

Title 18

TELECOMMUNICATIONS

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Chapter 18.04

GENERAL PROVISIONS

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18.04.010 Findings.

The city council of the city of Mount Vernon hereby finds:

A. That the city’s public rights-of-way and other city real property constitutes a public investment in valuable property, which has been acquired and maintained by the city over many years at taxpayer expense;

B. That such public property is critical to the travel of persons and the transport of goods in the business and social life of the community; is used by the city and other government agencies to provide services to protect public safety, critical utility services to its citizens, including electric, water and wastewater utility services; and is used by the city to provide telecommunications and other services to itself and other government agencies;

C. That such public property can be partially occupied by private companies and other entities for facilities used in the delivery, conveyance, and transmission of 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;

D. That such public property is 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 other ill effects, including degradation, upon the public from the construction, emplacement, relocation, and maintenance of telecommunication facilities in the public rights-of-way;

E. That it is in the interest of the public to permit use of the public rights-of-way and to establish standards for use of the public rights-of-way for

operators of telecommunications systems in a manner which:

1. Protects the public interests in the use of the limited physical capacity of the public rights-of-way;

2. Protects the public and the city from any harm resulting from such private use of public rights-of-way, and preserves and improves the aesthetics of the community;

3. Protects the city’s interests in using the public rights-of-way for the provision of services to the public, other governmental agencies and itself;

4. Protects and carries out the regulatory authority of the city and recovers administrative costs, in a manner consistent with federal and state law; and

5. Compensates the city for the fair and reasonable value of such property used, and for ongoing costs associated with the use of that property, insofar as possible. (Ord. 2959 § 1, 1999).

18.04.020 Purpose.

The purpose and intent of this title is to:

A. Establish guidelines and policies through which the city will permit and manage access to the limited physical capacity of the available public rights-of-way of the city for telecommunications purposes on a competitively neutral basis;

B. Assure that the city can continue to fairly and responsibly protect the public health, safety, and welfare;

C. Enable the city to discharge its public trust responsibilities consistent with rapidly evolving federal and state regulatory policies, industry competition, and technological development;

D. Establish a clear and nondiscriminatory local policy, local guidelines, standards, and time frames for use of the public rights-of-way by telecommunications providers;

E. Assure that all telecommunications systems and private telecommunications systems within the city comply with the ordinances, rules, and regulations of the city;

F. Assure that the city’s current and ongoing costs of granting and regulating private access to and use of the public rights-of-way are fully paid by those seeking access and using such public rights-of-way, and assure that the taxpayers secure fair and reasonable compensation, in a nondiscriminatory manner, for permitting private use of the public rights-of-way in a manner consistent with state and federal law;

G. Encourage economic development within the city while preserving aesthetic and other com-

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munity values and preventing the proliferation of above-ground facilities;

H. Ensure the ability of the city to obtain sufficient information from persons subject to the provisions of this title to enable the city to make effective decisions regarding access to city rights-of-way and the effective management of activity in the rights-of-way; and

I. Conserve the limited physical capacity of the public rights-of-way held in public trust by the city. (Ord. 2959 § 1, 1999).

18.04.030 Definitions.

For the purpose of this title, the following words and phrases shall have the meanings given herein, unless the context of the sentence in which they are used shall clearly 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. Unless otherwise expressly stated, words not defined in this title shall be construed consistently with Title 47 of the United States Code, and with the constitution and statutory law of the state of Washington. 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 denominated, and include laws, ordinances and regulations now in force or hereinafter enacted or amended.

“Applicant” means any person or entity that applies for any right-of-way license, franchise, lease, or other permit pursuant to this title.

“Application fee” means the charge specified in MVMC 18.08.020, and designed to recover the city’s costs in processing applications for any right-of-way license, facilities lease, or other permit pursuant to this title.

“Cable service” for the purpose of this title shall have the same meaning provided by the Cable Communications Policy Act of 1984, 47 U.S.C. Sections 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, as further amended from time to time.

“Cable system” means a facility consisting of a set of closed transmission paths and associated sig-

nal generation, reception, and control equipment that is designed to provide cable service.

“City” means the city of Mount Vernon, a municipal corporation of the state of Washington, in its present incorporated form or in any later reorganized, consolidated, enlarged, or reincorporated form.

“City property” means and includes all real property, utility poles, conduits, 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 franchising as provided in this title.

“Construction, operation or repair,” and also similar formulations of these terms, mean the named actions interpreted broadly, encompassing but not limited to, installation, extension, maintenance, replacement of components, relocation, undergrounding, grading, site preparation, adjusting, testing, make-ready, and excavation.

“Director” means the public works director of the city of Mount Vernon.

“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.

“Facilities lease” or “lease” means the legal authorization to possess, occupy, and use discrete city property for a specified term and under the specified conditions as agreed to between the city and the lessee.

“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.

“Fiber optics” means the technology of guiding and projecting light for use as a communications medium.

“Franchise” shall mean the initial authorization, or renewal thereof, granted by the city to a carrier or operator of a telecommunications system under this title giving the carrier or operator the nonexclusive right to occupy the space in, under, over or across public rights-of-way of the city to provide title service within a franchise area. Any franchise shall be issued in the form of an ordinance of the city, and must be accepted by the franchisee to become effective in the time and manner specified by the city, the Mount Vernon Municipal Code, or

the franchise ordinance. Such franchise shall not include or be a substitute for:

A. 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;

B. 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, construction and street cut permits;

C. Any permits or agreements for occupying any other property of the city or private entities to which access is not specifically granted by the franchise 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; or

By way of example, and without limiting the foregoing, this title 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, franchises, or agreements for that purpose, as may be required by the city.

“Franchise area” means the area of the city that a franchisee is authorized to serve by the terms of its franchise or by operation of law.

“Franchise territory” means the entire area of the city in its present incorporated form or in any later reorganized, consolidated, enlarged, or re-incorporated form, within which the city is authorized to grant franchises, right-of-way licenses or facilities leases.

“Franchisee” means the person, firm or corporation to whom or which a franchise, as defined in this section, is granted by the council under this title and the lawful successor, transferee or assignee of said person, firm or corporation subject to such conditions as may be defined in this title.

“Grantee” as used generally herein shall mean the holder of a right-of-way license, or facilities lease.

“Gross revenues” for purposes of this title include all revenue, including funds used to pay franchise fees, from the provision of telecommunications services in the city via the 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; provided further, that an 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 title; provided, that lessee or like provider submits a certificate to the telecommunications 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.

“license” or “right-of-way license” refers to the legal authorization to use the public rights-of-way to construct, maintain or repair a telecommunications facility or a telecommunications system. The term license or right-of-way license shall not mean or include:

A. 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;

B. Any 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 as defined in the city’s street excavations ordinance, Chapter 12.16 MVMC;

C. Any permits or agreements for occupying any other property of the city or 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 poles, conduits, other structures, or railroad easements, whether owned by the city or a private entity; or

D. 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, as by a facilities lease.

“Licensee” means the person, firm or corporation to whom or which a license, as defined in this section, is granted by the council under this title and the lawful successor, transferee or assignee of said person, firm or corporation subject to such conditions as may be defined in this title.

“Open video system” or “OVS” refers to a facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide title 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 may be hereafter amended.

“Open video system service” means video programming by means of an open video system.

“Overhead facilities” refers to electric utility and telecommunications facilities located above the surface of the ground, including the under-

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ground supports and foundations for such facilities.

“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 not the city.

“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.

“Public right-of-way” or “public way” means and includes the public streets and easements which, under city ordinances or applicable laws, the city has authority to grant franchises, licenses, or leases for use thereof, or has regulatory authority thereover, and as may be more specifically defined in the franchise, license, or lease granting any right to or use thereof. Public ways for the purpose of this title 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 public Way such as utility poles, light poles and bridges.

“Telecommunications carrier” or “carrier” means every person that owns or controls plant, equipment or property within the city, used or to be used for the purpose of offering telecommunications service.

“Telecommunications facilities” means all of the plant, equipment, fixtures, appurtenances, antennas, and other facilities necessary or convenient to furnish and deliver telecommunications service, including, but not limited to poles with or without crossarms, wires, lines, conduits, cables, communications and signal lines and equipment, braces, guys, anchors, vaults, and all attachments, appurtenances, and appliances necessary or incidental to the distribution and use of telecommunications service.

“Telecommunications provider” or “provider” means every person owning, operating, or managing any facilities used to provide telecommunications service for hire, sale, or resale to the general public. The term includes the legal successor to any such person.

“Telecommunications service” means the transmission for hire of information in electronic or optical form, including, but not limited to, voice,

video, or data. Telecommunications services include telephone service but does not include title service, open video system service or over-the-air broadcasts to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto.

“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 title system is not a telecommunications system to the extent that it provides only title service; an open video system is not a telecommunications system to the extent that it provides only video services.

“Transfer” means any transaction in which:

A. There is any change, acquisition, or transfer of working control of the franchisee or right-of-way license holder; or

B. The rights and/or obligations held by the franchisee or right-of-way license holder under the franchise or right-of-way license are transferred, sold, assigned, or leased, in whole or in part, to another party. It will be presumed that any transfer or cumulative transfer of voting interest of 20 percent or more is transfer of working control within the meaning of this paragraph.

“Underground facilities” means utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for overhead facilities.

“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.

“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 public rights-of-way of the city and used or to be used for the purpose of providing utility and telecommunications services.

“Working control” as used herein means the ability to affect management decisions. It will be

presumed that voting interest of 20 percent or more is considered working control within the meaning of this title. (Ord. 2959 § 1, 1999).

18.04.040 Occupation license required.

Except as otherwise provided in this title, or except as specifically exempted by Chapter 5.48 MVMC, any person engaged in the business of telecommunications service of any kind originating or terminating in the city shall first obtain an occupation license from the city pursuant to Chapter 5.48 MVMC. (Ord. 2959 § 1, 1999).

18.04.050 Right-of-way license required for telecommunications service.

Except as otherwise provided herein, any person who occupies, or desires to occupy for the first time, any public right-of-way of the city for the purpose of providing telecommunications service shall first obtain a right-of-way license pursuant to the provisions of this title. The fact that a particular franchised or licensed facility may be used for multiple purposes does not obviate the need to obtain a franchise for other purposes. By way of illustration and not limitation, an operator of a title system must obtain a cable franchise and, should it intend to provide telecommunications services over the same facilities, must also obtain a right-of-way license. (Ord. 2959 § 1, 1999).

18.04.060 Rules and regulations by the city.

A. In addition to the inherent powers of the city to regulate and control any authorization, license, or lease it issues, the authority granted to it by the Cable Act and the Telecommunications Act of 1996, and those powers expressly reserved by the city, or agreed to and provided for in any authorization, 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. Except as provided in this chapter, the foregoing does not allow for amendment by the city of material terms of any authorization, license, or lease it issues without the consent of the grantee.

B. The city reserves the right to delegate administrative functions, including lease administration to a designated agent, consistent with the provisions of this title.

C. The director may adopt such administrative rules as the director determines to be necessary and convenient in the proper administration of this title. (Ord. 2959 § 1, 1999).

18.04.070 Facilities lease required.

A. Any person who occupies or desires to locate telecommunications equipment on or in any city property, real or personal, including city-owned physical facilities, shall first obtain from the city a facilities lease pursuant to Chapter 18.06 MVMC.

B. The city council may, in its sole discretion, approve facilities leases for the location of telecommunications facilities and upon city property, on the terms and conditions as determined by the city council. Neither this section, nor any other provision of this title, shall be construed to create an entitlement or vested right in any person. (Ord. 2959 § 1, 1999).

18.04.080 Construction permits required.

Except as otherwise provided herein, the holder of a right-of-way license or facilities lease granted pursuant to this title shall obtain such other permits as may be required by the city, including, but not limited to, building permits, electrical permits, and right-of-way construction permits prior to commencing any construction operations within the city. No work, construction, development, excavation, or installation of any equipment or facilities for which a permit is required under Chapter 12.16 MVMC shall take place within the public rights-of-way or upon city property until such time as the right-of-way construction permit is issued, except as may be provided in the city's administrative rules and procedures. (Ord. 2959 § 1, 1999).

18.04.090 Effect of other laws.

A. Nothing in this title shall be deemed to create an obligation upon any person for which the city is forbidden to require pursuant to federal, state, or other law.

B. No reference herein, or in any franchise or right-of-way license shall be deemed to be a representation or guarantee by the city that its interest or other right to control the use of such property is sufficient to permit its use for telecommunication purposes, and a franchise or right-of-way license shall be deemed to grant no more than those rights which the city may have the undisputed right and power to give. (Ord. 2959 § 1, 1999).

18.04.100 Revocation of lease or license.

The revocation of a right-of-way license or facilities lease for one particular service in and of itself will not affect the authority of a license holder or lessee to continue to occupy the rights-of-way to provide services for which it holds other licenses or leases. (Ord. 2959 § 1, 1999).

18.04.110 Transitional provisions.

A. Persons Operating without a Right-of-Way License. Any person operating any telecommunications facility which requires a right-of-way license under this title shall have 90 days from the effective date of the ordinance codified in this title to file the necessary applications for a right-of-way license under this title. Any person timely filing such an application shall not be subject to city remedies under Chapter 18.12 MVMC for failure to have such a right-of-way license as long as said application remains pending; provided, however, that nothing herein shall relieve any person of any liability for failure to obtain any right-of-way license, or other permit or approval required under other provisions of the Mount Vernon Municipal Code, and nothing herein shall prevent the city from requiring removal of any facilities installed in violation of the Mount Vernon Municipal Code.

B. Persons Holding Right-of-Way Licenses. Any person holding an outstanding right-of-way license from the city for a telecommunications system to provide specified services or for a private telecommunications system may continue to operate under the existing right-of-way license to the conclusion of its present term (but not any renewal or extension thereof) with respect to those activities expressly authorized by the right-of-way license; provided, however, that such license holder may elect at any time to apply for a superseding right-of-way license under this title and must seek additional right-of-way licenses to provide other services; and provided further, that such person shall be subject to the other provisions of this title to the extent permitted by law; provided further, that right-of-way licenses that are revocable at will may be revoked by the city, and the right-of-way use holder may be required to obtain a new right-of-way license under this title.

C. Persons Holding Leases for Property. 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 title, may continue to occupy such property to the conclusion of the term of the lease (but not any renewal or extension thereof), in accordance with the terms of such lease; provided, however, that such lessee may elect at any time to apply for a superseding lease, or right-of-way license under this title. (Ord. 2959 § 1, 1999).

Chapter 18.06**ADMINISTRATIVE PROVISIONS**

Sections:

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- 18.06.030 Term.
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- 18.06.050 Nonexclusive grant.
- 18.06.060 Rights granted.
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18.06.010 Applications.

A. Right-of-Way License Application.

1. Required Information. Any person that desires a right-of-way license pursuant to this title shall file an application with the city, which application shall be made on the city's forms, and shall include the following information and materials:

a. The identity of the applicant and persons who are authorized by the applicant to exercise control over the applicant's operations within the city;

b. A description of the telecommunications services that are or will be offered or provided by the applicant over its telecommunications facilities. Only general, nonproprietary information need be provided;

c. Whether the applicant intends to provide title service, open video system service, or other video programming service, and sufficient information to determine whether such service is subject to the city's applicable cable franchising ordinances and regulations, in which case a separate cable television franchise from the city must be obtained. Only general, nonproprietary information need be provided;

d. At the time of the application, maps of the applicant's facilities intended to be located within the city's public rights-of-way, or on city property. The director shall have the discretion to prescribe the format and/or media of the maps, consistent with city codes and policies. To the extent compatible with the city's software, the grantee may provide maps in a computer readable format. The maps shall be in sufficient detail to identify:

i. The location and route requested for applicant's proposed facilities;

ii. The specific trees, structures, improvements, facilities and obstructions, if any, situated within the public right-of-way or on city property that the applicant proposes to temporarily or permanently remove or relocate; provided, that trees with a caliper of less than six inches at a point three feet above grade need not be indicated;

e. A description of the city's existing available facilities, such as utility poles, conduits, or vaults, that the applicant proposes to use to provide such telecommunications services. Use of the city's facilities is subject to applicable city regulations and the facilities leases provided in Chapter 18.10 MVMC;

f. A preliminary construction schedule and completion date;

g. Copies of any applicable certificates that authorize the applicant to provide telecommunications services as may be required by federal or state law; and

h. Such other information as the director may reasonably require as it relates to the use of the public rights-of-way.

2. Deposits or Charges and Application Fees. The application shall be accompanied by all deposits or charges and application fees required pursuant to this title.

3. Proprietary Information. In the event any information required by the city is considered by the applicant to be a business or trade secret and/or proprietary information within the meaning of the Public Records Act, Chapter 42.17 RCW and/or the Uniform Trade Secrets Act, Chapter 19.108 RCW, then such information shall be provided to the city in a separate envelope clearly marked "Proprietary information: DO NOT DISCLOSE" on the exterior of the envelope. The city will exercise good faith efforts to protect the confidentiality of the business or trade secrets or proprietary information that are designated as such.

a. In the event a public disclosure request is made for information marked as proprietary, and if the city attorney determines that the information may be subject to being disclosed, or if the city determines that the information should be disclosed in connection with its enforcement of any provision of this title, or in the exercise of its police or regulatory powers, then the city shall make reasonable efforts to immediately notify the applicant of the applicant's opportunity to seek a protective order from a court with appropriate jurisdiction. Any means of notification may be utilized that is reasonably calculated by the city to reach the appli-

cant, including notices by facsimile, telephone, or electronic medium. It is the sole responsibility of the applicant to provide the city with current information to allow the city to contact the applicant in a timely fashion.

b. In the event that the applicant does not obtain a protective order within 10 days or, if shorter, the time limitation set forth in state law, then the city may disclose the information. It shall be a condition of any permit, license, or lease issued pursuant to this title, and any application therefor, that the applicant shall reimburse and indemnify the city for all costs and damages that may be awarded or assessed by the court for any actions the city took at the request of the applicant, in addition to the city's reasonable attorney's fees.

c. In lieu of the foregoing disclosure procedures set forth in subsections (A)(3)(a) and (b) of this section, the proper city officials may enter into a supplemental agreement providing for the protection, and disclosure, of such trade secrets and proprietary information in accordance with the disclosure provisions set forth in RCW 80.04.095; provided, that the applicant agrees to indemnify, defend, and hold the city harmless from any costs and expenses, including reasonable attorney's fees, incurred by the city in resisting disclosure of the information identified as trade secrets and/or proprietary information by the applicant.

4. Applications for Transfer. An application for a transfer of a license to another person must contain the same information required by subsection (A)(1) of this section, except that, if the transferor submitted an application under subsection (A)(1) of this section, to the extent information provided by the transferor under subsection (A)(1) of this section remains accurate, the transferee may simply cross-reference the earlier application.

B. Facilities Lease Application.

1. Any person that desires to obtain the city's approval of a facilities lease for telecommunications facilities pursuant to this chapter shall file a lease application with the city which application shall be made on the city's forms, and which shall include the following information:

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 Chapter 17.100 MVMC, Wireless Telecommunications Towers and Antennas, if applicable.

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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 if reasonably known, 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;

2. All deposits or charges and application fees required pursuant to this title. (Ord. 2959 § 1, 1999).

18.06.020 Determination by the city.

A. Within 90 days after receiving a complete application under MVMC 18.06.010, the director shall issue a written recommendation to the city council that the application be granted or denied in whole or in part; provided, that if the director requests additional information from the applicant pursuant to MVMC 18.06.010, then in that event the 90-day time period shall be suspended until such time as the requested information is provided to the director; and provided further, that the 90-day review period shall not be construed by the applicant as a guarantee, warranty, or affirmation that the city will complete review within the 90-day time period.

B. If the director recommends that an application be granted, the director's written recommendation to the city council shall be accompanied by appropriate legislation granting the same, for approval and adoption by the council.

C. If the director recommends that an application be denied, the director's written recommendation to the city council shall include the reasons for denial.

D. The recommendation to grant or deny an application shall be based upon the following factors:

1. Whether the applicant has received all requisite permits and authorizations from any state or local agency with jurisdiction over the construction activities proposed by the applicant;

2. The capacity of the public ways to accommodate the applicant's proposed facilities;

3. The capacity of the public ways to accommodate additional utility facilities if the authorization is granted;

4. The disruption, if any, of public or private facilities, improvements, service, or landscaping if the authorization is granted;

5. The anticipated consequences to public safety of disrupting travel within the public rights-of-ways;

6. The effect, if any, on public health, safety and welfare after the completion of construction if the authorization is granted; provided, that the potential effects of electromagnetic radiation shall not be considered;

7. The availability of alternate routes and/or locations for the proposed facilities; and

8. Such other factors as may demonstrate that the grant to use the public ways will adversely affect the public health, safety, and welfare.

E. The director's recommendation to the city council shall be placed on the next available city council agenda; provided, that the city council may continue the matter to a later date.

F. The city council may accept, reject, or modify the director's recommendation.

G. An applicant shall not be issued a license or lease if it files or in the previous three years filed materially inaccurate or misleading information in an application, or intentionally withheld information that the applicant lawfully is required to provide.

H. In the case of a transfer, any approval will also be subject to a determination that:

1. The transferee will agree to be bound by all the conditions of the license or lease, and will assume all the obligations of its predecessor; and

2. Any outstanding compliance and compensation issues will be resolved or preserved to the satisfaction of the city prior to the effective date of the transfer. (Ord. 2959 § 1, 1999).

18.06.030 Term.

A. 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 years, subject to renewal as provided in this title.

B. Facilities Lease. Unless otherwise specified in a lease agreement, a facilities lease granted hereunder shall be valid for a term of one year, subject to annual renewal as provided in this title. (Ord. 2959 § 1, 1999).

18.06.040 Agreement.

No authorization 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 public rights-of-way of the city. (Ord. 2959 § 1, 1999).

18.06.050 Nonexclusive grant.

No right-of-way license granted under this title shall confer any exclusive right, privilege, license or franchise to occupy or use the public rights-of-way or property of the city for delivery of telecommunications services or any other purposes. (Ord. 2959 § 1, 1999).

18.06.060 Rights granted.**A. General.**

1. No right-of-way license or facilities lease granted under this chapter shall convey any right, equitable or legal title, or interest in the public rights-of-way or city property, but shall be deemed a right-of-way license or facilities lease only to use and occupy the public rights-of-way or city property for the limited purposes and on the terms stated in the agreement entered pursuant to MVMC 18.06.040, and subject to the limitations in this title. Further, no right-of-way license or facilities lease shall be construed as a warranty of title.

2. Every license or lease shall be:

a. Interpreted in a manner that conforms to the purposes of this title;

b. Deemed to provide for forfeiture under the circumstances set forth in the provisions of this title and any agreement granted hereunder; and

c. Construed to exclude the grant of any rights in any easement granted to the city for any purpose inconsistent with telecommunications purposes. (Ord. 2959 § 1, 1999).

18.06.070 Facilities lease provisions.

A. Interference with Other Users. No facilities lease shall be granted under this chapter unless it contains a provision substantially similar to the following:

The city may have previously entered into leases with other tenants for their equipment and antennae facilities on the same real property as that leased by lessee, and the lessee's possessory interest extends only to the discrete area occupied by lessee. Lessee acknowledges that the city is

also leasing the city property for the purposes of transmitting and receiving telecommunications signals from the city property. The city makes no warranty that other telecommunications equipment, whether in place at the time of the execution of the lease or installed during the term of the facilities lease, is in compliance with applicable law and will not interfere with lessee's equipment, and the city shall not in any way be 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 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 immediately eliminate any radio or television interference caused to city-owned facilities or surrounding residences at lessee's own expense and without installation of any additional equipment or devices on city-owned equipment without the city's consent.

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.

By executing this lease, lessee warrants that its facilities and equipment are presently in compliance with all applicable law, including and regulations promulgated by the Federal Communications Commission, and that lessee shall maintain such compliance at lessee's expense.

B. Miscellaneous Provisions.

1. In each facilities lease, the city shall specifically disclaim any warranties, implied or otherwise, that the premises are fit for the lessee's intended use, or for any other purpose.

2. In each facilities lease, the city reserves the right to inspect, make repairs, supply services, and show other prospective tenants the facilities.

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To this extent, the lessee waives its right to quiet enjoyment of the premises.

3. In each facilities lease, the lessee covenants that the premises will be used solely for the use and physical support of telecommunications facilities and associated equipment.

4. In each facilities lease, the lessee shall covenant that it will not create or permit to exist a nuisance on the demised premises.

5. In each facilities lease, the lessee shall consent to the lessor's efforts to repair and maintain the property, as determined necessary in the lessor's sole judgment.

6. In the event lessee claims constructive eviction, lessee's sole remedy shall be termination of the facilities lease, together with repayment of any advance rents and/or deposits.

C. Ownership and Removal of Improvements.

1. No facilities lease shall be granted under this chapter unless it contains a provision which states that all buildings, landscaping, and all other improvements, excepting only telecommunications equipment, shall become the property of the city upon expiration or termination of the lease; provided, that the parties may mutually agree to some other disposition of such property which agreement shall be in writing. In the event that telecommunications equipment is 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 90 days' written notice from the city, unless agreed to otherwise by the city.

2. 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 30 days after receiving notice from the city requiring removal of the improvements.

D. Cancellation of Lease by Lessee.

1. 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 30 days' prior written notice to the city.

2. 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 120 days' written notice to the city. However, no prepaid rent shall be refundable. (Ord. 2959 § 1, 1999).

18.06.080 Amendment.

A. Except as provided within an existing right-of-way license or lease agreement, a new application shall be required of any person who desires to expand, modify, or relocate its telecommunications facilities in public rights-of-way or city property in any manner not authorized in the right-of-way license or lease agreement previously granted under this title.

B. If ordered by the city to locate or relocate its telecommunications facilities in public rights-of-way not included in a previously granted right-of-way license or lease agreement, the city shall grant an amendment to the right-of-way license or lease agreement without further application. (Ord. 2959 § 1, 1999).

18.06.090 Renewal.

A grantee that desires to renew its right-of-way license or lease agreement under this chapter for an additional term shall, not more than 180 days nor less than 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 MVMC 18.06.010;

B. Any information specifically required by the existing right-of-way license or lease agreement between the city and the grantee;

C. All deposits or charges and application fees required pursuant to this title. (Ord. 2959 § 1, 1999).

18.06.100 Renewal determination.

Within 90 days after receiving a complete application for renewal of an existing right-of-way or facilities lease, the director shall issue a written recommendation to the city council that the renewal be granted or denied in whole or in part. The renewal of a facilities lease shall be within the sole discretion of the city council, and no facilities lease shall be construed so as to contain an option for an additional term. If the renewal application is denied, the written determination shall include the reasons for denial. The decision to grant or deny a renewal application shall be based upon the following standards, in addition to the standards set forth in MVMC 18.06.020:

A. The continuing capacity of the public rights-of-way to accommodate the applicant's existing facilities; and

B. The applicant's compliance with the requirements of this title and the existing right-of-way license or facilities lease. (Ord. 2959 § 1, 1999).

18.06.110 Obligation to cure as a condition of renewal.

No right-of-way license or lease agreement shall be renewed until any ongoing violations or defaults in the grantee's performance under the right-of-way license or lease agreement, or of the requirements of this title, have been cured, or a plan detailing the corrective action to be taken by the grantee has been approved by the city. (Ord. 2959 § 1, 1999).

Chapter 18.08

FEES AND COMPENSATION

Sections:

- 18.08.010 Payment of fees and compensation to the city.
- 18.08.020 Application and review fee.
- 18.08.030 Right-of-way construction permit fee.
- 18.08.040 Compensation for use of rights-of-way.
- 18.08.050 Compensation for city property occupancy and use, and facility leases.
- 18.08.060 General rules for payment of fees and compensation.
- 18.08.070 Regulatory fees and compensation not a tax.

18.08.010 Payment of fees and compensation to the city.

A. It is the purpose of this chapter to ensure that the city, as far as possible, is fairly 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 that the city is compensated for expenses arising from the use of those public rights-of-way and city property.

B. 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 title.

C. The fees, charges and fines provided for in this title and any compensation charged and paid for the public ways provided for herein, whether fiduciary or in-kind, are separate from, and additional to, any and all federal, state, local, and city taxes as may be levied, imposed or due from a telecommunications provider, its customers or subscribers or on account of the lease, sale, delivery or transmission of telecommunications services. (Ord. 2959 § 1, 1999).

18.08.020 Application and review fee.

A. Any applicant for a right-of-way license or facilities lease, or a renewal, transfer, or modification thereof, pursuant to this title shall make an initial deposit with the city, of one-half of one percent of the estimated construction cost of the applicant's proposed facilities, as certified by the applicant, up to a maximum of \$5,000. The minimum deposit shall be \$250.00.

B. The deposit shall be made as part of the application filed pursuant to this title and shall be

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used to reimburse the city for its actual administrative expenses incurred in receiving, reviewing, processing, considering, denying, or approving the issuance, renewal, transfer, or modification of a right-of-way license, or facilities lease. The city may, as costs are incurred, draw upon the deposit to recover its administrative costs, including, but not limited to, the reasonable cost of outside consultants retained by the city related to the city's consideration and processing of a license or facilities lease. The director, in consultation with the director of finance, may establish an alternative billing methodology calculated to recover the city's costs while minimizing administrative expenses.

C. The director, at any time, may require the applicant to deposit additional sums if it appears to the director that the initial deposit or subsequent deposits will be exhausted prior to the final action by the city relating to the consideration by the city of an application for issuance, renewal, transfer, or modification of a right-of-way license or facilities lease. The applicant will not be entitled to further consideration by the city of its requested action until such time as the additional deposit required by the director has been deposited with the city.

D. In the event the amount of the deposit of an applicant is in excess of the amount of the administrative expenses of the city related to the action requested, then the applicant shall be entitled to a return of any such excess amount at such time as the final action by the city is completed.

E. An applicant whose right-of-way license or facilities lease application has been withdrawn, abandoned or denied shall, within 60 days of its application and review fee payment, be refunded the balance of its deposit under this section, less:

1. Fifty dollars nonrefundable filing charge; and
2. All other costs and expenses incurred by the city in connection with the application. (Ord. 2959 § 1, 1999).

18.08.030 Right-of-way construction permit fee.

A. Prior to actual construction, every applicant for a right-of-way license shall obtain a right-of-way construction permit from the city, and pay the appropriate permit fees pursuant to the city's street excavations ordinance, Chapter 12.16 MVMC.

B. All grantees shall, within 30 days after written demand, reimburse the city for any and all costs the city reasonably incurs in response to any emergency involving the grantee's telecommunications facilities.

C. All grantees shall, within 30 days after written demand, reimburse the city for the grantee's proportionate share of all expenses incurred by the city in planning, constructing, installing, repairing or altering any city facility as a result of the construction or the presence in the public right-of-way of the grantee's telecommunications facilities. (Ord. 2959 § 1, 1999).

18.08.040 Compensation for use of rights-of-way.

Each authorization granted pursuant to this chapter is subject to the city's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for the right to occupy and use the public ways of the city granted under such authorization; provided, that nothing in this chapter shall prohibit the city and a grantee from agreeing to the compensation to be paid; provided further, that the compensation required from any telecommunications provider or carrier engaged in the "telephone business," as defined in RCW 82.04.065 shall be consistent with RCW 35.21.860. (Ord. 2959 § 1, 1999).

18.08.050 Compensation for city property occupancy and use, and facility leases.

A. Each facilities lease granted under this chapter shall be 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, that nothing in this title shall prohibit the city and a lessee from agreeing to the compensation to be paid.

B. The compensation for a facilities lease shall be based on the area of the property leased and its fair market value as determined by city policy.

C. All facilities lease payments shall be submitted to the city finance director with a reference to the city's ordinance or resolution number authorizing the execution of the lease or renewal, together with a clear and obvious notation substantially in the following form: facilities lease payment for the period: day/month/year through day/month/year.

D. It is the intent of the city that no person to which a facilities lease has been granted shall hold over after the expiration of the facilities lease term without the explicit approval of the city. To this end, the director of finance shall not accept any lease payments for any period or term that is beyond that period or term that has been authorized by the city council; provided, that this provision shall not be construed as a limit to the city council's authority to designate any person to authorize

the execution of any lease or leases. (Ord. 2959 § 1, 1999).

18.08.060 General rules for payment of fees and compensation.

A. Subject to the provisions of MVMC 18.08.050, compensation for facilities leases shall be payable in advance of the effective date of the lease and on or before January 31st of each calendar year. Any payments received after the due date shall include interest on the amount owed computed at the rate of one percent per month or at the maximum rate allowed by law, on the balance due, compounded monthly.

B. No acceptance by the city of any fees shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such fee payment be construed as a release of any claim the city may have for additional sums due. (Ord. 2959 § 1, 1999).

18.08.070 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 public rights-of-way and city property provided for in Chapters 18.06 and 18.08 MVMC, 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. Such fees and costs shall include actual costs, together with an amount calculated to reimburse the city for overhead, and when so calculated, such costs shall be presumed to be reasonably related to the actual costs incurred by the city in managing the public rights-of-way. (Ord. 2959 § 1, 1999).

Chapter 18.10

CONDITIONS OF LICENSES AND FACILITY LEASES

Sections:

- 18.10.010 Purpose.
- 18.10.020 Coordination of construction activities.
- 18.10.030 Reservation of powers.
- 18.10.040 Acceptance.
- 18.10.050 Safety requirements.
- 18.10.060 Insurance.
- 18.10.070 Performance bond.
- 18.10.080 General indemnification.
- 18.10.090 Location of facilities.
- 18.10.100 Maintenance of facilities.
- 18.10.110 Relocation or removal of facilities.
- 18.10.120 Removal of unauthorized facilities.
- 18.10.130 Emergency removal or relocation of facilities.
- 18.10.140 Abandonment of facilities.
- 18.10.150 Failure to remove or relocate.
- 18.10.160 Damage to grantee’s facilities.
- 18.10.170 Damage to property.
- 18.10.180 Interference with city property and the public rights-of-way.
- 18.10.190 Tree trimming.
- 18.10.200 As-built maps.
- 18.10.210 Assignments or transfers of grant.
- 18.10.220 Transactions affecting control of grant.
- 18.10.230 Revocation or termination of grant.
- 18.10.240 Notice and duty to cure.
- 18.10.250 Standards for revocation or lesser sanctions.
- 18.10.260 Incorporation by reference.

18.10.010 Purpose.

The purpose of this chapter is to set forth certain terms and conditions which are common to all right-of-way licenses and facilities leases. Except as otherwise provided in this title or in such a right-of-way license or facilities lease, the provisions of this chapter apply to all such right-of-way licenses facilities leases approved or granted by the city council. (Ord. 2959 § 1, 1999).

18.10.020 Coordination of construction activities.

A. By February 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. Such schedule shall generally indicate those construction activities that

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will entail excavation or tunneling within the public rights-of-way.

B. Each grantee shall meet with the city, other grantees, and users of the public rights-of-way annually or as determined by the director, to coordinate construction in the public rights-of-way.

C. All construction locations, activities, and schedules shall be coordinated, as ordered by the director, to minimize public inconvenience, disruption, or damages.

D. All grantees, before commencing any construction in the public rights-of-way, shall comply with all regulations of Chapter 19.122 RCW, the One Call Locator Service.

E. If directed by the city, at least 48 hours prior to entering private property or streets or public easements adjacent to or on such private property to perform new construction or reconstruction involving excavation or tunneling, a notice indicating the nature and location of the work to be performed shall be physically posted, at no expense to the city, upon the affected property by the grantee. A door hanger may be used to comply with the notice and posting requirements of this section. A grantee shall make a good faith effort to comply with the property owner/resident's preferences, if any, on location or placement of underground installations (excluding existing cable paths) consistent with sound engineering practices; provided, however, that nothing in this chapter shall permit a grantee to unlawfully enter or construct improvements upon the property or premises of another.

F. The city reserves the right, in the event of disposing of city property, to require all grantees to provide written confirmation:

1. Sufficient for customary land survey and land title insurance purposes concerning the location of their facilities in public rights-of-way; and

2. Disclaiming any interest in public rights-of-way where the grantees have no authority to construct or operate their facilities. (Ord. 2959 § 1, 1999).

18.10.030 Reservation of powers.

In addition to the inherent powers of the city to regulate and control any license or lease issues, and those powers expressly reserved by the city, or agreed to and provided for in any license 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. (Ord. 2959 § 1, 1999).

18.10.040 Acceptance.

A. No license or lease granted pursuant to the provisions of this title shall become effective unless and until the ordinance or resolution granting the same has become effective.

B. Within 30 days after the effective date of the ordinance or resolution granting a right-of-way license, or within such extended period of time as the council in its discretion may authorize, a grantee shall file with the city attorney its written acceptance of any license granted in a form satisfactory to the city attorney, together with the bonds and insurance policies required by this chapter.

C. Within 30 days after the effective date of the ordinance or resolution granting a facilities lease, or within such extended period of time as the council in its discretion may authorize, a grantee shall file with the city attorney an executed lease, together with the bonds and insurance policies required by this chapter.

D. In accepting any right-of-way license 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 it agrees to comply with all applicable general laws enacted by the city pursuant to such power. (Ord. 2959 § 1, 1999).

18.10.050 Safety requirements.

A. A grantee, 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 public rights-of-way or places of a license 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.

B. The city reserves the general right to see that the system of a grantee is constructed and maintained in a safe condition. If a violation of the National Electrical Code or other applicable regulation is found to exist by the city, the city will notify the grantee, and establish a reasonable time for the 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 the grantee.

C. Notwithstanding the foregoing, the city may, without providing advance notice to a grantee, take immediate action to safeguard the public safety in those situations in which the city determines that an immediate hazard exists; provided, that the city shall exercise reasonable efforts to notify the grantee either prior to, concurrently with, or immediately after taking such safeguarding action. In all such instances the city shall make reasonable efforts to protect the grantee's facilities; provided, that the health and safety of the public, in the city's sole discretion, shall always be of paramount concern.

D. Any person, and the officers, directors, managing agents, or partners of any corporation, firm, partnership or other organization or business failing to correct deficiencies within a reasonable time as established by the city pursuant to subsection (B) of this section shall be subject to a civil penalty in an amount not less than \$100.00 nor more than \$1,000 for each day in which the violation occurs or remains, from the date set for compliance until compliance with the order is achieved. The penalty imposed by this section shall be collected by civil action brought by the city. The mayor or designee shall notify the city attorney in writing of the name of any person subject to the penalty, and the city attorney shall, with the assistance of the mayor or designee, take appropriate action to collect the penalty.

E. Any person, and the officers, directors, managing agents, or partners of any corporation, firm, partnership or other organization or business violating or failing to comply with any of the applicable provisions of subsection (B) of this section, and who has had a judgment entered against him or her pursuant to subsection (B) of this section within the past five years shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding \$5,000 or be imprisoned for a term not exceeding one year or be both fined and imprisoned.

F. In addition to any penalty which may be imposed by the city, any person violating or failing to comply with any of the provisions of this chapter shall be liable for all damage to public or private property arising from such violation, including the cost of restoring the affected area to its condition prior to the violation. (Ord. 2959 § 1, 1999).

18.10.060 Insurance.

A. Unless otherwise provided in a license or lease agreement, each grantee, as a condition of its license, franchise or lease, shall secure and maintain the following insurance policies with insurers

licensed to do business in Washington by the Insurance Commissioner, and naming the city, its elected and appointed officers, officials, agents and employees as additional insureds. Such insurance policies shall be in the following forms, with the following minimum limits:

1. Commercial general liability policy with limits not less than:

a. Five million dollars each occurrence for bodily injury or death;

b. Five million dollars each occurrence for property damage resulting.

2. A business automobile policy for owned, non-owned and hired vehicles with a limit of \$3,000,000 each occurrence and \$5,000,000 general aggregate.

3. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than \$1,000,000.

4. Comprehensive form premises operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than \$3,000,000.

B. The liability insurance policies required by this section shall be maintained by the grantee throughout the term of the license or lease, and such other period of time during which the grantee is operating without a license 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 cancelled 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 attorney of such intent to cancel or not to renew.

C. Within 15 days after receipt by the city of said notice the grantee shall obtain and furnish to the city replacement insurance policies meeting the requirements of this section.

D. Grantees qualified to do business in the state of Washington as self-insured shall also meet the requirements of this section. (Ord. 2959 § 1, 1999).

18.10.070 Performance bond.

Every grantee shall be required to provide a cash deposit or construction performance bond, in a form and with sureties as approved by the city, to ensure the faithful performance of its responsibilities in accordance the city's street excavations ordinance, Chapter 12.16 MVMC. (Ord. 2959 § 1, 1999).

18.10.080 General indemnification.

A. No license or lease shall be deemed to be granted under this title 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 RCW Title 51, arising from injury or death of any person or damage to property of which the acts or omissions of the grantee, its agents, servants, officers or employees in performing under this license 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 RCW Title 51, arising against the city solely by virtue of the city's ownership or control of the public 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 public rights-of-way or other public property, based upon the city's negligent 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 or lease or pursuant to any other permit or approval issued in connection with this license or lease, excluding only those judgments or awards found to be based upon the city's willful misconduct or gross negligence.

This covenant of indemnification shall include, but not be limited by this reference, 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 or lease.

B. 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 of any litigation or the institution of any litigation.

C. 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 tribunal 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 attorney's fees and the reasonable costs of the city.

D. The provisions of this section shall survive the expiration or termination of this license or lease agreement. Notwithstanding any other provisions of this section, the grantee assumes the risk of damage to its facilities located in the city's public rights-of-way, rights-of-way, and easements from activities conducted by the city, its officers, agents, employees and contractors. The grantee releases and waives 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 public rights-of-way, rights-of-way, and easements subject to this license or lease, except to the extent any such damage or destruction is caused by or arises from the gross negligence or willful misconduct on the part of the city, its officers, agents, employees or contractors.

E. The grantee further agrees to indemnify, hold harmless and defend the city against any claims for damages, including, but not limited to, business interruption damages, lost profits, and consequential damages 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 willful misconduct or gross negligence on the part of the city, its officers, agents, employees or contractors, to the extent allowed by law. (Ord. 2959 § 1, 1999).

18.10.090 Location of facilities.

A. All facilities shall be constructed, installed and located in accordance with the provisions of this section, unless otherwise specified in a license or facilities lease.

B. Unless otherwise provided in a right-of-way license or facilities lease, a grantee with permission to occupy a public way must locate its telecommunications facilities underground; provided, that this provision shall not apply to any facilities installed prior to the effective date of the ordinance codified in this chapter.

C. Whenever any new or existing electric utilities, cable facilities, or telecommunications facilities are located or relocated underground within a public way of the city, a grantee, franchisee, or lessee that currently occupies the same public way shall relocate its facilities underground at no expense to the city. Absent extraordinary circumstances or undue hardship as determined by the city public works director, such relocation shall be made concurrently to minimize the disruption of the public ways. No extension granted by the director of public works under this subsection shall exceed a period of 12 months.

D. Whenever telecommunications facilities will exhaust the capacity of a public street or utility easement to reasonably accommodate future cable or telecommunications carriers or facilities, the grantee and all other occupants of the public way shall provide additional ducts, conduits, manholes, and other facilities for nondiscriminatory access to future operators and carriers at their own expense.

E. The director may waive the requirements for location of facilities under this section if the grantee demonstrates to the director's satisfaction that such location requirements are commercially unreasonable or if other law otherwise controls. (Ord. 2959 § 1, 1999).

18.10.100 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. (Ord. 2959 § 1, 1999).

18.10.110 Relocation or removal of facilities.

A. Within 30 days following written notice from the city, with additional time allowed under warranted circumstances at the sole determination

of the director, a grantee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any telecommunications facilities within the public rights-of-way whenever the director, in the director's sole discretion, determines that such removal, relocation, or alteration is in the best interests of the public health, safety, or welfare, and is reasonably necessary for:

1. The construction, repair, maintenance or installation of any public improvement, whether commenced by the city or any other governmental entity;

2. The operations of the city or other governmental entity in or upon the public rights-of-way;

3. The vacation of a street or the release of a utility easement, or the condemnation thereof.

B. This requirement will not apply if any other law otherwise controls.

C. It shall be a condition of each and every facilities lease or right-of-way license granted by the city that the prevailing party's reasonable costs and attorney's fees in enforcing this section shall be paid by the nonprevailing party.

D. Whenever any person shall have obtained permission from the city to use any street or public way for the purpose of moving any building, a grantee upon 14 days' written notice from the city, shall raise or remove, at the expense of the person desiring to move the building, any of the grantee's, facilities which may obstruct the removal of such building; provided, that the person desiring to move the building shall comply with all requirements of the city for the movement of buildings. (Ord. 2959 § 1, 1999).

18.10.120 Removal of unauthorized facilities.

A. Within 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 public rights-of-way or city property shall, at its own expense, remove such facilities or appurtenances from the public 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 or lease;

2. Upon abandonment of a facility within the public rights-of-way or city property. Any property of a grantee shall be deemed abandoned if left in place 90 days after expiration or termination of a license or lease;

18.10.130

3. If the system or facility was constructed or installed without prior grant of a license or lease, unless said system or facility was constructed or installed prior to the effective date of the ordinance codified in this title;

4. If the system or facility was constructed or installed without prior issuance of a required construction permit;

5. If the system or facility was constructed or installed at a location not permitted by the grantee's license; and

6. If the system or facility was constructed or installed at a location not permitted by the grantee's lease.

B. Any plan for the removal of a facility must be first approved by the director, and all necessary permits must be obtained prior to such work; provided, however, that the city may, in its sole discretion, allow a grantee, or other such persons who may own, control, or maintain telecommunications facilities within the public rights-of-way or city property to abandon such facilities in place in such a manner as the city may prescribe. No facilities of any type may be abandoned in place without the express written consent of the city.

C. Upon permanent abandonment of such facilities in place, the property shall become that of the city, and such persons shall submit to the city an instrument in writing, to be approved by the city attorney, transferring to the city the ownership of such property. The provisions of this section shall survive the expiration, revocation, or termination of a license or lease granted under this title. (Ord. 2959 § 1, 1999).

18.10.130 Emergency removal or relocation of facilities.

The city retains the right and privilege to cut or move any telecommunications facilities located within the public 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 telecommunications carrier, operator, 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 section. (Ord. 2959 § 1, 1999).

18.10.140 Abandonment of facilities.

A. If the grantee abandons use of its cable, ducts, or other facilities authorized under a license or lease, then the facilities shall be removed from the public rights-of-way or city property to the sat-

isfaction of the city at 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. This is covered in MVMC 18.10.120(C) above.

B. Upon revocation or termination of a license or lease, the grantee shall to the satisfaction of the city and, without cost or expense to the city, promptly remove its facilities unless permitted by the city to be left in place in such manner as the city may prescribe. If the grantee determines to remove such facilities, or any portion thereof, then the grantee, at its sole expense, shall restore the public rights-of-way where disturbed by such removal to the satisfaction of the city.

C. Any such facilities which are not removed within 120 days of either such date of termination or revocation or of the date the city issued a permit authorizing removal, whichever is later, automatically shall become the property of the city. The grantee shall notify the city to record facilities abandoned. Any costs incurred by the city in safeguarding such facilities shall be reimbursed by the grantee, and the grantee's bond shall be liable for such costs in the event the grantee fails to perform. (Ord. 2959 § 1, 1999).

18.10.150 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. Any costs incurred by the city in remove, relocate, change or alter such facilities shall be reimbursed by the grantee, and the grantee's bond shall be liable for such costs in the event the grantee fails to perform. (Ord. 2959 § 1, 1999).

18.10.160 Damage to grantee's facilities.

Unless directly and proximately caused by the willful misconduct or gross negligence 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 public 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 public rights-of-way. (Ord. 2959 § 1, 1999).

18.10.170 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, public rights-of-way of the city, other

ways or other property, whether publicly or privately owned, located in, on or adjacent thereto without the express written consent of the city. (Ord. 2959 § 1, 1999).

18.10.180 Interference with city property and the public rights-of-way.

No grantee may locate or maintain its telecommunications facilities to unreasonably interfere with the use of city property or 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 city property and public rights-of-way. Unreasonable interference will include disruption to vehicular or pedestrian traffic on city property or the public rights-of-way, interference with other government utilities, and such other activities that will present a hazard to public health, safety or welfare, when alternative methods of construction will result in less disruption. (Ord. 2959 § 1, 1999).

18.10.190 Tree trimming.

A. Upon 30 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 rights-of-way to prevent their branches or leaves from touching or otherwise interfering with its wires. All trimming or pruning shall be at the sole cost of the grantee.

B. The grantee may contract for trimming or pruning services with the city or any person approved by the city prior to the rendering of trimming services. The grantee shall comply with all applicable laws in conducting such trimming, including any prevailing wage statutes. (Ord. 2959 § 1, 1999).

18.10.200 As-built maps.

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 a map or maps accurately reflecting the horizontal and vertical location and configuration of the grantee's facilities within the public rights-of-way and upon city property. The city may use or disclose such information only as allowed by law and in accordance with MVMC 18.06.010(A)(3). Submittal by a grantee of construction plans and/or revised maps shall constitute the grantee's certification that the city may rely upon such maps in the design and construction of city improvements in the public rights-of-way, including emergency repairs. (Ord. 2959 § 1, 1999).

18.10.210 Assignments or transfers of grant.

A. It is the intent of the city council that the city is always cognizant of those authorized to occupy the public rights-of-way, and that the insurance coverages, bonds, and similar protections afforded the city pursuant to this and other chapters of the Mount Vernon Municipal Code are always in place. Working control of a right-of-way license or lease may not, directly or indirectly, be transferred, assigned or disposed of by sale, merger, consolidation or other act of the grantee, by operation of law or otherwise, without complying with this section.

B. 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 45 days prior to the proposed date of transfer:

1. All information required of a right-of-way license or lease applicant pursuant to Chapter 18.06 MVMC with respect to the proposed transferee or assignee; and

2. Proof of insurance coverage and a performance bond, as set forth in MVMC 18.10.060 and 18.10.070.

C. Unless otherwise provided in a license or facilities 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 or lease. No assignment or transfer shall be concluded until all such costs and expenses have been paid.

D. Any transfer or assignment of a lease without prior written approval of the city under this section or pursuant to a facilities lease agreement shall be void and is cause for revocation of the facilities lease. (Ord. 2959 § 1, 1999).

18.10.220 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 MVMC 18.10.210. Transactions between affiliated entities are not exempt from city approval unless said affiliated entities are named in the initial application, insurance coverages, and bonds. (Ord. 2959 § 1, 1999).

18.10.230 Revocation or termination of grant.

A right-of-way license or lease granted by the city to use or occupy public rights-of-way or city property may be revoked for any of the following reasons:

18.10.240

A. Construction or operation in the public rights-of-way or city property without a license or lease grant of authorization.

B. Construction or operation at an unauthorized location.

C. The sale, assignment or transfer of a grantee's license or lease, or a substantial interest therein, when such sale, assignment or transfer leads to a loss or reduction in insurance coverage or the loss or reduction in the protection afforded by any bonds benefiting the city.

D. 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 or lease pursuant to this title.

E. Unauthorized abandonment of telecommunications facilities in the public rights-of-way or upon city property.

F. Failure to relocate or remove facilities as required in this title.

G. Failure to pay taxes, compensation, fees or costs when and as due the city.

H. Violation of any material provision of this title.

I. Violation of the material terms of a right-of-way license or lease agreement. (Ord. 2959 § 1, 1999).

18.10.240 Notice and duty to cure.

A. In the event that the city attorney believes that grounds exist for revocation of a right-of-way license or facilities 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 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 non-compliance.

3. That it would be in the public interest to impose some penalty or sanction less than revocation.

B. In the event that a grantee fails to provide evidence reasonably satisfactory to the city attorney as provided in subsection A above, the city attorney shall refer the apparent violation or non-compliance to the city council for action to revoke in accordance with the provisions of MVMC 18.10.250. The city council shall provide the grantee with not less than 10, nor more than 30,

days' notice of a revocation hearing, and a reasonable opportunity to be heard concerning the matter. (Ord. 2959 § 1, 1999).

18.10.250 Standards for revocation or lesser sanctions.

A. If the city council determines that a grantee willfully violated or failed to comply with any of the provisions of this title or a license or lease granted under this title, 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 title, then the grantee shall, at the election of the city council, forfeit all rights conferred hereunder and the license or lease may be revoked or annulled by the city council.

B. The city 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 a court having jurisdiction compelling the grantee to comply with the provisions of this title and any license or lease granted hereunder, and to recover damages and costs incurred by the city by reason of the grantee's failure to comply.

C. The city 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. (Ord. 2959 § 1, 1999).

18.10.260 Incorporation by reference.

The provisions of this title shall be incorporated by reference in any license or lease approved hereunder. The provisions of any proposal submitted and accepted by the city shall be incorporated by reference in the applicable license or lease. In the event of any conflict between the proposal, this title, and the license or lease, the license or lease shall be the prevailing document. (Ord. 2959 § 1, 1999).

Chapter 18.12**REMEDIES AND ENFORCEMENT**

Sections:

- 18.12.010 Police power.
- 18.12.020 City remedies.
- 18.12.030 Other remedies.
- 18.12.040 No waiver.
- 18.12.050 Severability and pre-emption.

18.12.010 Police power.

In accepting any license 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 it agrees to comply with all applicable general laws enacted by the city pursuant to such power. (Ord. 2959 § 1, 1999).

18.12.020 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 title. Violation of the terms of this title may also result in the revocation of any license, lease, approval, or permit issued or granted hereunder. (Ord. 2959 § 1, 1999).

18.12.030 Other remedies.

Nothing in this title shall be construed as limiting any judicial remedies that the city may have, at law or in equity, for enforcement of this title. (Ord. 2959 § 1, 1999).

18.12.040 No waiver.

The failure of the city to enforce any provision of this title on any occasion shall not operate as a waiver or estoppel of the city's right to enforce any provision of this title 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 title or any other provision of applicable law. (Ord. 2959 § 1, 1999).

18.12.050 Severability and pre-emption.

A. If any section, subsection, sentence, clause, phrase, term, provision, condition, covenant or portion of this title is for any reason held invalid or unenforceable by any court of competent jurisdiction, or superseded by state or federal legislation,

rules, regulations or decision, the remainder of this title 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, provision, condition, covenant and portion of this title shall be valid and enforceable to the fullest extent permitted by law.

B. In the event that federal or state laws, rules or regulations preempt a provision or limit the enforceability of a provision of this title, then the provision shall be read to be pre-empted 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 pre-empted is no longer pre-empted, such provision shall thereupon return to full force and effect, and shall thereafter be binding on the parties hereto, without the requirement of further action on the part of the city, and any amendments to this title as a result of such provision being pre-empted shall no longer be of any force or effect. (Ord. 2959 § 1, 1999).

