

The City's practice has been to require any entity that wishes to deploy or has deployed facilities in the rights-of-way in the City, such as gas, electric and communications service providers, to obtain a franchise agreement from the City, which agreement authorizes the entity's use of the rights-of-way and sets the related terms and conditions. The municipal code currently does not expressly require franchise agreements or similar authorizations for entities that use or wish to use the City's rights-of-way. Though the City has home rule and statutory authority to require franchise agreements without an ordinance or Code provision expressly requiring such agreements, we recommend the Council consider adopting an ordinance that clearly establishes the requirements for long term use of the rights-of-way by utilities.

One approach used by many cities in Oregon is an ordinance establishing a license-based system for managing use of the rights-of-way. This system uses City-issued licenses rather than negotiated franchises to authorize utilities to use the rights-of-way. The license requires the utility to comply with the City's rights-of-way ordinance and other applicable laws and regulations. In essence, the rights-of-way requirements that would be negotiated in a franchise are instead set by the Council in the ordinance. There are several benefits to this approach:

Efficiency: A license-based system will provide efficiency for the City and utilities because time consuming franchise negotiations are no longer required. Utilities can apply for a license using a short application, which the City can review and approve in a matter of days rather than the months (or years) franchise negotiations often take.

Uniformity: A license-based system will ensure uniformity in the regulations applied to entities using the rights-of-way in the City. With negotiated franchise agreements, terms can vary between different entities depending on the outcome of the negotiations. These variations require the City to review each franchise to understand the obligations specific to that entity. For example, each franchise may include a different timeframe for the utility to relocate its facilities for a City project, which can complicate the City's project and lead to delays. A license-based system would, once all existing franchises have expired, require all utilities to follow the same rules, eliminating the variations in rights-of-way regulations.

Transparency: A rights-of-way ordinance codified in the Municipal Code would ensure that utilities (particularly new communications providers that may wish to construct facilities in or through the City) can easily locate and understand the City's requirements for using the rights-of-way in the City. A codified ordinance would also demonstrate that the City has a uniform set of standards for all utilities.

Cost Savings: A license-based system will reduce the City's expenses incurred in franchise negotiations and in compliance matters. Franchise negotiations can be costly, particularly where outside legal counsel is used. License applications generally should not require outside legal assistance, saving the City on those costs. Uniform rights-of-way requirements may also save City staff time and potentially avoid delays with respect to City work in the rights-of-way that can occur when dealing with non-uniform franchise terms.

Potential For Increased Revenue: A license ordinance may result in some additional revenue to the City through increased payments for use of the rights-of-way, which is essentially a form of

rent. A new ordinance may help the City identify entities that are using City rights-of-way without a franchise—and thus are not paying any franchise fees to the City—and pursue those companies to obtain licenses and pay the associated fees. In other cities, sending notice of the new requirements to entities operating in the area has led to increased voluntary compliance. The ordinance also gives the City better enforcement tools when it identifies entities that are using the rights-of-way without authorization. Currently, because there is no ordinance requiring a franchise or establishing rights-of-way fees for entities that are in the rights-of-way without a franchise, the City does not have a clear means to impose fines or penalties, or to recoup unpaid franchise fees from these companies. The ordinance would address these issues by clearly requiring a license prior to installing facilities in the rights-of-way, establishing fees that must be paid even if an entity fails to get a license, and providing penalties for failure to comply.

The City could also opt to use the license ordinance to establish additional fees that would apply to entities that use the rights-of-way to provide services in the City but do not own the facilities they use to do so. This type of fee would most likely apply to entities that are providing telecommunications services in the City by leasing capacity on another telecommunications provider's network, which could include wireless providers if the City opted to do so. A fee structure including these types of providers better ensures that all entities that benefit from use of the rights-of-way pay for that use, and that entities that own facilities are not at a competitive disadvantage compared to those providing similar services over third party facilities. However, this type of fee structure would be a policy choice for the City and should not impact the enforceability of the license ordinance whether or not the City opts to include these fees.