

**AN ORDINANCE OF THE CITY OF BELLINGHAM, WASHINGTON, RELATING TO FRANCHISES AND USE OF CITY RIGHT OF WAY, REGULATING TELECOMMUNICATIONS AND CABLE TELEVISION FACILITIES, ESTABLISHING LAND USE REQUIREMENTS FOR TELECOMMUNICATIONS AND CABLE FACILITIES, AND AMENDING CERTAIN SECTIONS OF THE BELLINGHAM MUNICIPAL CODE AND ADDING NEW CHAPTERS 6.70 AND 13.15 THERETO .**

WHEREAS Bellingham City Charter Article XI sets out requirements applicable to franchises for use of City right of way for various commercial purposes; and,

WHEREAS, the City has never adopted Municipal Code provisions to implement the Charter, which Code provisions are necessary to provide reasonable uniformity in grants franchises and give notice of general City requirements to prospective franchisees; and,

WHEREAS changes in Federal and State law and in telecommunication technology and in the telecommunications industry make it prudent for the City to adopt comprehensive provisions related to use of City right of way and siting of telecommunications facilities; and,

WHEREAS the City of Bellingham intends by this ordinance

- (a) to regulate in a reasonable fashion the placement of facilities in the right of way and other City property,
- (b) to protect the public's current and future interest in the right of way and other City property,
- (c) to place the costs of doing business in public right of way on entities doing such business and not on the general public,
- (d) to preserve significant land-use characteristics and zoning objectives of the City, and,
- (e) at the same time, within the foregoing constraints, to enhance the availability of utility and telecommunications technology for the citizens of Bellingham.

**NOW, THEREFORE, THE CITY OF BELLINGHAM DOES ORDAIN AS FOLLOWS:**

**Section 1:** New chapter 6.70 is added to the Bellingham Municipal Code to read as follows:

**6.70 UTILITY AND TELECOMMUNICATIONS PROVIDERS**

**TABLE OF CONTENTS**

**PURPOSE AND GENERAL PROVISIONS**

<b>6.70.010</b>	<b>Purpose</b>
<b>6.70.020</b>	<b>Definitions</b>
<b>6.70.030</b>	<b>Registration and Fees</b>
<b>6.70.040</b>	<b>Franchise; permit</b>
<b>6.70.050</b>	<b>[Reserved]</b>
<b>6.70.060</b>	<b>Cable television</b>
<b>6.70.070</b>	<b>Application to existing agreements</b>
<b>6.70.080</b>	<b>Penalties and remedies</b>
<b>6.70.090</b>	<b>Other remedies</b>
<b>6.70.100</b>	<b>Severability</b>

**FRANCHISES**

<b>6.70.200</b>	<b>Franchise</b>
<b>6.70.210</b>	<b>Application</b>
<b>6.70.220</b>	<b>Determination by the City</b>
<b>6.70.230</b>	<b>Extent of franchise</b>
<b>6.70.240</b>	<b>Term of franchise</b>
<b>6.70.250</b>	<b>Compensation to the City</b>
<b>6.70.260</b>	<b>Amendment of franchise</b>
<b>6.70.270</b>	<b>Nondiscrimination</b>
<b>6.70.280</b>	<b>Service to the City</b>

**FEES**

<b>6.70.300</b>	<b>Fees</b>
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**A. PURPOSE AND GENERAL PROVISIONS**

**6.70.010 - Purpose** The purpose of this chapter is

A. To set forth rules and regulations regarding reasonable access to right of way in the City of Bellingham and siting of facilities for the following uses:

- (1) Railroads and other routes and facilities for public conveyances, and
- (2) Poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof
  - (a) for transmission and distribution of electrical energy, signals, and other methods of communication,

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- (b) for gas, steam, and liquid fuels, and
- (c) for water, sewer, and other private and publicly owned and operated facilities for public service.

B. To establish nondiscriminatory policy for the City of Bellingham concerning telecommunications providers and services.

C. To reasonably and fairly compensate the City for use of and disruption to right of way.

**6.70.020      Definitions**

A. "*Affiliate*" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.

B. "*Cable service*" for the purpose of this chapter shall have the same meaning provided by the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, as amended by portions of the Telecommunications Act of 1996, and as hereafter amended.

C. "*Facility*" or "*Facilities*" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, pedestals, antennae, electronics, cables, wires, plant, and other appurtenances and equipment located under, on or above the surface of the ground within the right of way of the City and used or to be used for the purpose of providing Utility Services or transmitting, receiving, distributing, providing, or offering Telecommunications Services.

D. "*FCC*" or "*Federal Communications Commission*" means the Federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

E. "*Grantee*" means any Person obtaining a permit or Franchise pursuant to this Chapter.

F. "*Open Video System*" or "*OVS*" refers to a Telecommunications Carrier or Provider which owns or utilizes a set of transmission paths and associated signal generation, reception, and control equipment or other Facilities designed to provide video programming provided to multiple subscribers and which Carrier or Provider the Federal Communications Commission as certified under applicable law.

G. *"Overhead Facilities"* means Utility Facilities and Telecommunications Facilities located above the surface of the ground, including the underground supports and foundations for such Facilities.

H. *"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 it does not mean or include governmental entities or persons acting on their behalf.

I. *"Public Street"* means any highway, street, alley or other public right of way (whether improved or unimproved) under the jurisdiction and control of the City the use of which is not inconsistent with Telecommunications or Utility Facilities.

J. *"Surplus Space"* means that portion of the usable space on a pole which has the necessary clearance from other pole users, as required by the orders and regulations of the FCC or the Washington Utilities and Transportation Commission ("UTC"), to allow its use by a Telecommunications Carrier, Provider, or Utility for a pole attachment.

K. *"Telecommunications Carrier"* means and includes every person that directly or indirectly owns, controls, operates or manages plant, equipment or property within the City, used or to be used for the purpose of offering Telecommunications Service.

L. *"Telecommunications Provider"* means and includes every person who provides Telecommunications Services over Telecommunications Facilities without any ownership or management control of such Facilities.

M. *"Telecommunications Services"* means the providing or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of voice, data, image, graphic and video programming information between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar Facilities, with or without benefit of any closed transmission medium.

N. *"Usable Space"* means the total distance between the top of a pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the FCC, UTC, the National Electrical Code, and the National Electrical Safety Code.

O. *"Utility Easement"* means any easement owned by the City and acquired, established, dedicated or devoted for public utility purposes not inconsistent with

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Telecommunications or Utility Facilities.

P. *"Utility" or "Utility Services"* means (1) railroad or other Facility for public conveyances, and (2) a Person engaging in the business of transmission, generation, or distribution of electrical energy or gas, steam, or liquid fuels, or owning or operating a private or publicly owned Facility for public service.

Q. *"Work"* means all construction, alteration, enlargement, improvement, repair, and/or demolition of a Facility which has not been previously authorized by franchise, lease, or permit.

**6.70.030 Registration and fees** All Telecommunications Carriers, Providers, or Utilities engaged in the business of transmitting, supplying, or furnishing Telecommunications or Utility Services originating, terminating, or existing within the City or having Facilities within the City shall register with the City pursuant to this chapter and pay all applicable fees. In addition, such entity shall provide the following information on forms provided by the City:

- (1) A description of the registrant's existing and proposed Telecommunications Facilities within the City;
- (2) A description of the Telecommunications Service that the registrant intends to offer or provide;
- (3) Any other information deemed by the City to be relevant to determine whether the registrant (a) is subject to right of way permitting or franchising under this chapter, chapter 6.17, or chapter 13.15, (b) is required to pay any other applicable fee or tax, and/ or (c) has duly obtained and maintains in force any applicable permit or other authorization from either the State of Washington or the Federal Communications Commission.

**6.70.040 Franchise: permit**

A. Other than as provided in section 6.70.060, any Telecommunications Carrier, Provider, or Utility which intends to make any use of, perform work in, or conduct any activity whatsoever in City right of way for the purpose of constructing, installing, operating, maintaining or locating Facilities in order to provide Telecommunication Service, other than an Open Video System, shall obtain a permit pursuant to Bellingham Municipal Code chapter 13.15.

B. Other than as provided in section 6.70.060, any other Person who intends to make any use of, perform work in, or conduct any activity whatsoever in City right of way for

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the purpose of constructing, installing, operating, maintaining or locating Facilities shall obtain a franchise from the City for use of public right of way pursuant to this chapter.

**6.70.050**      **[Reserved]**

**6.70.060**      **Cable television**      Any Telecommunications Carrier, Provider, or Utility which intends to make any use of or conduct any activity whatsoever in City right of way for the purpose of constructing, installing, operating, maintaining or locating Telecommunication or Utility Facilities in order to provide Cable Service only shall comply with the provisions of Bellingham Municipal Code chapter 6.17. Any Person providing more than Cable Service shall comply with the provisions of this chapter and chapter 13.15 to the extent applicable with regard to Facilities for such services. In the event of conflict between provisions of this chapter and chapter 6.17 or chapter 13.15, the provision in the City's discretion which is most likely to further or protect its interests shall apply unless the context clearly requires otherwise.

**6.70.070**      **Application to existing agreements** This chapter shall have no effect on any existing franchise ordinance, franchise agreement, lease of City property, or permit until the expiration of said franchise ordinance, agreement, lease or permit, including any extensions of the same which are at the sole option of the franchisee, lessee or permittee

**6.70.080**      **Penalties and remedies**      Any person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this chapter shall be fined not less than One Hundred Dollars (\$100.00) nor more than Seven Hundred Fifty Dollars (\$750.00) for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues.

**6.70.090**      **Other remedies**      Nothing in this ordinance shall be construed as limiting any judicial remedies that the City may have at law or in equity for enforcement of this chapter.

**6.70.090**      **Rules and regulations**      The City may establish from time to time further rules, regulations, and procedures for the implementation of this chapter.

**6.70.100**      **Severability**      If any section, subsection, sentence, clause, phrase, or other portion of this chapter, or its application to any person, is, for any reason, declared invalid, in whole or in part by any court or agency of competent jurisdiction, said decision shall not affect the validity of the remaining portions hereof.

out the public interest. To the extent practicable, Franchises granted hereunder shall contain substantially similar terms and shall not contain more or less favorable terms and conditions than exist in other such franchises, taking into consideration relevant characteristics of each applicant.

**6.70.230**      **Extent of franchise**    No grant of franchise hereunder shall confer any exclusive right, privilege, or license to occupy any City right of way, nor convey any right, title, or interest in such right of way. Franchisees shall comply with all applicable laws and regulations and obtain all necessary construction and other permits.

**6.70.240**      **Term of franchise**    A franchise shall be for a term not exceeding twenty-five years. A franchise may be renewed upon application therefor not more than three years nor less than 180 days prior to the expiration of an existing franchise. Such application shall contain the information required for the original franchise. Determination regarding renewal shall be made in the same manner as the original franchise.

**6.70.250**      **Compensation to the City**    Each franchise granted hereunder is subject to the City's right, which is expressly reserved, to determine a fair and reasonable compensation to be paid for the use of City property, annually or on some other basis, provided nothing shall prohibit the applicant and the City from agreeing upon such compensation.

**6.70.260**      **Amendment of franchise**    A new franchise application and grant shall be required for any extension, addition, relocation, or other material modification to an applicant's Facilities or services; provided, that this shall not apply to a relocation or modification ordered by the City.

**6.70.270**      **Nondiscrimination**    A franchisee shall make its Telecommunications or Utility Services available to any customer within its franchise area who shall request such service, without discrimination as to the terms, conditions, rates or charges for franchisee's services; provided, however, that nothing in this chapter shall prohibit a franchisee from making any reasonable classifications among differently situated customers.

**6.70.280**      **Service to the City**    A franchisee shall make its Telecommunications or Utility Services available to the City at its most favorable rate for similarly situated users; provided, however, that the City may negotiate more favorable rates, free service, or right to use or access franchisee's Facilities in lieu of other obligations of franchisee.

## B. FRANCHISES

**6.70.200 Franchise** Pursuant to City Charter and this chapter, any Person electing to obtain a franchise granting use of City right of way shall do so in accordance with this chapter. Such franchise shall be in the form of an ordinance duly adopted by the City Council and executed by the Mayor and shall be consistent with the provisions of Code chapter 13.15 unless specifically modified by such ordinance. In the event of conflict between provisions of this chapter and chapters 3.15 and 6.70, the provision most likely to further the City's interests shall apply unless the context clearly requires otherwise.

**6.70.210 Application** An applicant seeking a franchise under this chapter shall provide to the City on an application form sufficient information to enable the City to make its determination regarding such franchise including but not limited to the following:

- (1) The financial and technical ability and legal capacity of the applicant;
- (2) A complete description of applicant's proposed Facilities;
- (3) The capacity of the right of way to accommodate applicant's Facilities;
- (4) The capacity of the right of way to accommodate additional Utility or Telecommunications Facilities;
- (5) The extent of damage to or disruption of any public or private Facilities, improvements, services, travel, or landscaping and any plans by applicant to mitigate or repair the same; and,
- (6) The availability or unavailability of alternate routes to those proposed by the applicant.

**6.70.220 Determination by the City** Within 120 days of receiving a completed application, the City department charged with administration of the franchise applied for shall make its recommendation to the City Council regarding issuance of the franchise. Grant of any franchise shall be by ordinance and is within the sole discretion of the City Council. The Council's decision will be based upon the information provided in the application and the recommendation of the affected City department and will take into consideration the impact on City right of way and related Facilities, proposed mitigation of damage and disruption, applicable laws and regulations, and any other factors deemed necessary by the City to carry

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## C. FEES

### **6.70.300 Fees**

A. Other than for Open Video Systems as provided in section 6.70.310, fees for registration, a permit, or a franchise application pursuant to this chapter shall be established from time to time by the Department of Public Works. Fees for franchises governed by this chapter shall be determined by negotiation between the City and the prospective franchisee.

B. All fees shall ensure compensation to the City for (1) all administrative costs and expenses associated with processing an application and monitoring compliance with any permit or franchise provisions and (2) all costs of current and ongoing maintenance, repair, or restoration of right of way related to the impact of the installation, maintenance, and use of Facilities.

### **6.70.310 Fees for Open Video Systems; public access responsibilities**

A. Every person operating an Open Video System shall pay to the City, in addition to the registration fee required pursuant to section 6.70.030, a percentage of its gross revenue each quarter equal to the gross revenue percentage allowed to be required of a Person providing Cable Service pursuant to Municipal Code chapter 6.17.

B. "Gross revenue" is defined as any and all gross revenues a Person or its affiliates derives directly or indirectly from operation of the Open Video System, including revenue from sales, rental, or installation of equipment, from advertising revenues, from subscribers, and from all carriage revenues received from unaffiliated video programming providers. Gross revenues shall not include any taxes on services which taxes are imposed directly on a subscriber or user by a city, county, state or other governmental unit and collected by a Person subject to this chapter for such taxing entity. Gross revenue shall not include amounts which cannot be collected and are identified as bad debt; provided, that amounts previously identified as bad debt which are eventually collected shall be reported for the period in which that occurs.

C. In addition, every Person operating an Open Video System shall be required, as a condition of receiving a permit under this chapter, to provide or otherwise contribute financially to support public, education, and government ("PEG") use of its system. The extent of provision of such use or financial contribution shall be negotiated between such Person and the City and shall include, to the extent permitted by law, channel capacity, financial contribution, and/or in-kind contributions. If terms regarding PEG cannot be successfully

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negotiated, the extent of such Person's PEG responsibility shall be that prescribed by applicable law.

**Section 2:** New chapter 13.15 is added to the Bellingham Municipal Code to read as follows:

**13.15 UTILITIES AND TELECOMMUNICATIONS FACILITIES LOCATED  
WITHIN CITY RIGHT OF WAY**

**TABLE OF CONTENTS**

**GENERAL PROVISIONS**

<b>13.15.010</b>	<b>General</b>
<b>13.15.020</b>	<b>Application for permit</b>
<b>13.15.030</b>	<b>Notice of permit application</b>
<b>13.15.040</b>	<b>Interference with right of way</b>
<b>13.15.050</b>	<b>Damage to property</b>
<b>13.15.060</b>	<b>Notice of work</b>
<b>13.15.070</b>	<b>Repair and emergency work</b>
<b>13.15.080</b>	<b>Maintenance of facilities</b>
<b>13.15.090</b>	<b>Location of facilities</b>
<b>13.15.100</b>	<b>Relocation or removal of facilities</b>
<b>13.15.110</b>	<b>Removal of unauthorized facilities</b>
<b>13.15.120</b>	<b>Failure to remove or relocate</b>
<b>13.15.130</b>	<b>Emergency removal or relocation of facilities</b>
<b>13.15.140</b>	<b>Damage to facilities</b>
<b>13.15.150</b>	<b>Work in and restoration of right of way</b>
<b>13.15.160</b>	<b>Insurance</b>
<b>13.15.170</b>	<b>Indemnification</b>
<b>13.15.180</b>	<b>Performance bond</b>
<b>13.15.190</b>	<b>Security fund</b>
<b>13.15.200</b>	<b>Assignments or transfers of franchise or permit</b>
<b>13.15.210</b>	<b>Transfers affecting control</b>
<b>13.15.220</b>	<b>Revocation or termination</b>
<b>13.15.230</b>	<b>Notice and duty to cure</b>
<b>13.15.240</b>	<b>Department action and hearing</b>
<b>13.15.250</b>	<b>Standard for revocation or lesser sanctions</b>

**CONSTRUCTION STANDARDS**

<b>13.15.400</b>	<b>General</b>
<b>13.15.410</b>	<b>Applicable laws</b>
<b>13.15.420</b>	<b>Construction permits</b>
<b>13.15.430</b>	<b>Engineer's certification</b>

- 13.15.440 Traffic control plan
- 13.15.450 Issuance of permit
- 13.15.460 Notice of construction
- 13.15.470 Compliance with permit
- 13.15.480 Display of permit
- 13.15.490 Survey of underground facilities
- 13.15.500 Noncomplying work
- 13.15.510 Completion of construction
- 13.15.520 Restoration of improvements
- 13.15.530 Landscape restoration

#### A. GENERAL PROVISIONS

##### 13.15.010 General

A. No Person shall install, construct, or otherwise place within City right of way Utility or Telecommunications Facilities as defined herein and in chapter 6.70 except pursuant to the provisions of this chapter. Those Persons who are granted franchises by the City or who enter into lease agreements with the City shall be required in those instruments to comply with the provisions of this chapter, except as specifically negotiated otherwise for good cause clearly and convincingly demonstrated to the City's satisfaction.

B. Further, all Persons subject to this chapter shall

- (1) at all times comply with all applicable statutes, laws, ordinances, policies, and regulations;
- (2) upon reasonable request, timely provide written confirmation sufficient for customary land survey purposes concerning location of Facilities;
- (3) upon reasonable request, timely provide the City with accurate as-built maps and plans certifying location of Facilities;
- (4) upon request, timely make available books, records, maps, and other documents maintained with respect to Facilities for inspection at reasonable times and places; and,
- (5) pay all applicable fees required under this chapter and chapter 6.70.

**13.15.020 Application for permit** A Person seeking a permit under this chapter shall provide to the City on an application form sufficient information to enable the City to make its determination regarding such permit including but not limited to the following:

- (A) The financial and technical ability and legal capacity of the applicant;

- (B) A complete description of applicant's proposed Facilities;
- (C) The capacity of the right of way to accommodate applicant's Facilities;
- (D) The capacity of the right of way to accommodate additional Utility or Telecommunications Facilities;
- (E) The extent of damage to or disruption of any public or private Facilities, improvements, services, travel, or landscaping and any plans by applicant to mitigate or repair the same; and,
- (F) The availability or unavailability of alternate routes or sites to those proposed by the applicant.

**13.15.030 Notice of permit application.** Notice of application for a permit pursuant to this chapter shall be published at least once per week for two weeks prior to the granting of such permit. The notice shall briefly describe the nature of the application, and the cost of publication thereof shall be borne by the applicant. If at any time prior to granting of the permit the City receives a signed request in writing for a hearing on the permit, the City Council shall set the matter for timely hearing and take whatever action thereon it deems appropriate. However, the Department of Public Works may develop a procedure for dispensing with this notice procedure in situations where the impact of the work to be performed is not substantial.

**13.15.040 Interference with right of way** No Person may locate or maintain its Facilities so as to unreasonably interfere with the use the rights of way by the City, by the general public, or by any Persons authorized to use or be present in such rights of way.

**13.15.050 Damage to property** No Person or anyone acting on such Person's behalf shall take any action or permit any action to take place which may impair or damage any right of way or other property located in, on, or adjacent thereto.

**13.15.060 Notice of work** Unless otherwise provided in a permit or franchise, no Person or anyone acting on such Person's behalf shall commence any non-emergency work in or about the right of way without ten days' written notice to the City of intent to do so. Owners of property adjacent to and potentially affected by such work shall also be notified in this way. However, the Department of Public Works may develop a procedure for dispensing with this notice procedure in situations where the impact of the work to be performed is not substantial.

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**13.15.070**     **Repair and emergency work**     In the event of an unexpected repair or emergency, a Person may commence repair or emergency work as reasonably required under the circumstances, provided notice is given to the City and affected property owners as completely and promptly as possible.

**13.15.080**     **Maintenance of Facilities**     Each Person shall maintain its Facilities in good and safe condition and in compliance with all applicable laws and like requirements.

**13.15.090**     **Location of Facilities**     All Facilities shall be constructed, installed, and located in accordance with the following terms and conditions:

A.     Poles, wires and appurtenances shall be located, erected and maintained so that no Facilities shall endanger or interfere with the lives of persons, or interfere with any improvements the City, county or state may deem proper to make, or unnecessarily hinder or obstruct the free use of the streets, alleys, bridges, easements or public property.

B.     All transmission and distribution structures, lines and equipment shall be so located as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and as to cause minimum interference with the rights or reasonable convenience of property owners who are adjacent to any of the said streets, alleys or other public ways and places.

C.     Underground placement of cable, wires, and conduit is the preferred method of distribution and shall be required in all areas currently receiving underground telephone and electric service. If Facilities of any Person subject to this chapter are required to be placed underground in the future, others subject to this chapter (including those previously permitted) shall likewise place their Facilities underground within a reasonable period of time specified by the City.

D.     Wherever possible location or relocation of Facilities shall be accomplished concurrently with other users of the right of way in order to minimize disruption. Facilities shall be installed within an existing underground duct or conduit whenever capacity permits. Whenever new Facilities will exhaust the capacity of a public street, right of way, or utility easement to accommodate future Facilities, a Person subject to this chapter shall provide additional ducts, conduits, manholes, and other Facilities for nondiscriminatory access by future carriers in accordance with policies to this effect promulgated by the Public Works Department.

E.     **Erection, Removal, and Common Uses of Poles.**

(1) No poles or other wire holding structures shall be erected within the public right of way without prior approval of the City with regard to the location, height, types, and any other pertinent aspect of such structures. However, no location of any pole or wire holding structure of the company shall be a vested interest, and such poles or structures shall be removed or modified by the company at its own expense whenever the city determines that the public convenience would be enhanced thereby.

(2) Where the City or a Person subject to this chapter desires to make use of the poles or other wire holding structures of one or more other Persons subject to this chapter, but agreement thereof among such parties cannot be reached, the City may require the Person whose structures are sought to be used to permit use by another for such consideration and upon such terms as the City Council shall determine to be just and reasonable, if the City Council determines that (a) the use would enhance the public convenience, (b) the use would not unduly interfere with the operations of the Person whose structures are sought to be used, and (c) such requirement by the City is permitted under applicable law.

F. A Person subject to this chapter shall, on the request of any person holding a building moving permit issued by the City, temporarily raise or lower its wires to permit the moving of buildings. The expense of such temporary removal, raising or lowering of wires shall be paid by the person requesting the same. The Person subject to this chapter shall have the authority to require such payment in advance and shall be given not less than forty-eight hours' advance notice to arrange for such temporary wire changes.

G. Each Person subject to this chapter is required to provide the City by March 31 of each year a schedule of its proposed construction activities for that year which may affect the right of way. All such Persons shall cooperate to the extent reasonably required by the City with other users of the right of way and with the City to coordinate construction activities.

**13.15.100 Relocation or removal of Facilities** Within thirty days of written notice by the City, a Person subject to this chapter shall at its own expense temporarily or permanently remove, relocate, alter, or change the position of any Facilities within the right of way whenever the City, in its sole discretion, determines that such is reasonably necessary for (a) construction, repair, maintenance, or installation of any City or other public improvement in or upon the right of way, (b) operations in or upon the right of way by the City, or by Persons acting for or present in the right of way with the City's permission, or by other governmental

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entity , or (c) the vacation of a public street or release of a utility easement.

**13.15.110**     **Removal of unauthorized Facilities**     Within forty-five days of written notice by the City, a Person subject to this chapter shall, at its sole expense remove any Facilities from the right of way. Facilities are subject to removal upon any of the following:

- A.     Termination or expiration of such Person's franchise or permit.
- B.     Abandonment of a Facility within the right of way.
- C.     The Facility having been constructed or located without the prior grant of franchise, execution of a lease, or issuance of a construction permit, or constructed or located at a location not so permitted.
- D.     Circumstances reasonably determined by the City to be inconsistent with public health, safety, or welfare.

**13.15.120**     **Failure to remove or relocate** If any Person subject to this chapter who owns, controls, or maintains any unauthorized Facilities within the right of way fails to remove or relocate any Facilities as required in chapter, the City may cause such removal or relocation and charge the responsible party for the costs incurred.

**13.15.130**     **Emergency removal or relocation of Facilities**     The City reserves the right to cut, alter, remove, or relocate any Facilities located within the right of way as necessary on account of a public health or safety emergency.

**13.15.140**     **Damage to Facilities** Unless directly and proximately caused by the willful, intentional, or malicious acts of the City or its sole and gross negligence, the City shall not be liable for any damage to or loss of Facilities within the right of way as a result of any public works or improvements, construction, excavation, grading, filling, or work of any kind either by or on behalf of the City, including actions taken by the City to remove, relocate, or alter any Facilities.

**13.15.150**     **Work in and restoration of right of way**     When a Person subject to this chapter or someone acting on such Person's behalf does any work within a right of way, such Person shall at its own expense promptly remove any obstructions therefrom and restore such ways or adjacent property to the same condition as existed prior to such work. All Persons subject to this chapter shall conduct all work in accordance with State of Washington "locate laws" and with Department of Transportation Standard Specifications for Road, Bridge, and Municipal Construction as most recently promulgated.

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**13.15.160 Insurance**

A. Unless specifically agreed to by the City after evaluating the risk, a Person subject to this chapter shall secure and maintain in force the following liability insurance policies (or evidence of self-insurance satisfactory to the City):

(1) \$1,000,000 for personal injury or death to any one person and \$3,000,000 aggregate for personal injury or death per single accident or occurrence.

(2) \$1,000,000 for property damage to any one person and \$3,000,000 aggregate for property damage per single accident or occurrence.

(3) \$1,000,000 for all other types of liability including claims for damages for invasion of the right of privacy; for defamation of any person, firm, or corporation; for the violation or infringement of any copyright, trademark, trade name, service mark or patent; or, for damage to any other person, firm, or corporation arising out of or alleged to arise out of failure to comply with the provisions of any statute, regulation or resolution of the United States, State of Washington, or any local agency with jurisdiction.

B. Such insurance shall specifically name as additional insured the City of Bellingham, its officers, and employees, and shall further provide that the policy shall not be modified or canceled during the life of the permit or franchise without giving 30 days' written notice to the City.

C. A Person subject to this chapter shall file with the City copies of all certificates of insurance showing up-to-date coverage, additional insured coverage, and evidence of payment of premiums as set forth above. Coverage shall not be changed or canceled without approval of the City, and failure to maintain required insurance may be considered a breach of this agreement. The City may at its option review all insurance coverage. If it is determined by the City Risk Manager that circumstances require and that it is reasonable and necessary to increase insurance coverage and liability limits to adequately cover the risks of the City, the City may require additional insurance to be acquired. The City shall provide written notice should the City exercise its right to require additional insurance. All insurance shall provide 30 days' prior written notice to the City in the event of modification or cancellation. The City shall be provided written notice within 30 days after any approved reduction in the general annual aggregate limit.

**13.15.170 Indemnification**

A Person subject to this chapter shall, at its sole expense,

**City of Bellingham**  
CITY ATTORNEY  
210 Lottie Street

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fully indemnify, defend and hold harmless the City, and in its capacity as such, the officers and employees thereof, from and against any and all claims, suits, actions, liability and judgments for damage or otherwise (except those arising wholly from negligence on the part of the City or its employees) (a) for actual or alleged injury to persons or property, including loss of use of property due to an occurrence, whether or not such property is physically damaged or destroyed, in any way arising out of or through or alleged to arise out of or through the acts or omissions of such Person or its officers, agents, employees, or contractors or to which such Person or its officers', agents', employees' or contractors' acts or omissions in any way contribute, and whether or not such acts or omissions were authorized or contemplated by the permit or franchise or applicable law; (b) arising out of or alleged to arise out of any claim for damages for such Person's invasion of the right of privacy, defamation of any person, firm or corporation, or the violation of infringement of any copyright, trademark, trade name, service mark or patent, or of any other right of any person, firm or corporation; and/or (c) arising out of or alleged to arise out of such Person's failure to comply with the provisions of any statute, regulation or applicable policy of the United States, State of Washington or any local agency applicable to such Person in its business. Nothing herein shall be deemed to prevent the City, its officers, or its employees from participating in the defense of any litigation by their own counsel at such parties' expense. Such participation shall not under any circumstances relieve a Person subject to this chapter from its duty of defense against liability or of paying any judgment entered against the City, its officers, or its employees.

**13.15.180 Performance bond.** Within 30 days after a grant herein, a Person subject to this chapter shall submit to the City Attorney, which shall be filed with the City Finance Director and maintained at all times in full force and effect, a performance bond running to the City, with good and sufficient surety licensed to do business in the State of Washington and approved by the City in an amount reasonably determined by the City, conditioned that such Person shall well and truly observe, fulfill, and perform each term and condition of its permit or franchise. This bond shall be conditioned that in the event such Person shall fail to comply with any one or more of the provisions of its permit or franchise, then there shall be recoverable jointly and severally from the principal and surety of such bond, any damages suffered by the City as a result thereof, including the full amount of any compensation, indemnification, or cost of removal or abandonment of property as prescribed; said condition to be a continuing

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210 Lottie Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

obligation for the duration of the permit or franchise and thereafter until such Person has liquidated all of its obligations with the City that may have arisen from the acceptance of a franchise or issuance of a permit or from such Person's exercise of any privilege herein granted; provided that, upon completion of any construction called for in a franchise or permit, the amount of this bond may be reduced to an amount reasonably determined by the City to be adequate to protect its interests. Written evidence of payment of required premiums shall be provided to the City upon request.

**13.15.190      Security fund**

A.      The City reserves the right to require of any Person subject to this chapter that such Person deposit into a bank account, established by the City, and maintain for such term as is reasonable under the circumstances with interest running to such Person, a sum of money in an amount reasonably determined by the City as security for the faithful performance by such Person of all the provisions of its franchise or permit, and compliance with all orders, permits and directions of any agency of the City, and for the payment of any claims, liens and taxes due the City or liquidated damages imposed by the City which arise by reason of the construction, operation or maintenance of such Person's system. Within 30 days after notice to it that any amount has been withdrawn by the City from the security fund pursuant to the foregoing, such Person shall deposit a sum of money sufficient to restore such security fund to the original amount in the account at the time of withdrawal.

B.      If such Person fails after 10 days' notice to pay the City any delinquent fees, taxes or other amounts due and unpaid; or, fails to repay to the City, after such 10 days' notice, any damages, costs or expenses which the City shall be compelled to pay by reason of any act or default of such Person; or fails after 45 days' notice of such failure by the City to comply with any provision of its franchise or permit which the City reasonably determines can be remedied by an expenditure of the security, the City may immediately withdraw the amount thereof, with interest and any penalties, from the security fund. Upon such withdrawal, the City shall notify such Person of the amount and date thereof.

C.      The security fund deposited pursuant to this section shall become the property of the City in the event that a franchise or permit is canceled by reason of the default of the Person subject to this chapter or revoked for cause. Such Person, however, shall be entitled to the return of such security fund or portion thereof which remains on deposit at the expiration of the

**City of Bellingham**

CITY ATTORNEY

210 Lottie Street

Bellingham, Washington 98225

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term of the permit or franchise, or upon termination of the permit or franchise at an earlier date, upon payment of all sums then due to the City.

**13.15.200      Assignments or transfers of franchise or permit**

The City reserves the right to require in any franchise or permit that ownership or control of a Person subject to this chapter shall not, directly or indirectly, be transferred, assigned, or disposed of by sale, lease, merger, consolidation or other act of such Person, by operation of law or otherwise, without the prior written consent of the City, which consent shall not be unreasonably withheld or delayed.

A.      No franchise shall be assigned or transferred in any manner with twelve months of its initial issuance, unless otherwise provided.

B.      Absent extraordinary and unforeseeable circumstances, no franchise shall be assigned or transferred before construction of the Facilities has been completed.

C.      A franchisee and the proposed assignee or transferee shall provide and certify the following to the City not less than one hundred and twenty days prior to the proposed date of transfer:

(1)      Complete information setting forth the nature, terms and conditions of the proposed assignment or transfer;

(2)      All information otherwise reasonably required by the City of a franchise applicant under this chapter with respect to the proposed assignee or transferee;

(3)      Any other information reasonably required by the City; and,

(4)      An application fee which shall be set by the City, plus any other costs actually and reasonably incurred by the City in processing and investigating the proposed assignment or transfer.

D.      No transfer shall be approved unless the assignee or transferee has at least the legal, technical, financial, and other requisite qualifications to carry on the activities of the franchisee or permit granted hereunder.

E.      Any transfer or assignment of a permit or franchise without the prior written consent of the City as set forth herein shall be void and shall result in revocation of the existing permit or franchise.

**13.15.210      Transfers affecting control** Any transactions which singularly or collectively result in a change of fifty percent or more of the ownership or working control of the

**City of Bellingham**  
CITY ATTORNEY  
210 Lottie Street  
Bellingham, Washington 98225  
Telephone (360) 676-6903

franchisee, of the ownership or control of affiliated entities have ownership or working control of the franchisee, or of control of the capacity or the Facilities or substantial parts thereof of the franchisee shall be considered an assignment or transfer requiring City approval pursuant to section 13.15.200. Transactions between affiliated entities are not exempt from City approval; however, a transfer by a franchisee to another Person or entity controlling, controlled by, or under common control with franchisee shall not require City approval, provided notice thereof is timely provided to the City. Approval shall not be required for mortgaging purposes.

**13.15.220**    **Revocation or termination**    A franchise or permit granted hereunder may be revoked for the following reasons:

- A.    Construction or operation in the City without a franchise or permit.
- B.    Construction or operation at an unauthorized location.
- C.    Unauthorized transfer of control of the Person subject to this chapter.
- D.    Unauthorized assignment of a franchise or permit.
- E.    Unauthorized sale, assignment or transfer of all of a franchisee's or permittee's assets, or a substantial interest therein.
- F.    Misrepresentation or lack of candor by or on behalf of a Person in any application upon which the City relies in making any decision herein.
- G.    Abandonment of Facilities in the public ways.
- H.    Failure to relocate or remove Facilities as required in this chapter.
- I.    Failure to pay taxes, compensation, fees or costs when and as due.
- J.    Insolvency or bankruptcy of the franchisee or permittee.
- K.    Violation of material provisions of this chapter.
- L.    Violation of the material terms of a permit or franchise agreement.

**13.15.230**    **Notice and duty to cure**    In the event that the City believes that grounds exist for revocation of a franchise or permit, the City shall give the Person subject to this chapter 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 such Person a reasonable period of time not exceeding thirty (30) days to furnish evidence:

- A.    That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.

- B. That rebuts the alleged violation or noncompliance.
- C. That it would be in the public interest to impose some penalty or sanction less than revocation.

**13.15.240 Department action and hearing**

A. In the event that a Person who holds a permit fails to provide evidence reasonably satisfactory to the City, the City department which issued the permit may terminate it or take other reasonably necessary action based on the criteria and goals set out in this chapter.

B. In the event that a Person holding a franchise fails to provide evidence reasonably satisfactory to the City department responsible for administration of the franchise shall refer the apparent violation or non-compliance to the City Council. The City Council shall provide such Person with notice and a reasonable opportunity to be heard concerning the matter.

**13.15.250 Standards for revocation or lesser sanctions** In determining whether a Person subject to this chapter has violated or failed to comply with material provisions of this chapter or of a franchise or permit, the appropriate authority shall determine the appropriate action to take considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

- A. Whether the misconduct was egregious.
- B. Whether substantial harm resulted.
- C. Whether the violation was intentional.
- D. Whether there is a history of prior violations of the same or other requirements.
- E. Whether there is a history of overall compliance.
- F. Whether the violation was voluntarily disclosed, admitted or cured.

**B. CONSTRUCTION STANDARDS**

**13.15.400 General** No person shall commence or continue with the construction, installation or operation of Facilities within the City except as provided herein.

**13.15.410 Applicable laws** Facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations, including the State's on-call system.

**13.15.420**      **Construction permits**

A.      The Public Works Department is authorized to establish a reasonable fee for permission to cut any public street or alley, provided such fee is reasonably related to recovering costs, if any, to the general public caused by such activity.

B.      Other than as exempted by applicable law, no person shall construct or install any Facilities within the City without first obtaining a construction permit therefor. The applicant shall provide the following:

(1)      The location and route of all Facilities to be installed on existing utility poles.

(2)      The location and route of all Facilities to be located under the surface of the ground, including the line and grade proposed for the burial at all points along the route which are within the public ways.

(3)      The location of all existing underground utilities, conduits, ducts, pipes, mains and installations which are within the public ways along the underground route proposed by the applicant.

(4)      The location of all Facilities within the City which are not located within right of way.

(5)      Construction methods to be employed for protection of existing structures, fixtures, and Facilities within and adjacent to the right of way.

(6)      The location, dimensions, and type of trees and significant vegetation within or adjacent to the right of way along the route proposed by the applicant, together with a landscape plan for protecting, trimming, removing, replacing, and restoring any trees or significant vegetation or areas disturbed by the construction.

**13.15.430**      **Engineer's certification**      Upon request by the City, permit applications shall be accompanied by the certification of a registered professional engineer that the drawings, plans and specifications submitted with the application comply with applicable technical codes, rules and regulations.

**13.15.440**      **Traffic control plan**      All permit applications which involve work on, in, under, across or along any public ways shall be accompanied by a traffic control plan demonstrating the protective measures and devices that will be employed, consistent with Uniform Manual of Traffic Control Devices, to prevent injury or damage to persons or property and to minimize

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210 Lottie Street  
Bellingham, Washington 98225  
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disruptions to efficient pedestrian and vehicular traffic.

**13.15.450**     **Issuance of permit**     Within forty-five (45) days after submission of all plans and documents required of the applicant and payment of the permit fees required by this chapter, the City, if satisfied that the applications, plans and document comply with all requirements of this chapter, shall issue a permit authorizing construction of the Facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as are deemed necessary or appropriate.

**13.15.460**     **Notice of construction**     Other than for routine, individual service installations, the permittee shall notify the City not less than five working days in advance of any excavation or work in the public ways.

**13.15.470**     **Compliance with permit**     All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the Facilities. Authorized representatives of the City shall be provided access to the work and such further information is required to ensure compliance with such requirements.

**13.15.480**     **Display of permit**     The permittee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by representatives of the City at all times when construction work is occurring.

**13.15.490**     **Survey of underground facilities**     If the construction permit specifies the location of Facilities by depth, line, grade, proximity to other Facilities or other standard, the permittee shall cause the location of such Facilities to be verified by a registered land surveyor. The permittee shall relocate any Facilities which are not located in compliance with permit requirements.

**13.15.500**     **Noncomplying work**     Upon order of an authorized representative of the City, all work which does not comply with the permit, the approved plans and specifications for the work, or the requirements of this chapter, shall be removed.

**13.15.510**     **Completion of construction**     The permittee shall promptly complete all construction activities so as to minimize disruption of right of way and other public and private property. All construction work authorized by a permit within the right of way, including restoration, must be completed within 120 days of the date of issuance.

**13.15.520**     **Restoration of improvements**     Upon completion of any construction

**City of Bellingham**

CITY ATTORNEY

210 Lottie Street

Bellingham, Washington 98225

Telephone (360) 676-6903

work, the permittee shall promptly repair any and all public and provide property improvements, fixtures, structures and Facilities in the public ways or otherwise damaged during the course of construction, restoring the same as nearly as practicable to its condition before the start of construction.

**13.15.530 Landscape restoration**

A. All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, repair or replacement of Facilities, whether such work is done pursuant to a franchise or permit, shall be replaced or restored as nearly as may be practicable, to the condition existing prior to performance of work.

B. All restoration work within the public ways shall be done in accordance with landscape plans approved by the City.

**Section 3:** Bellingham Municipal Code section 13.14.010 is amended to read as follows:

**13.14.010 - Right-Of-Way Use Permit Required**

A. A right-of-way use permit is required for any use of an alley or street right-of-way that substantially interferes with the free use, by the public, of city rights-of-way. Such a permit is required whether or not the street or alley has been built or improved in the right-of-way.

B. A permit is not required for:

- (1) Street construction projects undertaken by the city pursuant to a contract between the city and its contractor;
- (2) Activities licensed by street obstruction licenses and open air vendor's licenses;
- (3) Displays of merchandise and portable advertising signs, placed by an abutting business, conforming with applicable city policies;
- (4) The planting or maintenance of decorative vegetation within a right-of-way, including street trees as they may be regulated by law; provided, that vegetation in a right-of-way is subject to removal at any time by order of the City Public Works Director, without liability for damages to the person owning the vegetation; and
- (5) Those uses which the Public Works Director finds to be of a minor nature, for which a permit is not justified.

C. Permission to use the right of way for utility or telecommunications facilities shall be granted pursuant to the provisions of chapter 13.15.

PASSED by the Council this 28<sup>th</sup> day of September 1998.

Bob Ryan  
Council President

APPROVED by me this 29<sup>th</sup> day of September, 1998.

Mark A. Anderson  
Mayor

ATTEST Juan Carpenter  
Finance Director

APPROVED AS TO FORM:

[Signature]  
Office of the City Attorney

Published: 10-04-98

**CITY OF BELLINGHAM WASHINGTON**

ORDINANCE NUMBER: 1998-09-074  
COUNCIL BILL NUMBER: 12421  
AGENDA BILL NUMBER: 13690  
1ST/2ND READING/INTRODUCTION: 8-24-98  
3RD/FINAL READING: 9-14-98  
PUBLISHED: 10-04-98

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CC: LEGISLATIVE COORDINATOR  
LEGAL SECRETARY  
ITSD (TO SCAN)  
OTHER: Linda Stork-JSS  
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