

**CITY OF BOARDMAN
ORDINANCE 2-2025**

**AN ORDINANCE TO APPROVE AN AMENDMENT TO THE BOARDMAN
MUNICIPAL CODE ADDING TITLE 12, CHAPTER 12.16 UTILITY USE OF THE
RIGHTS-OF-WAY**

WHEREAS, the City of Boardman has the authority pursuant to its Charter and the Oregon Constitution and statutes to manage its rights-of-way and to receive compensation for use of the rights-of-way consistent with applicable state and federal law; and

WHEREAS, the City has identified the need to establish uniform requirements for use of the rights-of-way by utilities, including requiring licenses rather than individually negotiated franchise agreements, to better ensure transparent, consistent and efficient management of the public rights-of-way; and

WHEREAS, the adoption of Chapter 12.16 requires related conforming amendments to Chapter 12.08 Excavations; and

WHEREAS, the City finds it is in the public interest to enact the updates to the Municipal Code as set forth in this Ordinance.

NOW THEREFORE, THE PEOPLE OF BOARDMAN DO ORDAIN AS FOLLOWS:

Section 1. Boardman Municipal Code Title 12 shall be amended to add Chapter 12.16 as set forth in Exhibit A.

Section 2. Boardman Municipal Code Chapter 12.08.050 shall be amended as follows (additions in underline; deletions in ~~striketrough~~):

12.08.010 - Permit required.

No person, firm or corporation shall excavate, cut, break, dig up, damage in any manner, undermine or tunnel under a public street or alley without first securing a permit and depositing security as provided in this chapter and Boardman Municipal Code Chapter 12.16.

12.08.050 - Utilities.

Cuts or excavations in the city streets made by a ~~franchised~~ public utility operator shall be subject to Boardman Municipal Code Chapter 12.16. ~~repaired within a reasonable time according to the standards set out in this chapter, including the placement of~~

~~a temporary patch within twenty-four (24) hours as provided in Section 12.08.040. If the utility fails to repair after written notice by the city, the city may make the repairs and restore the street and charge the costs to the utility at the prevailing rate for the work in the city, plus ten (10) percent to cover administration.~~

Section 3. This Ordinance shall become effective on the 30th day after its adoption.

Passed by the Council and approved by the Mayor this ____ day of _____, 2025.

Paul Keefer – Mayor

Amanda Mickles – City Clerk

EXHIBIT A

12.16.010 – Jurisdiction and management of the public rights-of-way.

- A. The city has jurisdiction and exercises regulatory management over all public rights-of-way within the city under authority of the city Charter and state law.
- B. The city has jurisdiction and exercises regulatory management over each public right-of-way whether the city has a fee, easement, or other legal interest in the public right-of-way. The city has jurisdiction and regulatory management of each public right-of-way whether the legal interest in the public right-of-way was obtained by grant, dedication, prescription, reservation, condemnation, annexation, foreclosure or other means.
- C. No person may occupy or encroach on a public right-of-way without the permission of the city. The city grants permission to use public rights-of-way by licenses, franchises and permits.
- D. The exercise of jurisdiction and regulatory management of a public right-of-way by the city is not official acceptance of the public right-of-way, and does not obligate the city to maintain or repair any part of the public right-of-way.
- E. The city retains the right and privilege to cut or move any utility facilities located within the public rights-of-way in the city, as the city may determine to be necessary, appropriate or useful in response to a public health or safety emergency.

12.16.020 – Regulatory fees and compensation not a tax.

- A. The fees and costs provided for in this chapter, and any compensation charged and paid for use of the public rights-of-way provided for in this chapter, are separate from, and in addition to, any and all federal, state, local, and city charges as may be levied, imposed, or due from a utility operator or provider, its customers or subscribers, or on account of the lease, sale, delivery, or transmission of utility services.
- B. The city has determined that any fee provided for by this chapter is not subject to the property tax limitations of Article XI, Sections 11 and 11b of the Oregon Constitution. These fees are not imposed on property or property owners.
- C. The fees and costs provided for in this chapter are subject to applicable federal and state laws.

12.16.030 – Definitions.

For the purpose of this code the following terms, phrases, words and their derivations shall have the meaning given herein. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number and words in the singular number include the plural number. The words “shall” and “will” are mandatory and “may” is permissive. Words not defined herein shall be given the meaning set forth in the Communications Policy Act of 1934, as amended, the Cable Communications Policy Act of 1984, the Cable Television Consumer Protection and Competition Act of 1992, and the Telecommunications Act of 1996. If not defined there, the words shall be given their common and ordinary meaning.

- A. "Antenna" means the same as defined in 47 C.F.R. § 1.6002(b), as may be amended or superseded, which defines the term to mean an apparatus designed for the purpose of emitting radio frequencies (RF) to be operated or operating from a fixed location pursuant to Federal Communications Commission authorization, for the provision of personal wireless service and any commingled information services. For purposes of this definition, the term antenna does not include an unintentional radiator, mobile station, or device authorized under 47 C.F.R. Part 15.
- B. "Antenna Equipment" means the same as defined 47 C.F.R. § 1.6002(c), as may be amended or superseded, which defines the term to mean equipment, switches, wiring, cabling, power sources, shelters or cabinets associated with an antenna, located at the same fixed location as the antenna, and, when collocated on a structure, is mounted or installed at the same time as such antenna.
- C. "Antenna Facility" means the same as defined in 47 C.F.R. § 1.6002(d), as may be amended or superseded, which defines the term to mean an antenna and associated antenna equipment.
- D. "Cable service" is to be defined consistent with federal laws and means the one-way transmission to subscribers of video programming, or other programming service, and subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.
- E. "City" means the city of Boardman, an Oregon municipal corporation, and individuals authorized to act on the city's behalf.
- F. "City council" means the elected governing body of the city of Boardman, Oregon.
- G. "City property" means and includes all real property owned by the city, other than public rights-of-way and public utility easements as those are defined in this chapter, and all property held in a proprietary capacity by the city, which are not subject to public right-of-way licensing or franchising as provided in this code.
- H. "Collocate" or "Collocation" means mounting or installing an antenna facility on a preexisting pole or structure.
- I. "Communications services" means any service provided for the purpose of transmission of information including, but not limited to, voice, video, or data, without regard to the transmission protocol employed, whether or not the transmission medium is owned by the provider itself. "Communications service" includes all forms of telephone services and voice, video, data or information transport, but does not include: (1) cable service; (2) open video system service, as defined in 47 C.F.R. 76; (3) public communications systems; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996).
- J. "Days" means calendar days unless otherwise specified.

- K. "Decorative Pole" means a pole that is specially designed and placed for aesthetic purposes.
- L. "Emergency" means a circumstance, as determined by the city, in which immediate work to utility facilities is necessary to restore lost service or prevent immediate harm to persons or property.
- M. "Federal Communications Commission" means the federal administrative agency, or its lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.
- N. "Franchise" means an agreement between the city and a utility operator which grants a privilege to use public rights-of-way within the city for a dedicated purpose and for specific compensation.
- O. "Grantee" or "licensee" means the person to which a franchise or license is granted by the city.
- P. "Person" means an individual, corporation, company, association, joint stock company or association, firm, partnership, limited liability company or governmental entity.
- Q. "Public communications system" means any system owned or operated by a government entity or entities for its exclusive use for internal communications or communications with other government entities, and includes services provided by the State of Oregon pursuant to ORS 283.140. "Public communications system" does not include any system used for sale or resale, including trade, barter or other exchange of value, of communications services or capacity on the system, directly or indirectly, to any person.
- R. "Public rights-of-way" means and includes the streets, roads, highways, bridges, alleys, sidewalks, public utility easements, and all other public ways or areas, including the subsurface under and air space over these areas, that are generally open to the public for vehicular and pedestrian travel, but does not include parks, parkland or other city property. This definition applies only to the extent of the city's right, title, interest or authority to grant a license or franchise to occupy and use such areas for utility facilities.
- S. "Public utility easement" means any easement granted to or owned by the city and acquired, established, dedicated or devoted for public utility purposes. "Public utility easement" does not include an easement solely for the construction, reconstruction, operation, maintenance, inspection and repair of city facilities, or where the proposed use by the utility operator is inconsistent with the terms of any easement granted to the city.
- T. "Small wireless facility" means the same as defined in 47 C.F.R § 1.6002(l), as may be amended or superseded, which defines the term to mean antenna facilities that meet the following conditions:
 - 1. The facilities (i) are mounted on structures 50 feet or less in height including the antennas, or (ii) are mounted on structures no more than 10 percent taller than other adjacent structures, or (iii) do not extend existing structures on

- which they are located to a height of more than 50 feet or by more than 10 percent, whichever is greater; and,
2. Each antenna associated with the deployment, excluding associated antenna equipment, is no more than three cubic feet in volume; and,
 3. All other wireless equipment associated with the structure, including wireless equipment associated with the antenna and any pre-existing associated equipment on the structure, is no more than 28 cubic feet in volume; and,
 4. The facilities do not require antenna structure registration under 47 C.F.R. Part 17; and
 5. The facilities are not located on Tribal lands, as defined under 36 C.F.R. 800.16(x); and
 6. The facilities do not result in human exposure to radiofrequency radiation in excess of the applicable safety standards specified in 47 C.F.R. § 1.1307(b).
- U. “State” means the state of Oregon.
- V. “Utility facilities” or “facilities” means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, cable, wires, plant and equipment located or to be located under, on, or above the surface of the ground within the public right-of-way in the city and used or to be used for the purpose of providing utility services.
- W. “Utility operator” means any person who owns, operates or controls a utility facility within the public rights-of-way in the city.
- X. “Utility services” means the provision, by means of utility facilities permanently located within, under or above the public rights-of-way, whether or not such facilities are owned by the service provider, of electricity, natural gas, communications services, cable services, water, sewer or storm sewer to or from customers within the corporate boundaries of the city, or the transmission of any of these services through the city whether or not customers within the city receive those transmissions or services.
- Y. “Work” means the construction, demolition, installation, replacement, repair, maintenance, or relocation of any utility facility, including but not limited to any excavation and restoration required in association with such construction, demolition, installation, replacement, repair, maintenance, or relocation.

12.16.040 – Construction standards.

- A. General. No person shall commence or continue with any work or operation of utility facilities within any portion of the public rights-of-way except as provided in this chapter.
- B. Construction Codes. Utility facilities shall be constructed, installed, operated and maintained in accordance with, and permittees shall at all times comply with, all applicable federal, state and local laws, codes, ordinances, rules and regulations, including the National Electrical Code and the National Electrical Safety Code and the requirements of the city’s applicable design and construction standards.
- C. Construction Permits.

1. Except as provided in subsection C.2 or as otherwise agreed to in writing by the city, no person shall construct or install any utility facilities or perform any work within any portion of the public rights-of-way without first obtaining all applicable construction permits and paying the construction permit fees established pursuant to subsection G of this section.
 2. In the event of an emergency, a utility operator with a license pursuant to this chapter or a valid franchise agreement, or the utility operator's contractor, may perform work on its utility facilities without first obtaining a permit from the city; provided, that, to the extent reasonably feasible, it attempts to notify the city prior to commencing the emergency work and in any event applies for a permit from the city and pays all applicable permit fees as soon as reasonably practicable, but not more than 48 hours after commencing the emergency work.
 3. No permit shall be issued for the construction or installation of utility facilities or any work within the public rights-of-way unless the utility operator has first applied for and received a license pursuant to section 12.16.060 or holds a valid franchise from the city.
- D. Permit Applications. Applications for construction permits shall be submitted upon forms to be provided by the city and shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:
1. That the construction, installation or other work in the public rights-of-way related to utility facilities will be in accordance with all applicable laws, codes, ordinances, rules and regulations and the license or franchise agreement.
 2. The location and route of all utility facilities to be installed above ground, including on existing utility poles.
 3. The location and route of all new utility facilities on or in the public rights-of-way to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route which are within the public rights-of-way. Existing facilities shall be differentiated on the plans from new construction.
 4. The location of all of applicant's existing underground utility facilities, including conduits, ducts, pipes, mains and installations which are within the public rights-of-way along the underground route proposed by the applicant. A cross-section shall be provided showing new or existing facilities in relation to the street, curb, sidewalk or public right-of-way.
 5. The construction methods to be employed for protection of existing structures, fixtures, and facilities within or adjacent to the public rights-of-way, and description of any improvements that applicant proposes to temporarily or permanently remove or relocate.
 6. The applicant has an adequate traffic control plan to protect bicyclists, pedestrians, construction personnel, and vehicular traffic, and to warn and safeguard the public against injury or damage resulting from the work.

7. To the extent the proposed utility facility involves collocation, (i) a structural report performed by a duly licensed engineer demonstrating that the pole or structure will structurally support the additional load and meet any applicable spacing requirements, or that describes how the pole or structure will be modified to meet such requirements; and (ii) a copy of the authorization for use of the property from the pole or structure owner on which the antenna facility will be placed or attached.
 8. To the extent the proposed utility facility includes antenna facilities or a new pole, accurate visual depictions or representations of the proposed new facilities.
 9. To the extent the proposed utility facility includes antenna facilities, reports or similar documentation confirming that the proposed antenna facilities are in compliance with all applicable FCC regulations relating to radio frequency emissions.
 10. Whether the proposed work is subject to ministerial review or administrative review as provided in section 12.16.040.H and I.
- E. Applicant's Verification. All permit applications shall be accompanied by the verification of a registered professional engineer, or other qualified and duly authorized representative of the applicant, that the drawings, plans and specifications submitted with the application comply with applicable technical laws, codes, ordinances, rules and regulations.
- F. Construction Schedule. All permit applications shall be accompanied by a written construction schedule, which shall include a deadline for completion of construction. The construction schedule is subject to approval by the city.
- G. Construction Permit Fee. Prior to issuance of a construction permit, the applicant shall pay a permit fee in an amount determined by resolution of the city council.
- H. Issuance of Permit.
1. Ministerial Review. For applications the city manager or their designee determines to be permitted uses subject to ministerial review, the city manager or their designee shall issue a permit authorizing construction or installation of the utility facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as he or she may deem necessary or appropriate, provided that the proposed facility:
 - a. Complies with the provisions of this chapter and the license or franchise;
 - b. Does not materially interfere with sight lines or clear zones for transportation or pedestrians;
 - c. Complies with the Americans with Disabilities Act or similar federal, state, or local laws, standards and regulations regarding pedestrian access or movement;
 - d. Complies with all applicable FCC regulations and guidelines for human exposure to RF emissions and will not result in RF exposures that

- exceed the FCC's maximum permissible exposure level for the general population;
- e. Is designed by qualified, licensed persons to provide the maximum protection that is technically feasible to prevent electrical and fire hazards; and
 - f. Complies with city codes, standards and regulations, including, without limitation, the city's public works construction standards, building and electrical codes, and any other codes, rules, or laws that the city determines are applicable.
2. Permits Subject to Ministerial Review The following uses within the public rights-of-way shall be permitted uses subject to ministerial review.
- a. Installation of a utility facility where the installation is installed underground or is exempt from underground placement as provided in Boardman Municipal Code 13.12.030.
 - b. Collocation of a small wireless facility that complies with the City's small wireless facilities design standards without any deviations, including deviations allowed pursuant to the deviation provisions of the design standards.
 - c. Collocation of a small wireless facility, including modification or replacement of a pole for collocation of a small wireless facility, where the collocation, modification or replacement qualifies as an eligible facilities request as defined in 47 C.F.R. § 1.6100(b)(3), as may be amended or superseded, provided that the city manager or their designee may include conditions with the permit to ensure that the collocation, modification or replacement is consistent with applicable provisions of this chapter and the city's small wireless facilities design standards to the extent consistent with applicable law.
 - d. Placement of a new, modified, or replacement pole to be used for collocation of a small wireless facility that (i) does not modify or replace a decorative pole; and (ii) complies with the city's small wireless facilities design standards without any deviations, including deviations allowed pursuant to the deviation provisions of the design standards.
3. Administrative Review. For applications subject to administrative review, the city manager or their designee may issue a permit authorizing construction of the utility facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as they may deem necessary or appropriate, if the city manager or their designee determines in his or her sole discretion that:
- a. The proposed utility facility complies with the provisions of subsection H.1.a-f of this section 12.16.040, except to the extent deviations are expressly granted in writing by the city manager or their designee;
 - b. The proposed utility facility, as proposed or with the conditions imposed by the city manager or their designee, will comply with all

applicable city design standards, or the city manager or their designee has expressly granted in writing a deviation from the city design standards or determined that a deviation from the design standards shall be allowed pursuant to the deviation process in the city's small wireless facilities design standards;

- c. The proposed utility facility would violate the underground location requirements provided in Boardman Municipal Code 13.12.030, but a deviation is appropriate because:
 - (i) The topography is such, due to terrain, rock, etc., as to make compliance physically impractical;
 - (ii) Underground installation is economically not feasible; or
 - (iii) The utility lines are of such voltage, size or capacity that underground installation is not feasible;
- d. The proposed utility facility, as proposed or with the conditions imposed by the city manager or their designee, will comply with all applicable city design standards, or the city manager or their designee has determined that the proposed facility avoids the intangible public harm of unsightly or out-of-character deployments and the negative impact of the proposed facility on the surrounding uses and public facilities is minimized; and/or
- e. The denial of the permit will prohibit or effectively prohibit the provision of telecommunications service or personal wireless service.

The city manager or designee may grant deviations for applicable design standards where the city manager or designee determines, in their sole discretion, that (a) strict compliance with the standards is not technically feasible; (b) the applicant's proposed facility provides equivalent or superior public safety and/or aesthetic value when compared to strict compliance with applicable standards; and/or (c) denial of the permit violates or may violate applicable laws and regulations.

- 4. Permits Subject to Administrative Review. All uses of the public rights-of-way for utility facilities other than those set forth in subsection H.2 of this section 12.16.040, including uses described in subsection H.2 that do not fully comply with the city's applicable design and/or public works standards without a deviation, shall be subject to administrative review as provided in subsection 12.16.040.H.4.
- 5. Use of Consultants. Where deemed reasonably necessary by the city, the city may retain the services of professional consultants to assist the city in carrying out its duties in reviewing and making decisions on permit applications. The applicant shall be responsible for payment of all the actual costs incurred by the city for such services. The city shall provide the applicant with a detailed invoice of time spent and the nature of the review, and the applicant shall submit payment to the city within 30 days of receipt of the invoice.

- I. Design Standards.
 - 1. Maximum Size of Permitted Use. No person may install, modify, or replace small wireless facilities on a pole in the public rights-of-way that exceeds the height limits contained in small wireless facilities design standards, or install, modify or replace a pole in the public rights-of-way with a new pole that will be more than 10 percent taller than other adjacent poles, unless the city manager or their designee approves the installation, modification or replacement after administrative review.
 - 2. Decorative Poles. No person may attach any utility facilities or collocate an antenna facility on a decorative pole, or replace a decorative pole, including with a new decorative pole, unless the city manager or their designee approves the attachment, collocation or replacement after administrative review.
 - 3. Notwithstanding any other provision of this chapter, the city manager shall have the authority to waive any provision of this chapter if the city manager determines in his or her sole discretion that the denial of an application would prohibit or effectively prohibit the provision of telecommunications services or personal wireless services in violation of the Telecommunications Act of 1996. An applicant may appeal the denial of a request for a waiver to the city council, whose decision shall be final.
- J. Notice of Construction. Except in the case of an emergency, the permittee shall notify the city not less than two working days in advance of any work in the public rights-of-way.
- K. Compliance with Permit. All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The city and its representatives shall be provided access to the work site and such further information as they may require to ensure compliance with such requirements.
- L. Noncomplying Work. All work that does not comply with the permit, the approved or corrected plans and specifications for the work, or the requirements of this code, shall be promptly removed or corrected at the sole cost and expense of the permittee.
- M. Completion of Construction. The permittee shall promptly complete all construction activities so as to minimize disruption of the public rights-of-way and other public and private property. All construction work within the public rights-of-way, including restoration, must be completed within 120 days of the date of issuance of the construction permit unless an extension or an alternate schedule has been approved pursuant to the schedule submitted and approved by the appropriate city official as provided in subsection F of this section.
- N. As-Built Drawings. If requested by the city, the permittee shall furnish the city with two complete sets of plans in a format acceptable to the city drawn to scale and certified to the city as accurately depicting the location of all utility facilities constructed pursuant to the permit. These plans shall be submitted to the public

works director or designee within 60 days after completion of construction, in a format acceptable to the city.

O. Restoration of Public Rights-of-Way.

1. When a permittee, or any person acting on its behalf, does any work in or affecting any public rights-of-way or city property, it shall, at its own cost and expense, promptly remove any obstructions therefrom and, unless otherwise directed by the city, restore such public rights-of-way or property to the same or better condition as existed before the work was undertaken, in accordance with applicable federal, state and local laws, codes, ordinances, rules and regulations as determined by the public works director or designee.
2. If weather or other conditions do not permit the complete restoration required by this section, the permittee shall temporarily restore the affected public rights-of-way or property. Such temporary restoration shall be at the permittee's sole cost and expense and the permittee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration. Any corresponding modification to the construction schedule shall be subject to approval by the city.
3. If the permittee fails to restore any portion of the public rights-of-way or property as required in this chapter, the license and the permit issued by the city, the city shall give the permittee written notice and provide the permittee a reasonable period of time not exceeding 30 days to restore the public rights-of-way or property. If, after said notice, the permittee fails to restore the public rights-of-way or property to as good a condition as existed before the work was undertaken or as otherwise directed by the city pursuant to this subsection O, the city shall cause such restoration to be made at the sole cost and expense of the permittee.
4. A permittee or other person acting on its behalf shall use suitable barricades, flags, flagging attendants, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such public rights-of-way or property.

P. Performance and Completion Bond. Unless otherwise agreed to by the city, a performance bond or other form of surety acceptable to the city equal to at least 100 percent of the estimated cost of permittee's work within the public rights-of-way in the city shall be provided before work is commenced.

1. The surety shall remain in force until 60 days after substantial completion of the work, as determined in writing by the city, including restoration of public rights-of-way and other property affected by the construction.
2. The surety shall guarantee, to the satisfaction of the city:
 - a. Timely completion of construction;
 - b. Construction in compliance with applicable plans, permits, technical codes and standards;

- c. Proper location of the facilities as specified by the city;
- d. Restoration of the public rights-of-way and other property affected by the construction; and
- e. Timely payment and satisfaction of all claims, demands or liens for labor, material, or services provided in connection with the work.

12.16.050 – Location of utility facilities.

- A. Facilities. Upon request, each grantee shall provide the city with an accurate map or maps, in a format acceptable to the city, certifying the location of all of its utility facilities within the public rights-of-way in the city.
- B. Location of Facilities. All facilities shall be located underground as provided in Boardman Municipal Code 13.12.030, except as provided therein or in this subsection B. This requirement shall not apply to the installation of facilities used for transmission of electric energy at nominal voltages in excess of 35,000 volts, or to antennas, pedestals, cabinets or other equipment of any utility operator where underground operation is not technically feasible and the city, in its sole discretion, has approved an above-ground location. If a grantee proposes to install an antenna facility in an area where all wireline utility facilities in the public rights-of-way are underground, the city and grantee shall work to find a location for such antenna facility that is technically feasible and avoids the intangible public harm of unsightly or out-of-character deployments.
- C. Interference with the Public Rights-of-Way. No grantee may locate or maintain its utility facilities so as to unreasonably interfere with the use of the public rights-of-way by the city, by the general public or by other persons authorized to use or be present in or upon the public rights-of-way. All use of public rights-of-way shall be consistent with city codes, ordinances, rules and regulations.
- D. Relocation or Removal of Facilities.
 - 1. When requested to do so in writing by the city, a utility operator shall, at no cost or expense to the city, temporarily or permanently remove, relocate, change or alter the position of any utility facility within a public right-of-way, including relocation of aerial facilities underground; provided that underground relocation shall not be required for facilities for which underground operation is not technically feasible and the city, in its sole discretion, has approved the continued use of the above-ground location.
 - 2. The city will cooperate with the utility operator in securing alternate locations in the public rights-of-way; provided that the city shall bear no responsibility or cost to secure any alternate location either within or outside the public rights-of-way, or otherwise compensate or assist the utility operator in relocation of the facilities.
 - 3. The city shall coordinate the schedule for relocation of utility facilities and shall provide written notice of the time by which the utility operator must remove, relocate, change, alter or underground its facilities, which shall not be less than 30 days except as provided in subsection D.4 of this section. If a

utility operator fails to remove, relocate, change, alter or underground any utility facility as required by the city, the utility operator shall pay all costs and expenses incurred by the city due to such failure, including but not limited to costs related to project delays, and the city may cause the utility facility to be removed, relocated, changed, altered or undergrounded at the utility operator's sole cost and expense using qualified workers in accordance with applicable state and federal laws and regulations. The utility operator shall reimburse the city within 30 days of receipt of an invoice from the city.

4. In the event of a public health or safety emergency, as determined by the city, the city may require a utility operator to immediately remove, relocate, change or alter the position of any utility facility within a public right-of-way. The city retains the right and privilege to cut or remove, relocate, change or alter the position of any utility facility within a public right-of-way, without notice, as the city may determine to be necessary, appropriate or useful in response to a public health or safety emergency, as determined by the city. The city will use qualified personnel or contractors consistent with applicable state and federal safety laws and regulations to the extent reasonably practicable without impeding the city's response to the emergency.

E. Removal of Unauthorized and Abandoned Facilities.

1. Within 30 days following written notice from the city, any utility operator or other person that owns, operates or controls any unauthorized utility facility or related appurtenances within the public rights-of-way in the city shall, at its own cost and expense, remove such facilities or appurtenances from the public rights-of-way in the city. If a utility operator or other person fails to remove any abandoned facilities or appurtenances, the utility operator or person shall pay all costs and expenses incurred by the city due to such failure, including but not limited to costs related to project delays, and the city may cause the utility facility or appurtenances to be removed at the utility operator's or other person's sole cost and expense using qualified workers in accordance with applicable state and federal laws and regulations. The utility operator or person shall reimburse the city within 30 days of receipt of an invoice from the city.
2. A utility facility is unauthorized and subject to removal in the following circumstances:
 - a. One year after the expiration, revocation or termination of the grantee's license or franchise without renewal thereof.
 - b. Upon abandonment of a utility facility within the public rights-of-way in the city. All or any portion of a utility facility will be considered abandoned when it is deactivated, out of service, or not used for its authorized purpose for a period of 90 days or longer. A utility facility will not be considered abandoned if it is temporarily out of service during performance of repairs or if the facility is being replaced.

- c. If the utility facility was constructed or installed without the appropriate prior authority at the time of installation.
 - d. If the utility facility was constructed or installed at a location not permitted by the utility operator's license or franchise, or the permit issued pursuant to this chapter.
- F. Relocation or Removal by City. The city shall not be liable to any utility operator for any damage to utility facilities, or for any consequential losses resulting directly or indirectly therefrom, by the city or its contractor in removing, relocating or altering the facilities pursuant to this section, or resulting from the utility operator's failure to remove, relocate, alter or underground its facilities as required by this section, unless such damage arises solely and directly from the city's negligence or willful misconduct.
- G. Coordination of Construction Activities. All grantees are required to make a good faith effort to cooperate with the city in coordinating construction activities in the public rights-of-way.
 - 1. By January 1st of each year, grantees shall provide the city with a schedule of their proposed construction activities in, around or that may affect the public rights-of-way.
 - 2. If requested by the city, each grantee shall meet with the city annually or as determined by the city, to schedule and coordinate construction in the public rights-of-way. At that time, city will provide available information on plans for local, state, and/or federal construction projects.
 - 3. All construction locations, activities and schedules shall be coordinated, as ordered by the public works director or designee, to minimize public inconvenience, disruption or damage.

12.16.060 – Utility license.

- A. Utility License. Every person that owns, operates or controls utility facilities as of the effective date of this chapter shall apply for a license from the city within 30 days of the later of:
 - 1. The effective date of this chapter, or
 - 2. The expiration of a valid franchise agreement granted by the city, unless a new franchise agreement is granted by the city pursuant to subsection K of this section.
- B. Application. The license application shall be on a form provided by the city, and shall be accompanied by any additional documents required by the application or the city to identify the applicant, its legal status, including its authorization to do business in Oregon, a description of the utility facilities in the public rights-of-way or to be installed in the public rights-of-way, a description of type of utility service provided or to be provided by the applicant, if any, and other information reasonably necessary to determine the applicant's ability to comply with the terms of this chapter.

- C. Application Fee. The application shall be accompanied by a nonrefundable application fee or deposit set by resolution of the city council.
- D. Determination by the City. The city shall issue a written determination granting or denying the application in whole or in part. If the application is denied, the written determination shall include the reasons for denial. The application shall be evaluated based upon the provisions of this chapter, the continuing capacity of the public rights-of-way to accommodate the applicant's proposed utility facilities and the applicable federal, state and local laws, rules, regulations and policies.
- E. Scope of Grant.
 - 1. A license shall authorize the licensee, subject to the provisions of the city codes, including this Chapter, and other applicable provisions of state or federal law, as amended from time to time, to construct, place, maintain, upgrade, repair and operate utility facilities in the public rights-of-way for the term of the license for the provision of the utility service(s) authorized in the license. In the event the licensee, or another person using the licensee's facilities, offers different utility service(s) than those authorized in the license, the licensee shall inform the city of such changes no later than 30 days after the provision of such services.
 - 2. No license granted pursuant to this chapter shall convey any right, title or interest in the public rights-of-way, but shall be deemed a non-exclusive grant to use and occupy the public rights-of-way for the limited purposes and term provided in this chapter. The license is subject to all recorded deeds, easements, dedications, conditions, covenants, restrictions, encumbrances and claims of title of record that may affect the public rights-of-way.
 - 3. No license granted pursuant to this chapter shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights-of-way for utility facilities, delivery of utility services or any other purpose. The city expressly reserves the right to grant licenses, franchises or other rights to other persons, as well as the city's right to use the public rights-of-way, for similar or different purposes.
 - 4. Neither the issuance of the license nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, including, without limitation, the police power or regulatory power of the city.
- F. Term. Subject to the revocation and termination provisions in subsection J of this section, a utility license granted hereunder shall be in effect for a term of five years.
- G. Multiple Services.
 - 1. A utility operator that provides or transmits or allows the provision or transmission of utility services and non-utility services over its utility facilities is subject to the license and fee requirements of this chapter for the portion of the utility facilities and extent of utility services delivered by the utility operator over those facilities.

2. A utility operator that provides or transmits more than one utility service to customers in the city is not required to obtain a separate license or franchise for each utility service, but is required to pay the rights-of-way use fees due for each utility service the utility operator provides.
- H. Renewal Applications. A licensee that desires to renew its license under this code shall, not less than 30 days but no more than 180 days before expiration of the current license, submit an application with the city, including all information required in section 12.16.060.B and the application fee required in section 12.16.060.C. The city shall review the application as required by section 12.16.060.D and grant or deny the license within 90 days of submission of the application. If the city determines that the licensee is in violation of the terms of this chapter at the time it submits its application, the city may require that the licensee cure the violation or submit a detailed plan to cure the violation within a reasonable period of time, as determined by the city, before the city will consider the application and/or grant the license. If the city requires the licensee to cure or submit a plan to cure a violation, the city will grant or deny the license application within 90 days of confirming that the violation has been cured or of accepting the licensee's plan to cure the violation.
- I. Assignments or Transfers of System or License. Except as otherwise provided by applicable State and federal law, ownership or control of a majority interest in utility facilities or a license 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 consent of the city.
1. Licensee and the proposed assignee or transferee of the license or facilities shall agree, in writing, to assume and abide by all of the provisions of the license.
 2. No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other requisite qualifications to own, hold and operate the utility facilities pursuant to this code and otherwise meets the criteria for all license applicants set forth in section 12.16.060.D.
 3. Unless expressly prohibited by applicable state or federal law, the licensee shall reimburse the city for all direct and indirect fees, costs and expenses reasonably incurred by the city in considering a request to transfer or assign a utility license.
 4. Any transfer or assignment of a utility license or utility facilities without prior approval of the city under this code shall be void and is cause for revocation of the license.
- J. Revocation or Termination of License.
1. The city may, subject to applicable notice and cure provisions of this subsection J, revoke a license to use or occupy the public rights-of-way in the city for one or more of the following reasons:
 - a. Construction or operation in the city or in the public rights-of-way in the city without applicable permit(s);

- b. Construction or operation at an unauthorized location;
 - c. Failure to comply with subsection I of this section with respect to sale, transfer or assignment of utility facilities or a license;
 - d. Misrepresentation by or on behalf of a grantee in any application to the city;
 - e. Abandonment of utility facilities in the public rights-of-way;
 - f. Failure to relocate or remove facilities as required in this chapter;
 - g. Failure to pay taxes, compensation, fees or costs when and as due the city under this code;
 - h. Insolvency or bankruptcy of the grantee;
 - i. Violation of material provisions of this code; and/or
 - j. Violation of the material terms of the license.
2. Notice and Duty to Cure. In the event that the city believes that grounds exist for revocation of a license, the city 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 30 days, to furnish evidence that:
 - a. Corrective action has been taken, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;
 - b. Rebuts the alleged violation or noncompliance; and/or
 - c. It would be in the public interest to impose some penalty or sanction less than revocation.
 3. Public Hearing. In the event that a grantee fails to provide evidence reasonably satisfactory to the city of its compliance with the license or with this code, the city staff shall refer the apparent violation or noncompliance to the city council. The city council shall provide the grantee with notice and a reasonable opportunity to be heard concerning the matter.
 4. Standards for Revocation or Lesser Sanctions. If persuaded that the grantee has violated or failed to comply with material provisions of this code, or of a license, the city council shall determine whether to revoke the license, or to establish some lesser sanction and cure, considering the nature, circumstances, extent, and gravity of the violation as reflected by one or more of the following factors. Whether:
 - a. The misconduct was egregious;
 - b. Substantial harm resulted;
 - c. The violation was intentional;
 - d. There is a history of prior violations of the same or other requirements;
 - e. There is a history of overall compliance;
 - f. The violation was voluntarily disclosed, admitted or cured;
 - g. Grantee has failed to cure the violation after notice.

5. The provisions of this subsection J are in addition to, and in no way limit, the other penalties provided in this chapter and any other remedies the city may have at law or in equity.
- K. Franchise Agreements. If the public interest warrants, as determined by the city in its sole discretion, the city and utility operator may enter into a written franchise agreement that includes terms that clarify, enhance, expand, waive or vary the provisions of this chapter, consistent with applicable state and federal law. The franchise may conflict with the terms of this chapter with the review and approval of city council. The franchisee shall be subject to the provisions of this chapter to the extent such provisions are not in conflict with the express provisions of any such franchise. In the event of a conflict between the express provisions of a franchise and this chapter, the franchise shall control.

12.16.070 – License terms.

- A. Maintenance. The utility operator shall be solely responsible for any repairs or maintenance required to keep its facilities in a clean, safe and code-compliant condition. The operator, at its sole cost and expense, shall repair any damage to its facilities within: (1) 30 days after the permittee discovers or receives notice (written or verbal) that such damage exists or (2) immediately if such repairs are necessary to preserve life or property. If, after notice from the city of the need for repair or maintenance as required in this subsection, a utility operator fails to repair and maintain utility facilities as requested by the city and by the date reasonably established by the city, the city may perform such repair or maintenance using qualified personnel or contractors consistent with applicable state and federal safety laws and regulations at the utility operator's sole cost and expense. Within 30 days of receipt of a detailed invoice from the city, the utility operator shall reimburse the city the full invoiced amount.
- B. Reservation of City Rights. Nothing in the license shall be construed to prevent the city from grading, paving, repairing and/or altering any public rights-of-way, constructing, laying down, repairing, relocating or removing city facilities or establishing any other public work, utility or improvement of any kind, including repairs, replacement or removal of any city facilities. If any of licensee's utility facilities interfere with the construction, repair, relocation, replacement, alteration or removal of any public rights-of-way, public work, city utility, city improvement or city facility, licensee's facilities shall be removed or relocated as provided in section 12.16.050.
- C. Damage to Grantee's Facilities. Unless directly and proximately caused by negligence or willful misconduct by the city, the city shall not be liable for any damage to or loss of any utility facility within the public rights-of-way in the city as a result of or in connection with any public works, public improvements, construction, excavation, grading, filling, or work of any kind in the public rights-of-way by or on behalf of the city, or for any consequential losses resulting directly or indirectly therefrom.

- D. Duty to Provide Information. Within 30 days of a written request from the city, each grantee shall furnish the city with the following:
1. Information sufficient to demonstrate that grantee has complied with all requirements of the license and this code, including but not limited to payment of any applicable fees.
 2. Any books, records, maps, and other documents maintained by the grantee with respect to its facilities within the public rights-of-way that the city may request.
- E. Compensation for City Property. If any right is granted, by lease or other manner, to use and occupy city property for the installation of utility facilities, the compensation to be paid for such use shall be fixed by the city. No license issued pursuant to this chapter shall grant any right, license or authority to install utility facilities or otherwise use or occupy city property.
- F. Cable Franchise. Utility operators providing cable service shall be subject to the separate cable franchise requirements of the city and other applicable authority, subject to applicable law.
- G. Leased Capacity. A grantee shall have the right, without prior city approval, to offer or provide capacity or bandwidth to its customers; provided that (i) the use of the utility facilities does not require or involve any additional equipment owned or operated by the lessee to be installed in or on the facility (unless the lessee has obtained a ROW license or franchise from the city); and (ii) the grantee provides the city with the name and business address of any lessee within 30 days of the effective date of the lease or other agreement to provide capacity or bandwidth.
- H. Grantee Insurance.
1. Each grantee shall, as a condition of the license, 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 coinsured:
 - a. Comprehensive general liability insurance with limits of not less than:
 - i. Three million dollars (\$3,000,000) for bodily injury or death to each person;
 - ii. Three million dollars (\$3,000,000) for property damage resulting from any one accident; and;
 - iii. Three million dollars (\$3,000,000) for all other types of liability.
 - b. Automobile liability for owned, non-owned and hired vehicles with a limit of one million dollars (\$1,000,000) for each person and three million dollars (\$3,000,000) for each accident.
 - c. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than one million dollars (\$1,000,000).
 - d. 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).

2. The limits of the insurance shall be subject to statutory changes as to maximum limits of liability imposed on municipalities of the State of Oregon. The insurance shall be without prejudice to coverage otherwise existing.
3. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the license, and such other period of time during which the grantee is operating without a license, or is engaged in the removal of its utility facilities.
4. Each such insurance policy shall contain the following endorsement:

It is hereby understood and agreed that this policy may not be canceled or materially altered, nor the intention not to renew be stated, until 30 days after receipt by the City, by registered mail, of a written notice addressed to the City of such intent to cancel or not to renew.
5. Prior to said cancellation or material alteration, the grantee shall obtain and furnish to the city evidence that the grantee continues to meet the requirements of this section.
6. As an alternative to the insurance requirements contained herein, a grantee may provide evidence of self-insurance subject to review and acceptance by the city.
7. A grantee shall maintain on file with the city a certificate of insurance, or proof of self-insurance acceptable to the city, certifying the coverage required above.
- I. General Indemnification. To the fullest extent permitted by law, each grantee shall defend, indemnify and hold the city and its officers, employees, agents and representatives harmless from and against any and all damages, losses, costs and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from, or alleged to arise out of or result from, the negligent, careless or wrongful acts, or any acts, omissions, failures to act or misconduct, of the grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its utility facilities, and/or in providing or offering utility services over the facilities, whether such acts or omissions are authorized, allowed or prohibited by this code or by a license granted pursuant to this code.
- J. Performance Surety. Unless otherwise agreed to in writing by the city, before a license granted pursuant to this chapter is effective, and as necessary thereafter, the grantee shall provide a performance bond, in form and substance acceptable to the city, as security for the full and complete performance of a license granted under this chapter, including any costs, expenses, damages or loss the city pays or incurs because of any failure attributable to the grantee to comply with the codes, ordinances, rules, regulations or permits of the city. This obligation is in addition to the performance bond or surety required for construction of facilities.

12.16.080 – Rights-of-Way use fees.

- A. Every person that owns, operates or controls utility facilities in the city shall pay the rights-of-way use fee in the amount determined by resolution of the city council.
- B. Fees required by this section shall be reduced by any franchise fees, but in no case shall be less than zero dollars (\$0).
- C. No acceptance of any payment shall be construed as accord that the amount paid is in fact the correct amount, nor shall such acceptance of payment be construed as a release of any claim the city may have for further or additional sums payable.
- D. Unless otherwise agreed to in writing by the city, the fees set forth under this section shall be paid quarterly, in arrears, within 45 days after the end of each calendar quarter. Each payment shall be accompanied by an accounting of the basis for the calculation of the amount payable on a remittance form provided by the city. The utility operator shall provide to the city any additional reports or information the city deems necessary to ensure compliance with this section. Any person who fails to remit any fees when due under this section shall pay interest at the rate of one and one-half percent (1.5%) per month or fractions thereof, without proration for portions of a month, on the total amount due, from the date on which the payment first became delinquent, until received by the city.
- E. The calculation of the fees required by this section shall be subject to all applicable limitations imposed by federal or state law in effect and as may be subsequently amended.
- F. The city reserves the right to enact other fees and taxes applicable to person(s) subject to this Chapter. Unless expressly permitted by the city in enacting such fee or tax, or required by applicable state or federal law, no person may deduct, offset, or otherwise reduce or avoid the obligation to pay any lawfully enacted fees or taxes based on the payment of the fees required under this Chapter.
- G. Within 30 days of a written request from the city, or as otherwise agreed to in writing by the city, every utility operator shall furnish the city, at no cost to the city, information sufficient to demonstrate compliance with this section. If the city's review or audit of the books, records and other documents or information of the utility operator demonstrates that the utility operator has underpaid the rights-of-way use fee by three percent (3%) or more, the utility operator shall reimburse the city for the cost of the review or audit, in addition to any interest and penalties owed under this chapter. Any underpayment, including any interest, penalties or audit cost reimbursement, shall be paid within 30 days of the city's notice to the utility operator of such underpayment. The utility operator shall maintain records subject to this subsection for not less than six years.
- H. Rights-of-way usage fees not received by the city on or before the due date are subject to the penalties in the amount determined by resolution of the city council, which shall be addition to and not in lieu of any other penalties or remedies available to the city.

12.16.090 – General provisions.

- A. Governing Law. Any license granted under this chapter is subject to the provisions of the Constitution and laws of the United States, and the state of Oregon and the ordinances and Charter of the city.
- B. Severability and Preemption. If any article, section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this code is for any reason held to be invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal legislation, rules, regulations or decision, the remainder of the code shall not be affected thereby but shall be deemed as a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof, and each remaining section, subsection, sentence, clause, phrase, term, provision, condition, covenant and portion of this code shall be valid and enforceable to the fullest extent permitted by law. In the event that federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this code, then the provision shall be read to be preempted to the extent and for the time required by law. In the event such federal or state law, rule or regulation is subsequently repealed, rescinded, amended or otherwise changed so that the provision hereof that had been preempted is no longer preempted, such provision shall thereupon return to full force and effect, and shall thereafter be binding, without the requirement of further action on the part of the city.
- C. Penalties. Any person violating any of the provisions of this chapter is liable for a citation for a Class B violation consistent with Boardman Municipal Code Chapter 1.16.
- D. 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.
- E. Compliance with Laws. Any grantee under this code shall comply with all federal and state laws, rules and regulations, including regulations of any administrative agency thereof, as well as all codes, ordinances, resolutions, rules and regulations of the city heretofore or hereafter adopted or established during the entire term any license granted under this code, which are relevant and relate to the construction, maintenance and operation of a utility system or the provision of utility services.
- F. Application to Existing Ordinance and Agreements. To the extent that this chapter is not in conflict with and can be implemented with existing ordinances and franchise agreements, this code shall apply to all existing ordinances and franchise agreements for use of the public right-of-way for utility facilities.