" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:
  - 1. A facility that serves only to retransmit the television signals of one or more television broadcast stations;
  - 2. A facility that serves subscribers without using any public right-of-way;
  - 3. A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II (Common Carriers) of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services;

4. Any facilities of any electric utility used solely for operating its electric utility systems; or
5. An open video system that is certified by the FCC.

A reference to a Cable System includes pedestals, equipment enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the cable system.

- H. "City" means the City of Benton City, a non-charter code city of the State of Washington, in its present incorporated form or in any later reorganized, consolidated, enlarged or reincorporated form.
- I. "City Property" means and includes all real property, utility poles, conduits, bridges and similar facilities owned by the City, other than public streets and utility easements as those terms are defined herein, and all property held in a proprietary capacity by the City, which are not subject to right-of-way licensing and master permitting as provided in this Chapter.
- J. "Council" means the City Council of the City of Benton City, Washington.
- K. "Director" means the Mayor of the City of Benton City or his/her designee.
- L. "Easement" means any City-held easement for access and public utilities.
- M. "Emergency" means a condition of imminent danger to the health, safety and welfare of property or persons located within the City including, without limitation, damage to persons or property from natural consequences, such as storms, earthquakes, riots or wars.
- N. "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facilities within the right-of-way that is or will be available for use for additional telecommunications facilities.
- O. "Facilities" means all of the plant, equipment, fixtures, appurtenances, antennas, and other facilities necessary to furnish and deliver telecommunications services, private telecommunications services, and cable television services, including but not limited to poles with crossarms, poles without crossarms, wires, lines, conduits, cables, communication and signal lines and equipment, braces, guys, anchors, faults, and all attachments, appurtenances, and appliances necessary or incidental to the distribution and use of telecommunications services, private telecommunications services, and cable television services.
- P. "Facilities Lease" or "Lease" means the legal authorization to occupy and use specific City property and/or specific areas of City right-of-way for the specified time and under the specified terms as agreed to between the City and the lessee.
- Q. "FCC" or "Federal Communications Commission" means the federal administrative agency or lawful successor, authorized to regulate and oversee telecommunications, cable and open video carriers, operators and providers on a national level.

- R. "Fiber Optics" means the technology of guiding and projecting light for use as a communications medium.
- S. "Franchise" means the prior authorization, granted by the City to a service provider giving the carrier or operator the non-exclusive right to occupy the space in, under, over or across rights-of-way of the City to provide a specified service within the City. Such franchises do not include and are not a substitute for:
1. Any other permit or authorization required for the privilege of transacting and carrying on a business within the City required by the ordinances and laws of the City;
  2. Any permit, agreement or authorization required in connection with operations on or in public streets or property, including by way of example and not limitation, right-of-way construction, use and street cut permits;
  3. Any permits or agreements for occupying any City Property or property of private entities to which access is not specifically granted by the franchise including, without limitation, permits and agreements for placing devices on or in any City Property including, without limitation, poles, conduits, buildings, other structures or railroad easements, or property of a private entity; or
  4. The right to place devices in the right-of-way, such as pay telephones, for end user use in terminating or originating transmissions.
- By way of example, and without limiting the foregoing, this Chapter shall not be read to diminish or in any way affect the authority of the City to control and charge for the use of its real estate, fixtures or personal property. Therefore, any person who desires to use such property must obtain additional approvals, master permits, use permits or agreements for that purpose, as may be required by the City or state law.
- T. "Franchisee" means the person, firm or corporation to whom or which a franchise, as defined in this Section, was previously granted by the City and the lawful successor, transferee or assignee of said person, firm or corporation subject to such conditions as may be established in this Chapter.
- U. "Grantee" means the holder of a franchise, right-of-way license, master permit, use permit or facilities lease.
- V. "Gross Revenues" means all revenue, including funds used to pay franchise fees, from the provision of telecommunications services in the City via a telecommunications system; provided, however, gross revenues shall not include taxes imposed directly upon any subscriber or user by the federal, state, county, or other governmental unit and required to be collected by the grantee; and provided further, that a grantee may deduct from its gross revenues those revenues received from a lessee or a like provider that holds a franchise or license under this Chapter, provided that said lessee or like provider submits a certificate to the grantee stating that it has paid the fees it owes the City for the applicable reporting period. Copies of the certificate must be provided to the

City.

- W. "License" or "right-of-way License" refers to the legal authorization, in lieu of a franchise or master permit, to use a particular, discrete, and limited portion of the public rights-of-way to construct, maintain or repair a telecommunications facility or a private telecommunications system by a non-service provider. The term license or right-of-way license shall not mean or include:
1. Any other permit or authorization required for the privilege of transacting and carrying on a business within the City;
  2. Any other permit, agreement or authorization required in connection with operations on public streets or property, including by way of example and not limitation, right-of-way construction permits or use permits as defined in Chapter 12.04 BCMC;
  3. Any permits or agreements for occupying any City Property or property of private entities to which access is not specifically granted by the right-of-way license including, without limitation, permits and agreements for placing devices on or in any City Property including, without limitation, poles, conduits buildings, other structures or railroad easements, or property of a private entity; or
  4. The right to place devices in the right-of-way, such as pay telephones, for end-user use in originating and terminating transmissions, otherwise authorized, such as by a facilities lease.
- X. "Master Permit" means the agreement between the City in which it grants general permission to a service provider to enter, use, and occupy the right-of-way for the purpose of locating facilities. For purposes of this Chapter, a franchise, except for a cable television franchise, is a master permit. A master permit does not include cable television franchises. The term master permit shall not mean or include:
1. Any other permit or authorization required for the privilege of transacting and carrying on a business within the City.
  2. Any other permit, agreement or authorization required in connection with operations on public streets or property, including by way of example and not limitation, right-of-way construction permits and use permits as defined in Chapter 12.04 BCMC.
  3. Any permits or agreements for occupying any other property of the City or private entities to which access is not specifically granted by the master permit including, without limitation, permits and agreements for placing devices on or in poles, conduits other structures, or railroad easements, whether owned by the City, or a private entity.
  4. The right to place devices in the right-of-way, such as pay telephones, for end-user use in originating and terminating transmissions, otherwise authorized, such as by a facilities lease.
- Y. "Non-Service Provider" means any person installing, constructing, monitoring or

operating a private telecommunications system or installing, constructing, maintaining facilities, including but not limited to conduit and/or unlit dark fiber located in the right-of-way that is not used to provide telecommunications service for hire, sale or resale to the general public.

- Z. "Open Video System" or "OVS" means a facility consisting of a set of transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service, which includes video programming, which is provided to multiple subscribers within a community, and which the Federal Communications Commission or its successor has certified as compliant with Part 76 of its rules, 47 C.F.R., Part 76, as amended from time to time.
- AA. "Open Video System Service" means video programming by means of an open video system.
- BB. "Other Ways" means the highways, streets, alleys, utility easements or other rights-of-way within the City; but under the jurisdiction and control of a governmental or private entity other than the City.
- CC. "Overhead Facilities" refers to electric utility and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.
- DD. "Person" means and includes corporations, companies, associations, joint stock companies or associations, firms, partnerships, limited liability companies and individuals and includes their lessors, trustees and receivers but does not include the City.
- EE. "Personal Wireless Service" means commercial mobile services, unlicensed wireless services, and common carrier wireless exchange access services, as defined by federal law and regulations.
- FF. "Private Telecommunications Facilities" means all of the plant, equipment, fixtures, appurtenances, antennas, and other facilities necessary to furnish and deliver private telecommunications services, including but not limited to poles with crossarms, poles without crossarms, wires, lines, conduits, cables, communication and signal lines and equipment, braces, guys, anchors, faults, and all attachments, appurtenances and appliances necessary or incidental to the distribution and use of private telecommunications services. "Private telecommunications facilities" also includes any conduit, lines, fiber or unlit dark fiber that is not used to provide telecommunications services for hire, sale or resale to the general public.
- GG. "Private Telecommunications System" means a telecommunications system controlled by a person or entity for the sole and exclusive use of such person, entity or affiliate thereof, including the provision of private shared telecommunications services within a user group located in discrete private premises in building complexes, campuses or high rise buildings, by such party or entity, but not encompassing in any respect, a system offered for hire, sale or resale to the general public. For the purposes of this Chapter, "private

telecommunications system" also includes facilities comprised of conduit, lines, fiber or unlit dark fiber located in the right-of-way that are not used to provide telecommunications services for hire, sale or resale to the general public.

HH. "Private Telecommunications System Owner" means a person that owns or leases a private telecommunications system.

II. "Proposal" means the response, by an individual or organization, to a request by the City regarding the provision of telecommunications services. "Proposal" also includes an unsolicited plan submitted by an individual or organization seeking to provide telecommunications services in the City.

JJ. "Right-of-way" means land acquired or dedicated for roads and public streets and easements for which, under City ordinances and other applicable laws, the City has authority to grant master permits, licenses or leases for use thereof, or has regulatory authority thereover, and may be more specifically defined in the master permit, license or lease granting any right to or use thereof. "Rights-of-way" for the purpose of this Chapter do not include buildings, parks, poles, conduits or similar facilities or property owned by or leased to the City, including, by way of example and not limitation, structures in the right-of-way such as utility poles, and bridges.

KK. "Service Provider" means every corporation, company, association, joint stock association, firm, partnership, or person owning, operating, or managing any facilities used to provide and providing telecommunications or cable television service for hire, sale, or resale to the general public. Service provider includes the legal successor to any such corporation, company, association, joint stock association, firm, partnership, or person.

LL. "State" means the State of Washington.

MM. "Surplus Space" means that portion of the usable space on a utility pole, or in a duct or conduit which has the necessary clearance from other users, as required by federal or state orders and regulations, to allow its use by a telecommunications carrier for a pole attachment or other telecommunications facility.

NN. "Telecommunications Service" means the transmission of information by wire, radio, optical cable, electromagnetic, or other similar means for hire, sale, or resale to the general public. For the purposes of this Chapter, "information" means knowledge or intelligence represented by any form of writing, signs, signals, pictures, sounds, or any other symbols. For the purpose of this Chapter, "telecommunications service" excludes the over-the-air transmission of broadcast television or broadcast radio signals.

OO. "Telecommunications System" means a tangible facility that is used to provide one or more telecommunications services, any portion of which occupies public rights-of-way. The term "telecommunications system" by way of example, and not limitation, includes wires, equipment cabinets, guys, conduit, radio transmitting towers, poles, other supporting structures and associated and appurtenant facilities used to transmit telecommunications signals. The term

"telecommunications system" includes all devices mounted on electric utility poles in the public rights-of-way through which telecommunications services are originated or terminated. A cable system is not a telecommunications system to the extent that it provides only cable service and an open video system is not a telecommunications system to the extent that it provides only video services.

PP. "Transfer" means any transaction in which:

1. There is any change, acquisition or transfer of working control of the franchisee, right-of-way license holder, or master permit holder; or
2. The rights and/or obligations held by the franchisee, right-of-way license holder, or master permit holder under the franchise, right-of-way license, or master permit are transferred, sold, assigned or leased, in whole or in part, to another party; provided that it will be presumed that any transfer or cumulative transfer of voting interest of twenty percent (20%) or more is transfer of working control within the meaning of this definition.

QQ. "Usable Space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in any federal or state order or regulation.

RR. "Use Permit" means the legal authorization from the City, in addition to a master permit or franchise, to enter and use a specified portion of the public rights-of-way for the purpose of installing, repairing, or removing identified facilities.

SS. "Utility Easement" means any easement owned by the City and acquired, established, dedicated or devoted for public utility purposes not inconsistent with telecommunications facilities, excluding easements not specifically allowing license, franchise or lease holders.

TT. "Utility Facilities" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within the rights-of-way of the City and used or to be used for the purpose of providing utility and telecommunications services.

UU. "Working Control" means the ability to affect management decisions. It will be presumed that voting interest of twenty percent (20%) or more is considered working control within the meaning of this Chapter. (Ord. 763, June 2003.)

**11.14.030 Occupation License Required.** Except as otherwise provided herein, any service provider engaged in the business of telecommunications service of any kind originating or terminating in the City shall obtain an occupation license from the City pursuant to Chapter 3.12, "Revenue and Finance", as applicable. (Ord. 763, June 2003.)

**11.14.040 Right-of-Way License Required for Private Telecommunications System.** Except as otherwise provided herein, any person who desires to construct, install, control or otherwise locate telecommunications facilities in, under, over or across any rights-of-way of the City for the sole purpose of providing a private telecommunications system shall first obtain a right-of-way

license granting the use of such rights-of-way from the City pursuant to BCMC 11.14.100. (Ord. 763, June 2003.)

**11.14.050 Master Permit Required for Telecommunications Service.** Except as otherwise provided herein, any person who desires to construct, install, control or otherwise locate telecommunications facilities in, under, over or across any rights-of-way of the City to provide telecommunications service, shall first obtain a master permit granting the use of such rights-of-way from the City pursuant to BCMC 11.14.100. (Ord. 763, June 2003.)

**11.14.060 Persons Asserting an Existing State-Wide Grant.** Any person asserting an existing state-wide grant based on a predecessor telephone or telegraph company's existence at the time of the adoption of the Washington State Constitution may continue to operate under the existing state-wide grant provided the person provides the City with documentation evidencing the existing state-wide grant. The City may request, but not require, a person asserting an existing state-wide grant to obtain a master permit under this Chapter. A person asserting an existing state-wide grant may elect at any time to apply for a superseding master permit under this Chapter. All service providers asserting existing state-wide grants or other authority to use and occupy the right-of-way shall be subject to the same requirements as holders of master permits to the extent allowed by state and federal law. (Ord. 763, June 2003.)

**11.14.070 Facilities Lease Required.** Any person, including but not limited to service providers and non-service providers, who occupies or desires to locate telecommunications equipment on or in City property, including lands or City-owned physical facilities other than the public rights-of-way, shall not locate such facilities or equipment on City property unless granted a facilities lease from the City pursuant to BCMC 11.14.030. The City reserves unto itself the sole discretion to lease City property for telecommunications facilities, and no vested or other right shall be created by this Section or any provision of this Chapter applicable to such facilities leases. For purposes of this Section, "City property" shall include site-specific locations in the rights-of-way. (Ord. 763, June 2003.)

**11.14.080 Use Permits Required.** Except as otherwise provided herein, the holder of a right-of-way license, master permit, franchise or lease granted pursuant to this Chapter or otherwise authorized to use and occupy the public rights-of-way, shall, in addition to said right-of-way license, master permit, franchise, lease, or grant be required to obtain a use permit from the City pursuant to BCMC 12.04 before performing any work in City rights-of-way. Pole attachments shall meet requirements of all applicable standards. No work, construction, development, excavation, or installation of any equipment or facilities shall take place within the rights-of-way or upon City property until such time as the use permit is issued. (Ord. 763, June 2003.)

**11.14.090 Transitional Provisions.**

- A. **Service Providers Operating without a Franchise or Master Permit or Other Grant or Agreement.** Any person operating any facility which requires a master permit under this Chapter, other than a person holding a franchise, license or

lease under this Chapter, or other grant or authority from the City, shall have three (3) months from the effective date of this Chapter to file the necessary applications for a master permit under this Chapter.

Any person timely filing such an application shall not be subject to City remedies under BCMC 11.14.130 hereof for failure to have such a master permit as long as said application remains pending; provided, however, nothing herein shall relieve any person of any liability for failure to obtain any franchise or right-of-way license required under other City ordinances, and nothing herein shall prevent the City from requiring removal of any facilities installed in violation of any such ordinances.

- B. Persons Holding Leases. Any lessee, under a lease from the City for facilities located on City property that is valid and in force on the effective date of this Chapter, may continue to occupy such property to the conclusion of the term of the lease, in accordance with the terms of such lease; provided, however, that such lessee may elect at any time to apply for a superseding lease under this Chapter. (Ord. 763, June 2003.)

#### **11.14.100 Administrative Provisions.**

- A. Right-of-Way License. A right-of-way license shall be required of any person who occupies or desires to construct, install, control or otherwise locate telecommunications facilities in, under, over or across any rights-of-way of the City, which facilities are not used to provide telecommunications service for hire, sale or resale to the general public or are used for the sole purpose of providing a private telecommunications system.

A right-of-way license is not required for persons already holding master permits for the same telecommunications facilities.

1. Right-of-way License Application. Any person who desires a right-of-way license pursuant to this Chapter shall file an application with the City, which shall include the following information:
  - a. The identity of the applicant and the persons who exercise working control over the applicant. Publicly traded entities may provide copies of the pertinent portions of their most recent sworn filing(s) with the Federal Securities and Exchange Commission that evidence any working control ownership interests, to comply with this requirement.
  - b. A description of the telecommunications services that are or will be offered or provided by the applicant over its telecommunications facilities. Only general, non-proprietary information need be provided.
  - c. Whether the applicant intends to provide cable service, open video service or other video programming service, and sufficient information to determine whether such service is subject to the City's cable franchising requirements. Only general, non-proprietary information need be provided.
  - d. A network map of existing and proposed facilities to be located within

the City, all in sufficient detail to identify:

- i. The location and route requested for the applicant's proposed facilities, including any environmentally sensitive areas that may be subject to City's State Environmental Protection Act (SEPA) ordinance.
  - ii. The specific trees, structures, improvements, facilities and obstructions, if any, that the applicant proposes to temporarily or permanently remove or relocate; and
  - iii. To the extent known at the time of application, the location(s) where there are or will be interconnections of telecommunications facilities by the applicant.
2. Map Format/Media. The Director shall have the discretion to prescribe the format and/or media of said maps, consistent with City ordinances and policies. To the extent compatible with any of the City's electronic mapping software, the applicant shall provide said maps in a computer readable electronic format, together with the following information:
- a. A description of the transmission medium that will be used by the applicant to offer or provide such private telecommunications services.
  - b. A description of the City's existing available facilities, such as utility poles, conduits, vaults, etc., that the applicant proposes to use to provide such private telecommunications services in accordance with applicable City regulations and requirements.
  - c. If the applicant is proposing to install overhead facilities, evidence that surplus space is available for locating its private telecommunications facilities on existing utility poles along the proposed route.
  - d. If the applicant is proposing an underground installation in existing ducts or conduits within the rights-of-way, evidence that surplus space is available for locating its private telecommunications facilities in such existing ducts or conduits along the proposed route.
  - e. A preliminary construction schedule and completion date.
  - f. Information establishing that the applicant has obtained all other governmental approvals, permits and facilities leases, to construct the facilities.
  - g. All deposits or charges and application fees required pursuant to this Chapter.
3. Determination by the City. Within ninety (90) days after receiving a complete application under BCMC 11.14.100A, the Director shall issue a written determination granting or denying the right-of-way license in whole or in part. If the right-of-way license is denied, the written determination shall include the reasons for denial. The decision to grant or deny an application for a right-of-way license shall be based upon the following

standards:

- a. Whether the applicant's private telecommunications system which will occupy the right-of-way has received all requisite licenses, certificates and authorizations from the Federal Communications Commission, the Washington Utilities and Transportation Commission, or any other federal or state agency having jurisdiction.
  - b. Whether the application demonstrates that adequate technical, financial and legal resources are available to perform the requirements of this ordinance.
  - c. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the right-of-way license is granted.
  - d. The public interest in minimizing the cost and disruption of construction within the rights-of-way.
  - e. The effect, if any, on public health, safety and welfare if the right-of-way license is granted.
  - f. The availability of alternate routes and/or locations for the proposed facilities.
  - g. Applicable federal and state telecommunications laws, regulations and policies.
4. Agreement. No right-of-way license shall be deemed to have been granted hereunder until the applicant and the City have executed a written agreement setting forth the particular terms and provisions under which the grantee has been granted the right to occupy and use rights-of-way of the City.
  5. Term of Right-of-Way License. Unless otherwise specified in a right-of-way license, a right-of-way license granted hereunder shall be valid for a term of five (5) years, subject to renewal as provided in this Chapter.
  6. Nonexclusive Grant. No right-of-way license granted under this Chapter shall confer any exclusive right, privilege, license or franchise to occupy or use the rights-of-way of the City for delivery of telecommunications services or any other purposes.
  7. Rights Granted. No right-of-way license granted under this Chapter shall convey any right, title or interest in the rights-of-way, but shall be deemed a right-of-way license only to use and occupy the rights-of-way for the limited purposes and term stated in the right-of-way license. Further, no right-of-way license shall be construed as any warranty of title.
  8. Specified Route. A right-of-way license granted under this Chapter shall be limited to a grant of specific rights-of-way and defined portions thereof.
  9. Amendment of Right-of-Way License. A new application shall be required of any person who desires to extend or locate its private telecommunications

facilities in rights-of-way of the City, which are not included in a right-of-way license previously granted under this Chapter. If ordered by the City to locate or relocate its private telecommunications facilities in rights-of-way not included in a previously granted right-of-way license, the City shall grant an amendment to the right-of-way license without further application.

10. **Renewal of Right-of-Way License.** A grantee that desires to renew its right-of-way license under this Chapter for an additional term shall, not more than one hundred eighty (180) days nor less than ninety (90) days before expiration of the current right-of-way license, file an application with the City for renewal which shall include the following:
    - a. The information required pursuant to BCMC 11.14.100A.
    - b. Any information required pursuant to the right-of-way license agreement between the City and the grantee.
    - c. All deposits or charges and application fees required pursuant to this Chapter.
  11. **Renewal Determination.** Within ninety (90) days after receiving a complete application for renewal, the Director shall issue a written determination granting or denying the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reasons for denial. The decision to grant or deny an application for the renewal of a right-of-way license shall, in addition to the standards set forth in BCMC 11.14.100.A.3, be based upon the following standards:
    - a. The continuing capacity of the rights-of-way to accommodate the applicant's existing facilities.
    - b. The applicant's compliance with the requirements of this Chapter and the right-of-way license.
    - c. Applicable federal, state and local telecommunications laws, rules and policies.
  12. **Obligation to Cure as a Condition of Renewal.** No right-of-way license shall be renewed until any ongoing violations or defaults in the grantee's performance under the right-of-way license, or of the requirements of this Chapter, have been cured, or a plan detailing the corrective action to be taken by the grantee has been approved by the City.
- B. **Master Permit.** A master permit shall be required of any service provider who desires to construct, install, control or otherwise locate telecommunications facilities in, under, over or across, any right-of-way of the City, and to provide telecommunications service for hire, sale or resale to the general public; provided, however, that a right-of-way license in accordance with BCMC 11.14.100A may, with the approval of the Director, be substituted for a master permit for de minimis (i.e., significantly less than city-wide or route specific) uses of rights-of-way made in conjunction with a telecommunications system located entirely upon publicly or privately owned property.

1. Master Permit Application. Any person that desires a master permit pursuant to this Chapter shall file an application with the City which shall include:
  - a. The identity of the applicant and the persons who exercise working control over the applicant. Publicly traded entities may provide copies of the pertinent portions of their most recent sworn filing(s) with the Federal Securities and Exchange Commission that evidence any working control ownership interests, to comply with this requirement.
  - b. A description of the telecommunications services that are or will be offered or provided by the applicant over its telecommunications facilities. Only general, non-proprietary information need be provided.
  - c. Whether the applicant intends to provide cable service, open video service or other video programming service, and sufficient information to determine whether such service is subject to the City's cable franchising requirements. Only general, non-proprietary information need be provided.
  - d. At the time of the application, a network map of existing and proposed facilities to be located within the City, all in sufficient detail to identify:
    - i. The location and route requested for applicant's proposed facilities, including any environmentally sensitive areas that may be subject to the City's SEPA ordinance.
    - ii. The specific trees, structures, improvements, facilities and obstructions, if any, that applicant proposes to temporarily or permanently remove or relocate.
    - iii. To the extent known at the time of application, the names of other telecommunications carriers, operators or providers to which there will be an interconnection of telecommunications facilities by the applicant.
  - e. An accurate map showing the location of any existing telecommunications facilities in the City that applicant intends to use or lease to the extent not previously provided.
  - f. The area or areas of the City that the applicant desires to serve and the initial schedule, if any, for build-out to the master area.
  - g. All deposits or charges and application fees required pursuant to this Chapter.
2. Determination by the City. Within one hundred twenty (120) days after receiving a complete application under BCMC 11.14.100B hereof, the City shall issue a written determination granting or denying the application in whole or in part unless the applicant agrees to a longer period or the master permit sought requires action of the Council and such action cannot reasonably be obtained within 120 days. If the application is denied, the City's decision shall be supported by substantial evidence contained in the

written determination, which shall include the reasons for denial. Prior to granting or denying a master permit under this Chapter, the Council shall conduct a public hearing and make a decision based upon the standards set forth below. The Council shall not approve any master permit hereunder until the next regularly scheduled Council meeting following the public hearing. Said standards are:

- a. Whether the applicant's telecommunications system which will occupy the right-of-way has received all requisite licenses, certificates and authorizations from the Federal Communications Commission, the Washington Utilities and Transportation Commission, or any other federal or state agency having jurisdiction.
  - b. To the extent allowed under applicable law or if the applicant is a provider of cable television service, whether the applicant's application demonstrates adequate technical, financial and legal resources are available.
  - c. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the master permit license is granted.
  - d. The public interest in minimizing the cost and disruption of construction within the rights-of-way.
  - e. The effect, if any, on public health, safety and welfare if the master permit license is granted.
  - f. The availability of alternate routes and/or locations for the proposed facilities.
  - g. Applicable federal and state telecommunications laws, regulations and policies.
3. Agreement and Ordinance. No master permit shall be deemed to have been granted hereunder until the applicant and the City have executed a written agreement, as adopted by ordinance, which ordinance shall set forth the particular terms and provisions under which the service provider has been granted the right to occupy and use rights-of-way of the City.
  4. Term of Master Permit Grant. Unless otherwise specified in a master permit agreement, a master permit granted hereunder shall be valid for a term of ten (10) years subject to renewal as provided in this Chapter.
  5. Nonexclusive Grant. No master permit granted under this Chapter shall confer any exclusive right or privilege to occupy or use the rights-of-way of the City for delivery of telecommunications services or any other purposes.
  6. Rights Granted. No master permit granted under this Chapter shall convey any right, title or interest in the rights-of-way, but shall be deemed a master permit only to use and occupy the rights-of-way for the limited purposes and term stated in the master permit. Further, no master permit shall be construed as any warranty of title.

7. Amendment of Master Permit Grant. A new master permit application and grant shall be required of any person who desires to extend its master permit territory or to locate its telecommunications facilities in rights-of-way of the City which are not included in a master permit previously granted under this Chapter. If ordered by the City to locate or relocate its telecommunications facilities in rights-of-way not included in a previously granted master permit, the grantee shall be granted a master permit amendment without further application.
8. Renewal of Master Permit. A service provider that desires to renew its master permit under this Chapter for an additional term shall, not more than one hundred eighty (180) days nor less than one hundred twenty (120) days before expiration of the current master permit, file an application with the City for renewal of its master permit, which application shall include the following:
  - a. The information required pursuant to BCMC 11.14.100A.
  - b. Any information required pursuant to the master permit agreement between the City and the grantee.
  - c. All deposits or charges and application fees required pursuant to this Chapter.
9. Renewal Determination. Within one hundred twenty (120) days after receiving a complete application for renewal, the City shall issue a written determination granting or denying the renewal application in whole or in part. If the renewal application is denied, the City's decision shall be supported by substantial evidence contained in the determination, which shall include the reasons for denial. Prior to granting or denying renewal of a master permit under this Chapter, the Council shall conduct a public hearing and make a decision based upon the standards set forth in BCMC 11.14.100B2, and the following additional standards:
  - a. The continuing capacity of the rights-of-way to accommodate the applicant's existing facilities.
  - b. The applicant's compliance with the requirements of this Chapter and the master permit agreement.
  - c. Applicable federal, state and local telecommunications laws, rules and policies.
10. Obligation to Cure as a Condition of Renewal. No master permit shall be renewed until any ongoing violations or defaults in the service provider's performance of the master permit agreement, or of the requirements of this Chapter, have been cured, or a plan detailing the corrective action to be taken by the service provider has been approved by the City.
11. Expedited Processing of Use Permits. A master permit may contain a procedure for expedited processing of a use permit based on reasonable

necessity arising from hardship or emergency.

- C. Facilities Lease. The Council may, in its sole discretion, approve facilities leases for the location of telecommunications facilities and other facilities upon City Property, as that term is defined in this Chapter or upon right-of-way as permitted under RCW 35.21.860(1)(e). Neither this Section nor any other provision of this Chapter shall be construed to create an entitlement or vested right in any person or entity.
1. Lease Application. Any person that desires to solicit the City's approval of a facilities lease for telecommunications facilities pursuant to this Chapter shall file a lease application with the City, which shall include the following:
    - a. The identity of the applicant.
    - b. A description of the telecommunications facilities or other equipment proposed to be located upon City property.
    - c. A description of the City property upon which the applicant proposes to locate telecommunications facilities or other equipment.
    - d. Demonstration of compliance with Title 20 BCMC, Zoning, if applicable.
    - e. Preliminary plans and specifications in sufficient detail to identify:
      - i. The location(s) of existing telecommunications facilities or other equipment upon the City property, whether publicly or privately owned.
      - ii. The location and source of electric and other utilities required for the installation and operation of the proposed facilities.
    - f. Accurate scale conceptual drawings and diagrams of sufficient specificity to analyze the aesthetic impacts of the proposed telecommunications facilities or other equipment.
    - g. An accurate map showing the location of any existing telecommunications facilities in the City that applicant intends to use or lease.
    - h. All deposits or charges and application fees required pursuant to this Chapter.
  2. Determination by the City. Within one hundred twenty (120) days after receiving a complete application under BCMC 11.14.100C, the City shall issue a written determination granting or denying the application in whole or in part. If the lease application is denied, the written determination shall include the reasons for denial. The decision to grant or deny an application for a facilities lease shall be based upon the following standards:
    - a. Whether the applicant's facilities, which will occupy the City property, have received all requisite licenses, certificates and authorizations from the Federal Communications Commission, the Washington Utilities and Transportation Commission, or any other federal or state agency having

jurisdiction.

- b. Whether the applicant's application demonstrates that adequate technical, financial and legal resources are available.
  - c. The damage or disruption, if any, of public or private facilities, improvements, service, travel or landscaping if the lease is granted.
  - d. The public interest in minimizing the cost and disruption of construction upon City property and within the rights-of-way.
  - e. The effect, if any, on public health, safety and welfare if the lease requested is approved.
  - f. The availability of alternate locations for the proposed facilities.
  - g. The potential for radio frequency and other interference with existing public and private telecommunications or other facilities located upon the City property.
  - h. The potential for radio frequency and other interference or impacts upon residential, commercial and other uses located within the vicinity of the City property.
  - i. Applicable federal and state telecommunications laws, regulations and policies.
3. Agreement. No facilities lease shall be deemed to have been granted hereunder until the applicant and the City have executed a written agreement setting forth the particular terms and provisions under which the lessee has been granted the right to occupy and use the City property.
  4. Term of Facilities Lease. Unless otherwise specified in a lease agreement, a facilities lease granted hereunder shall be valid for a term of one (1) year, subject to annual renewal as provided in this Chapter.
  5. Nonexclusive Lease. No facilities lease granted under this Chapter shall confer any exclusive right, privilege, license, master permit or franchise to occupy or use City property for delivery of telecommunications services or any other purposes.
  6. Rights Granted. No facilities lease granted under this Chapter shall convey any right, title or interest in the City property, but shall be deemed a facilities lease only to use and occupy the City property for the limited purposes and term stated in the lease agreement. Further, no facilities lease shall be construed as any warranty of title.
  7. Interference with Other Users. No facilities lease shall be granted under this Chapter unless it contains a provision, which is substantially similar to the following:

"The City may have previously entered into leases with other tenants for their equipment and antennae facilities. Lessee acknowledges that the City may also be leasing the City property for the purposes of transmitting and

receiving telecommunications signals from the City property. The City, however, is not in any way responsible or liable for any interference with lessee's use of the City property which may be caused by the use and operation of any other tenant's equipment, even if caused by new technology. In the event that any other tenant's activities interfere with the lessee's use of the City property, and the lessee cannot resolve this interference with the other tenants, the lessee may, upon thirty (30) days notice to the City, terminate this lease and restore the City property to its original condition, reasonable wear and tear excepted. The lessee shall cooperate with all other tenants to identify the causes of and work towards the resolution of any electronic interference problem. In addition, the lessee agrees to eliminate any radio or television interference caused to City-owned facilities or surrounding residences at lessee's own expense and without installation of extra filters on City-owned equipment. Lessee further agrees to accept such interference as may be received from City-operated telecommunications or other facilities located upon the City property subject to this lease."

8. Ownership and Removal of Improvements. No facilities lease shall be granted under this Chapter unless it contains a provision, which states that all buildings, landscaping and all other improvements, except telecommunications equipment, shall become the property of the City upon expiration or termination of the lease. In the event that telecommunications facilities or other equipment are left upon City property after expiration or termination of the lease, they shall become the property of the City if not removed by the lessee upon thirty (30) days written notice from the City.

In the event that the City requires removal of such improvements, such removal shall be accomplished at the sole expense of the lessee and completed within ninety (90) days after receiving notice from the City requiring removal of the improvements, or removal will be accomplished by the City at lessee's expense.

9. Cancellation of Lease by Lessee.
  - a. All facilities leases are contingent upon the prospective lessee obtaining all necessary permits, approvals and licenses for the proposed facilities. In the event that the prospective lessee is unable to obtain all such permits, approvals and licenses, it may cancel its lease, and obtain a pro rata refund of any rents paid, without further obligation by giving thirty (30) days written notice to the City.
  - b. In the event that the holder of a facilities lease determines that the City property is unsuitable for its intended purpose, the lessee shall have the right to cancel the lease upon one hundred twenty (120) days written notice to the City. However, no prepaid rent shall be refundable.
10. Amendment of Facilities Lease. Except as provided within an existing lease agreement, a new lease application and lease agreement shall be required of any telecommunications carrier or other entity that desires to expand,

modify or relocate its telecommunications facilities or other equipment located upon City property. If ordered by the City to locate or relocate its telecommunications facilities or other equipment on the City property, the City shall grant a lease amendment without further application.

11. **Renewal Application.** A lessee that desires to renew its facilities lease under this Chapter shall, not more than one hundred twenty (120) days nor less than sixty (60) days before expiration of the current facilities lease, file an application with the City for renewal of its facilities lease which shall include the following:
    - a. The information required pursuant to BCMC 11.14.100.C;
    - b. Any information required pursuant to the facilities lease agreement between the City and the lessee;
    - c. All deposits or charges and application fees required pursuant to this Chapter.
  12. **Renewal Determination.** Within sixty (60) days after receiving a complete application for renewal, the City shall issue a written determination granting or denying the renewal application in whole or in part. If the renewal application is denied, the written determination shall include the reasons for denial. The decision to grant or deny an application for the renewal of a facilities lease shall, in addition to the standards set forth in BCMC 11.14.100.C.2, be based upon the following additional standards:
    - a. The continuing capacity of the City property to accommodate the applicant's existing facilities.
    - b. The applicant's compliance with the requirements of this Chapter and the lease agreement.
    - c. Applicable federal, state and local telecommunications laws, rules and policies.
  13. **Obligation to Cure as a Condition of Renewal.** No facilities lease shall be renewed until any ongoing violations or defaults in the lessee's performance of the lease agreement, or of the requirements of this Chapter, have been cured, or a plan detailing the corrective action to be taken by the lessee has been approved by the City.
  14. There shall be no appeal of the City's determination under BCMC 11.14.100.C.
- D. Appeal of City Determination. Any person aggrieved by the granting or denying of a right-of-way license, master permit, use permit or the renewals thereof pursuant to this Chapter shall have the right to appeal to the Council as follows:
1. All appeals filed pursuant to this Subsection must be filed in writing with the Director within ten (10) working days of the date of the decision appealed from.
  2. All appeals filed pursuant to this Subsection shall specify the alleged error

of law or fact, or new evidence which could not have been reasonably available at the time of the Director's decision, which shall constitute the basis of the appeal.

3. Upon receipt of a timely written notice of appeal, the Director shall advise the Council of the pendency of the appeal and request that a date for considering the appeal be established.
4. The Council shall have the option of directing that the appeal be heard before the Board of Hearing Examiners who shall forward a recommendation to the Council, which shall take final action on the appeal. Referral to the Board of Hearing Examiners may be made by motion approved by a majority of the Council members present at the time of voting;
5. All relevant evidence shall be received during the hearing on the appeal.
6. Unless substantial relevant information is presented which was not considered by the Director, such decision shall be accorded substantial weight, but may be reversed or modified by the Council if, after considering all of the evidence in light of the applicable goals, policies and provisions of this Chapter, the Council determines that a mistake has been made. Where substantial new relevant information which was not considered in the making of the decision appealed from has been presented, the Council shall make its decision only upon the basis of the facts presented at the hearing of the appeal, or may elect to remand the matter for reconsideration by the Director in light of the additional information.
7. For all appeals decided pursuant to this Subsection, the City shall provide a record that shall consist of written findings and conclusions.
8. A service provider adversely affected by the final action of the City denying a master permit, or by an unreasonable failure to act on a master permit according to the procedures established by the City, may commence an action within thirty (30) days of the decision or the expiration of any reconsideration period, whichever is later, with a court having jurisdiction over such action. Any action against the City for denial of a master permit or unreasonable failure to act on a master permit shall be limited to injunctive relief.
9. No action to obtain judicial review shall be commenced unless all rights of appeal provided by this Subsection are fully exhausted. The cost of transcription of all records ordered certified by the court for such review shall be borne by the party seeking such review. A copy of each transcript prepared by such party shall be submitted to the City for confirmation of its accuracy. (Ord. 763, June 2003.)

#### **11.14.110 Fees and Compensation.**

- A. Payment of Fees and Compensation to the City. It is a significant purpose of this Chapter to ensure that the City, as far as possible, is compensated for the rights granted and receives fair and reasonable value for use of public rights-of-

way and City property over which it exercises control, or which is held in public trust and is compensated for expenses arising from the use of those public rights-of-way and City property.

The fact that a fee is paid on one type of service provided over a telecommunications system, does not excuse a carrier, operator or provider from its duty to pay fees on other services provided over that facility as required by this Chapter.

- B. Right-of-Way License, Master Permit or Facilities Lease - Application and Review Fee. The application shall be accompanied by the necessary application fee deposit as set forth pursuant to the City Fee Schedule Resolution.
- C. Use Permit Fee. Prior to actual construction, every applicant for a right-of-way license or master permit shall obtain a right-of-way use permit and pay the use permit fees pursuant to the City Fee Schedule Resolution.
- D. Compensation for Use of Rights-of-Way. RCW 35.21.860 currently prohibits a municipal franchise fee for permission to use the right of way from any person engaged in the "telephone business," as defined in RCW 82.04.065. The City reserves the right to impose and receive a master permit fee of a percentage, up to the maximum allowed by law, of the grantee's gross receipts from its business activities in the City, if this statutory prohibition is repealed, or for other telecommunications activities not covered by the statutory prohibition. The master permit fee shall be compensation for use of the rights-of-way and shall not be applied as credit towards occupational fees or taxes required under the Code.
- E. Compensation for City Property Occupancy and Use and Facility Leases. Each facilities lease granted under this Chapter or a lease for use and occupancy of a specific site in the right-of-way is subject to the City's right, which is expressly reserved, to fix a fair and reasonable compensation to be paid for the rights granted to the lessee; provided, nothing in this Chapter shall prohibit the City and a lessee from agreeing to the compensation to be paid. Notwithstanding any other provision in this Chapter, any charges for use and occupancy of a specific site in the right-of-way pursuant to an agreement between the City and a service provider of personal wireless services shall be in accordance with RCW 35.21.860(1)(e).

The compensation for a facilities lease shall be based on the area of the property leased and a rate determined by a professional appraiser approved by both the City and the applicant. The applicant shall pay the cost of the appraisal. Pole attachment and conduit, vault and other City infrastructure usage fees shall be the amounts required pursuant to the City Fee Schedule Resolution.

Compensation for facilities leases shall be payable in advance of the effective date of the lease and on or before January 31 of each calendar year. Any payments received after the due date shall include interest on the amount owed

of one percent (1%) per month, or prorated fraction thereof, compounded monthly.

F. Grantee's Costs. Nothing in this Chapter relieves any grantee of its obligation to bear costs associated with its operations, including but not limited to costs of moving facilities at the direction of the City, to the extent consistent with BCMC 11.14.120P.

G. General Rules for Payment of Fees and Compensation.

1. These general rules shall only apply in the event the franchise fee prohibition in RCW 35.21.860 is repealed.
2. Unless otherwise specified in a master permit or a right-of-way license, master permit and right-of-way license fees or compensation shall be paid to the City monthly, and not later than twenty-five (25) days after the end of the month for which the fee or compensation is owed. Any payments received after the due date shall include interest on the amount owed of one percent (1%) per month, or prorated fraction thereof, compounded monthly.
3. Unless a master permit or right-of-way license provides otherwise, each master permit or right-of-way license fee payment shall be accompanied by a statement showing the manner in which the fee was calculated. The statement shall be in a form approved by the City.
4. No acceptance by the City of any master permit or right-of-way license fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such master permit or right-of-way license fee payment be construed as a release of any claim the City may have for additional sums payable.
5. Within ninety (90) days following the end of the calendar year, each person which paid a master permit or right-of-way license fee based upon gross revenues shall submit a statement, certified as true by the chief financial officer of such person, setting forth gross revenues of the telecommunications system, by category, and describing what revenues were included and excluded in the fee calculation, and any adjustments made to gross revenues. If additional sums are payable, in addition to paying any applicable penalties or damages, the person that owes the additional fee shall pay interest on the amount owed, at the rate of one percent (1%) per month, or prorated fraction thereof, compounded monthly.
6. The City may, from time to time and upon reasonable advance written notice, inspect and audit any and all books and records reasonably necessary to the determination of whether fees have been accurately computed and paid. The grantee must provide the books and records or copies thereof to the City or advance the costs of travel and per diem for an employee or employees of the City to inspect and copy such books and records at any location more than fifty (50) miles outside the City at which such books and records are kept in the course of business. To the extent

allowed by law, the City shall treat all records provided by the grantee for inspection and audit as confidential and proprietary information not to be disclosed to others or used for any other purpose.

7. Notwithstanding the foregoing, in the event that a person that is obligated to pay a fee ceases to provide service for any reason (including as a result of a transfer), such person shall make a final payment of any amounts owed to the City within ten (10) calendar days of the date its operations in the City cease and shall provide a statement of gross revenues for the calendar year through the date operations ceased, which statement shall contain the information and certification required by BCMC 11.14.110.G.5.

- H. Regulatory Fees and Compensation Not a Tax. The regulatory fees and costs provided for in this Chapter and any compensation charged and paid for the rights-of-way and City property provided for in BCMC 11.14.110.D are separate from, and additional to, any and all federal, state, local and city taxes as may be levied, imposed or due from carriers, operators, providers, their customers or subscribers, or on account of the lease, sale, delivery or transmission of telecommunications services.

Compensation for use of the rights-of-way, if shown on applicant's customer bills, shall be identified as such and shall not be shown as, or combined with, other taxes. (Ord. 763, June 2003.)

#### **11.14.120 Conditions of Licenses, Master Permits and Leases.**

- A. Purpose. A significant purpose of this Chapter is to set forth certain terms and conditions which are common to all right-of-way licenses, master permits, and facilities leases. Except as otherwise provided in this Chapter or in such a right-of-way license, master permit or facilities lease, the provisions of this Chapter apply to all such right-of-way licenses, master permits and facilities leases approved or granted by the City.
- B. Rules and Regulations of the City.
  1. All grantees are required to provide copies of any applicable certificates that authorize the grantee to provide telecommunications services as may be required by federal or state law.
  2. All grantees are required to cooperate with the City and with each other.
    - a. Each grantee shall meet with the City, other grantees and users of the rights-of-way annually or as determined by the City to coordinate construction in the rights-of-way.
    - b. All construction locations, activities and schedules shall be coordinated, as ordered by the Director, to minimize public inconvenience, disruption or damages.
  3. All grantees, before commencing any construction in the rights-of-way, shall comply with all regulations of Chapter 19.122 RCW (One Call Locator Service).
  4. The City reserves the right to require all grantees to provide written

confirmation:

- a. Sufficient for customary land survey and land title insurance purposes concerning the location of their facilities in rights-of-way; and
  - b. Disclaiming any interest in rights-of-way where the grantees have no franchise to construct or operate their facilities.
5. In addition to the inherent powers of the City to regulate and control any right-of-way license, master permit or lease it issues and those powers expressly reserved by the City, or agreed to and provided for in any right-of-way license, master permit or lease, the right and power is hereby reserved by the City to promulgate such additional regulations as it may find necessary in the exercise of its lawful powers giving due regard to the rights of grantees.
6. Except as provided in this Chapter, the foregoing does not allow for amendment by the City of material terms of any license, master permit or lease it issues without the consent of the grantee.
- C. Acceptance. No right-of-way license, master permit or lease granted pursuant to the provisions of this Chapter shall become effective unless and until the grantee files with the City Clerk its written acceptance of the license, master permit or lease in a form satisfactory to the City Attorney, together with the bonds and insurance policies required by this Chapter.
- D. Safety Requirements. Grantees, in accordance with applicable national, state and local safety requirements, shall at all times employ ordinary care and shall install and maintain and use commonly accepted methods and devices for preventing failures and accidents which are likely to cause damage, injury or nuisance to the public. All structures and all lines, equipment and connections in, over, under and upon the streets, sidewalks, alleys and rights-of-way or places of a license, master permit or lease area, wherever situated or located, shall at all times be kept and maintained in a safe, suitable condition, and in good order and repair. If a violation of the National Electrical Safety Code or other applicable regulation is found to exist, the City may, after discussions with the grantee, establish a reasonable time for a grantee to make necessary repairs. If the repairs are not made within the established time frame, the City may make the repairs itself or have them made and collect all reasonable costs thereof from a grantee.
- E. Insurance. Unless otherwise provided in a license, master permit or lease agreement, each grantee, as a condition of the license, master permit or lease, shall secure and maintain the following liability insurance policies insuring both the grantee and the City and its elected and appointed officers, officials, agents and employees as co-insureds. Grantees qualified to do business with the State of Washington, as self-insureds shall also meet the requirements listed below:
1. Comprehensive general liability insurance with limits not less than:
    - a. Five million dollars (\$5,000,000.00) for bodily injury or death to each person;
    - b. Five million dollars (\$5,000,000.00) for property damage resulting from any

one (a) accident; and

c. Five million dollars (\$5,000,000.00) for all other types of liability.

2. Automobile liability for owned, non-owned and hired vehicles with a limit of three million dollars (\$3,000,000.00) for each person and three million dollars (\$3,000,000.00) for each accident.
3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars (\$1,000,000.00).
4. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than three million dollars (\$3,000,000.00).
5. The liability insurance policies required by this Subsection shall be maintained by the grantee throughout the term of the license, master permit, or lease, and such other period of time during which the grantee is operating without a license, master permit, or lease hereunder, or is engaged in the removal of its telecommunications facilities. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until ninety (90) days after receipt by the City, by registered mail, of a written notice addressed to the Director of such intent to cancel or not to renew."

6. Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation or intent not to renew, the grantee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Subsection.

F. General Indemnification. No license, master permit or lease shall be deemed to be granted under this Chapter unless it includes an indemnity clause substantially conforming to the following:

"The grantee hereby releases, covenants not to bring suit, and agrees to indemnify, defend and hold harmless the City, its officers, employees, agents and representatives from any and all claims, costs, judgments, awards or liability to any person, including claims by the grantee's own employees to which the grantee might otherwise be immune under Title 51 RCW, arising from injury or death of any person or damage to property, of which the negligent acts or omissions of the grantee, its agents, servants, officers or employees in performing under this license, master permit, or lease are the proximate cause.

The grantee further releases, covenants not to bring suit, and agrees to indemnify, defend, and hold harmless the City, its officers and employees from any and all claims, costs, judgments, awards or liability to any person including claims by the grantee's own employees, including those claims to which the grantee might otherwise have immunity under Title 51 RCW, arising against the City solely by virtue of the City's ownership or control of the rights-of-way or other public properties, by virtue of the grantee's exercise of the rights granted herein, or by

virtue of the City's permitting the grantee's use of the City's rights-of-way or other public property, based upon the City's inspection or lack of inspection of work performed by the grantee, its agents and servants, officers or employees in connection with work authorized on the City's property or property over which the City has control, pursuant to this license, master permit, or lease or pursuant to any other permit or approval issued in connection with this license, master permit, or lease.

This covenant of indemnification shall include, but not be limited by this reference to, claims against the City arising as a result of the negligent acts or omissions of the grantee, its agents, servants, officers or employees in barricading, instituting trench safety systems, or providing other adequate warnings of any excavation, construction or work in any public right-of-way or other public place in performance of work or services permitted under this license, master permit, or lease".

Inspection or acceptance by the City of any work performed by the grantee at the time of completion of construction shall not be grounds for avoidance of any of these covenants of indemnification. Said indemnification obligations shall extend to claims which are not reduced to a suit and any claims which may be compromised prior to the culmination or the institution of any litigation.

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

The provisions of this Subsection shall survive the expiration or termination of this license, master permit, or lease agreement. Notwithstanding any other provisions of this Subsection, the grantee shall assume the risk of damage to its facilities located in the City's rights-of-way, rights-of-way and easements from activities conducted by the City, its officers, agents, employees and contractors. The grantee shall release and waive any and all claims against the City, its officers, agents, employees or contractors for damage to or destruction of the grantee's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees and contractors, in the rights-of-way, rights-of-way and easements subject to this license, master permit or lease, except to the extent any such damage or destruction is caused by or arises from the negligence or willful conduct on the part of the City, its officers, agents, employees or contractors.

The grantee shall further agree to indemnify, hold harmless, and defend the City against any claims for damages, including, but not limited to, business interruption damages and lost profits, brought by or under users of the grantee's facilities as the result of any interruption of service due to damage or destruction of the user's facilities caused by or arising out of activities conducted by the City, its officers, agents, employees or contractors, except to the extent any such damage or

destruction caused by or arising from the negligence or willful conduct on the part of the City, its officers, agents, employees or contractors, to the extent allowed by law.

- G. Cash Deposit/Performance Bond. Every grantee shall be required to provide a cash deposit or performance bond to ensure the faithful performance of its responsibilities.
- H. Tree Trimming. Upon ten (10) days' written notice provided to the Director, except in an emergency of imminent danger to persons or property, the grantee may trim trees or other vegetation owned by the City or encroaching upon the public right-of-way to prevent their branches or leaves from touching or otherwise interfering with its wires. All trimming or pruning within environmentally sensitive areas shall be subject to applicable requirements of Chapter 16.04 BCMC. All trimming or pruning shall be at the sole cost of the grantee. The grantee may contract for said trimming or pruning services with any person approved by the City.
- I. Location of Facilities. All facilities shall be constructed, installed, and located in accordance with the following terms and conditions, unless otherwise specified in a license, master permit, or facilities lease:
1. Wherever a grantee has existing underground duct or conduit with capacity available, grantee shall install its telecommunications facilities within such underground duct or conduit.
  2. A grantee with permission to install overhead facilities shall install its telecommunications facilities on pole attachments to existing utility poles only and then only if surplus space is available.
  3. Whenever any existing electric utilities or telecommunications facilities are located underground within a right-of-way of the City, a grantee with permission to occupy the same right-of-way must also locate its telecommunications facilities underground.
  4. Whenever any new or existing electric utilities and/or telecommunications facilities are located or relocated underground within a right-of-way of the City, a grantee that currently occupies the same right-of-way shall, at its own expense, relocate its facilities underground. Absent extraordinary circumstances or undue hardship as determined by the Director, such relocation shall be made concurrently to minimize the disruption of the rights-of-way. No extension granted by the Director under this Subsection shall exceed a period of twelve (12) months.

The Director may waive the requirements for location of facilities under this Subsection, if the grantee demonstrates to the Director's satisfaction that such location requirements are commercially unreasonable or if provisions of the grantee's tariff filed with the Washington Utilities and Transportation Commission otherwise control.

- J. Interference with City Property and the Rights-of-Way. No grantee may locate or maintain its telecommunications facilities to unreasonably interfere with the use of City property or the rights-of-way by the City, by the general public or by other persons authorized to use or be present in or upon the City property and rights-of-

way. Unreasonable interference includes disruption to vehicular or pedestrian traffic on City property or the rights-of-way, interference with other City utilities, and such other activities that will present a hazard to public health, safety or welfare when alternative methods of construction would result in less disruption. All such facilities shall be moved by the grantee, at the grantee's cost, temporarily or permanently, as determined by the Director unless provisions of the grantee's tariff filed with the Washington Utilities and Transportation Commission otherwise control. If any grantee's tariff or if a change in the state law alters the responsibility for payment of relocation costs, then all affected grantees shall comply therewith.

- K. Damage to Property. No grantee nor any person acting on a grantee's behalf shall take any action or permit any action to be done which may impair or damage any City property, rights-of-way of the City, other ways or other property, whether publicly or privately owned, located in, on or adjacent thereto.
- L. Damage to Facilities. Unless directly and proximately caused by the willful, intentional, grossly negligent or malicious acts of the City, the City shall not be liable for any damage to or loss of any telecommunications facility upon City property or within the rights-of-way of the City as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling or work of any kind on such City property or within the rights-of-way by or on behalf of the City.
- M. Maintenance of Facilities. Each grantee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements.
- N. Abandonment of Facilities.
  - 1. If the grantee abandons use of its cable, ducts or other facilities authorized under a license, master permit, or lease, then the facilities shall be removed from the rights-of-way or City property to the satisfaction of the City at the grantee's cost. In lieu of removal the City may permit the improvements to be abandoned in place in such a manner as the City may prescribe. Upon permanent abandonment, the grantee shall submit to the City a proposal and instruments for transferring ownership to the City.
  - 2. Upon revocation or termination of a license, master permit or lease, grantee shall to the satisfaction of the City and, without cost or expense to the City, within ten (10) calendar days remove its facilities unless permitted by the City to be left in place in such manner as the City may prescribe. If grantee determines to remove such facilities, or any portion thereof, then grantee, at its sole expense, shall restore the rights-of-way where disturbed by such removal under the supervision and to the satisfaction of the City.
  - 3. Any such facilities, which are not removed within one hundred twenty days (120) of either such date of termination or revocation or of the date the City issued a permit authorizing removal, whichever is later, shall become the property of the City at the City's option. The grantee shall notify the City to record facilities abandoned.
- O. Emergency Removal or Relocation of Facilities. The City retains the right and

privilege to cut or move any telecommunications facilities located within the rights-of-way or City property, as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency with imminent substantial harm to life or property. The City shall not be liable to any service provider, non-service provider, or any other party for any direct, indirect or any other such damages suffered by any person or entity of any type as a direct or indirect result of the City's actions under this Subsection.

P. Relocation of Facilities.

1. The City may require service providers or non-service providers to relocate authorized facilities within the right-of-way when reasonably necessary for construction, alteration, repair, or improvement of the right-of-way for the purposes of public welfare, health, or safety. The City shall notify both service providers and non-service providers as soon as practicable of the need for relocation and shall specify the date by which relocation shall be completed. In calculating the date the relocation must be completed, the City shall consult with the affected service providers and non-service providers and consider the extent of facilities to be relocated, the service's requirements, and the construction sequence for the relocation, within the City's overall project construction sequence and constraints, to safely complete the relocation. Each service provider and non-service provider shall complete the relocation by the date specified, unless the City establishes a later date for completion, after a showing by the service provider or non-service provider that the relocation cannot be completed by the date specified using best efforts in meeting safety and service requirements.
2. A service provider may not seek reimbursement for its relocation expenses from the City under paragraph 1 of this Subsection except as strictly provided for in RCW 35.99.060.
3. The City may require the relocation of facilities at the service provider's or non-service provider's expense in the event of an unforeseen emergency that creates an immediate threat to the public safety, health, or welfare.

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

1. Upon expiration or termination of the grantee's license, master permit, or lease.
2. Upon abandonment of a facility within the rights-of-way or City property. Any property of a grantee shall be deemed abandoned if left in place ninety (90) days after expiration or termination of a license, master permit or lease.
3. If the system or facility was constructed or installed without prior grant of a license, master permit or lease, unless said system or facility was constructed

or installed prior to the effective date of this Chapter.

4. If the system or facility was constructed or installed without prior issuance of a required construction permit or use permit.
5. If the system or facility was constructed or installed at a location not permitted by the grantee's license, master permit, or lease.

The City may, in its sole discretion, allow a grantee, or other such persons who may own, control or maintain telecommunications facilities within the rights-of-way or City property to abandon such facilities in place. No facilities of any type may be abandoned in place without the express written consent of the City. Any plan for abandonment or removal of a grantee's facilities must be first approved by the Director, and all necessary permits must be obtained prior to such work.

Upon permanent abandonment of the facilities in place, at the City's option, the property shall become that of the City, and the grantee shall submit to the Director an instrument in writing, subject to approval by the City Attorney, transferring to the City the ownership of such facilities. The provisions of this Subsection shall survive the expiration, revocation, or termination of a license, master permit or lease granted under this Chapter or under any other City approval.

- R. Failure to Remove or Relocate. If a grantee is required to remove, relocate, change or alter the telecommunications facilities constructed, operated and/or maintained hereunder and fails to do so, the City may cause such to occur and charge the grantee for the costs incurred.
- S. Duty to Provide Information. Within thirty (30) days of a written request from the City, each grantee shall furnish the City with information sufficient to demonstrate:
  1. That grantee has complied with all requirements of this Chapter.
  2. That all sales, utility and/or telecommunications taxes due the City in connection with the telecommunications services and facilities provided by the grantee have been properly collected and paid by the grantee.
  3. All books, records, maps and other documents, maintained by the grantee for its facilities within the rights-of-way shall be made available for inspection by the City at reasonable times and intervals.

Nothing in this Subsection shall be construed to require a grantee to violate state or federal law regarding subscriber privacy, nor be construed to require a grantee to disclose proprietary or confidential information without adequate safeguards for its confidential or proprietary nature or unless required by State law.

- T. Facilities Maps. Upon request from the City to provide sufficient information for coordination of other construction, grantee shall provide the City with copies of its construction plans. If the construction plans do not conform with the City's guidelines for communications facility installations, or where the grantee's actual construction deviates materially from its submitted construction plans, as reasonably determined by the City, the grantee shall provide the City with additional

maps, including "as built" maps, showing the location and design attributes of its telecommunications facilities within the public rights-of-way. The City may use or disclose such information only as allowed by law.

- U. Assignments or Transfers of Grant. Working control of a right-of-way license, master permit or lease may not, directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the grantee, by operation of law or otherwise, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed except as provided by ordinance and then only on such reasonable conditions as may be prescribed therein.
1. The grantee and the proposed assignee or transferee of the grant or system shall provide and certify the following information to the City not less than forty-five (45) days prior to the proposed date of transfer:
    - a. Complete information on the nature, terms and condition of the proposed transfer or assignment.
    - b. All information required of a license, master permit or lease applicant pursuant to BCMC 11.14.100 with respect to the proposed transferee or assignee.
    - c. All deposits or charges and application fees required pursuant to this Chapter.
  2. Unless otherwise provided in a license, master permit or lease, the grantee shall reimburse the City for all direct and indirect costs and expenses reasonably incurred by the City in considering a request to transfer or assign a license, master permit or lease. No assignment or transfer shall be deemed approved until all such costs and expenses have been paid.
  3. Any transfer or assignment of a license, master permit or lease without prior written approval of the City under this Subsection or pursuant to a license, master permit or lease agreement shall be void and is cause for revocation of the grant.
- V. Transactions Affecting Control of Grant. Any transactions, which singularly or collectively result in a change of working control of the grantee or the working control of a telecommunications system, shall be considered an assignment or transfer requiring City approval pursuant to BCMC 11.14.100. Transactions between affiliated entities are not exempt from City approval unless said affiliated entities are named in the initial application.

A grantee shall within ten (10) calendar days notify the City prior to any proposed change in, transfer of, or acquisition by any other party of control of a grantee's company. Every change, transfer, or acquisition of control of a grantee's company shall cause a review of the proposed transfer. In the event the City denies its consent and such change, transfer or acquisition of control has been effected, the City may cancel the license, master permit or lease. Approval shall not be required for mortgaging purposes or if said transfer is from a grantee to another person or entity controlling, controlled by, or under common control with a grantee.

- W. Revocation or Termination of Grant. A license, master permit, or lease granted by the City to use or occupy rights-of-way or City property may be revoked for the following reasons:
1. Construction or operation in the rights-of-way or City property without a license, master permit, or lease grant of authorization.
  2. Construction or operation at an unauthorized location.
  3. Any interconnection with the telecommunications facilities of other telecommunications carriers, operators and providers that are not properly licensed or permitted by the City.
  4. Unauthorized substantial transfer of control of grantee.
  5. Unauthorized assignment of a license, franchise, master permit, or lease.
  6. Unauthorized sale, assignment or transfer of a grantee's license, master permit, or lease, assets, or a substantial interest therein.
  7. Misrepresentation by or on behalf of a grantee in any application or written or oral statement upon which the City relies in making the decision to grant, review or amend any license, master permit, or lease pursuant to this Chapter.
  8. Abandonment of telecommunications facilities in the rights-of-way or upon City property.
  9. Failure to relocate or remove facilities as required in this Chapter.
  10. Failure to pay taxes, compensation, fees or costs when and as due the City.
  11. Insolvency or bankruptcy of the grantee.
  12. Violation of any material provision of this Chapter.
  13. Violation of the material terms of a license, master permit, or lease agreement.
  14. Violation of any state or federal law relating to use of public rights-of-way by service providers.
  15. Violation of any applicable state or federal safety laws and standards.
  16. Violation of any applicable City ordinances, construction codes, regulations or standards.
  17. Failure to cooperate with the City to ensure that facilities are installed, maintained, repaired and removed within the right-of-way in such a manner and at such points so as to not inconvenience the public use of the right-of-way or to adversely affect the public health, safety and welfare.
  18. Failure to obtain a required use permit or right-of-way construction permit before constructing, installing, maintaining, repairing or removing identified facilities.
- X. Notice and Duty to Cure. In the event that the Director believes that grounds exist for revocation of a license, master permit or lease, he or she shall give the grantee written notice of the apparent violation or noncompliance, providing a short and

concise statement of the nature and general facts of the violation or noncompliance, and providing the grantee a reasonable period of time not exceeding thirty (30) days to furnish evidence:

1. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.
2. That rebuts the alleged violation or noncompliance.
3. That it would be in the public interest to impose some penalty or sanction less than revocation.

Y. Hearing. In the event that a grantee fails to provide evidence reasonably satisfactory to the Director as provided in BCMC 11.14.120.X, the Director shall refer the apparent violation or non-compliance to the Council for action to revoke in accordance with the provisions of BCMC 11.14.120.Z. The City shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.

Z. Standards for Revocation or Lesser Sanctions. If the Council determines that a grantee willfully violated or failed to comply with any of the provisions of this Chapter or a license, franchise or lease granted under this Chapter, or through willful misconduct or gross negligence failed to heed or comply with any notice given the grantee by the City under the provisions of this Chapter, then the grantee shall, at the election of the Council, forfeit all rights conferred hereunder and the license, master permit, or lease may be revoked or annulled by the Council. The Council may elect, in lieu of the above and without any prejudice to any of its other legal rights and remedies, to pursue other remedies, including obtaining an order from the superior court having jurisdiction compelling the grantee to comply with the provisions of this Chapter and any license, master permit, or lease granted hereunder, and to recover damages and costs incurred by the City by reason of the grantee's failure to comply. The Council shall utilize the following factors in analyzing the nature, circumstances, extent and gravity of the violation and in making its determination:

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

AA. Incorporation by Reference. The provisions of this Chapter shall be incorporated by reference in any license, master permit or lease approved hereunder. The provisions of any proposal submitted and accepted by the City shall be incorporated by reference in the applicable license, master permit, or lease. In the event of any conflict between the proposal, this Chapter, and the license, master permit, or lease, the license, master permit or lease shall be the prevailing document. (Ord. 763, June 2003.)

**11.14.130 Compliance.**

- A. Police Power. In accepting any license, master permit or lease, the grantee acknowledges that its rights hereunder are subject to the legitimate rights of the police power of the City to adopt and enforce general ordinances necessary to protect the safety and welfare of the public, and the grantee agrees to comply with all applicable general laws enacted by the City pursuant to such power.
- B. City Remedies. The City may seek legal or equitable relief to enjoin any acts or practices and abate any condition, which constitutes or will constitute a violation of the applicable provisions of this Chapter. Violation of the terms of this Chapter may also result in the revocation of any license, master permit or lease, approval, or other permit issued or granted hereunder.
- C. Other Remedies. Nothing in this Chapter shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Chapter.
- D. No Waiver. The failure of the City to enforce any provision of this Chapter on any occasion shall not operate as a waiver or estoppel of this right to enforce any provision of this Chapter on any other occasion, nor shall the failure to enforce any prior ordinance affecting telecommunications facilities or telecommunications system grantees act as a waiver or estoppel against application of this Chapter or any other provision of applicable law. (Ord 763, June 2003.)