

**ORDINANCE #2018-09-015**

**AN ORDINANCE OF THE CITY OF BELLINGHAM, WASHINGTON REGARDING RIGHT-OF-WAY FRANCHISES; REPEALING BELLINGHAM MUNICIPAL CODE CHAPTERS 6.70 AND 13.15, CREATING A NEW BELLINGHAM MUNICIPAL CODE CHAPTER 13.15, AND AMENDING BELLINGHAM MUNICIPAL CODE CHAPTER 6.17**

**WHEREAS**, the City of Bellingham is the trustee of the public right-of-way within its corporate limits and holds such right-of-way for the primary purpose of transportation and for many secondary uses, including utilities; and

**WHEREAS**, City Council is authorized in the City Charter to grant nonexclusive franchises for the placement and operation within the right-of-way of private and publicly owned and operated facilities for public service; and

**WHEREAS**, the City's franchise procedures and requirements are contained in BMC 6.17 Cable Television, BMC 6.70 Utility and Telecommunications Providers and BMC 13.15 Utilities and Telecommunications Facilities Located within City Right of Way; and

**WHEREAS**, City Council has determined that it is in the best interest of the City to repeal and replace BMC 6.70 and BMC 13.15 in order to update and consolidate their provisions under a new BMC 13.15 entitled Utilities and Telecommunications Franchises; and

**WHEREAS**, City Council has further determined that it is in the best interest of the City to amend Chapter 6.17 to clarify that cable television franchise holders must continue to obtain a construction permit for all work in the right-of-way as described in BMC 13.15.320 through BMC 13.15.430.

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BELLINGHAM DOES HEREBY ORDAIN THAT:**

**Section 1.** Chapter 6.70 BMC Utility and Telecommunications Providers and Chapter 13.15 BMC Utilities and Telecommunications Facilities Located within the Right-of-Way are hereby repealed and replaced with the following consolidated chapter:

**Chapter 13.15  
UTILITIES AND TELECOMMUNICATIONS FRANCHISES**

Sections:

- 13.15.010 Purpose and Scope.
- 13.15.020 Definitions.
- 13.15.030 Franchise.
- 13.15.040 Application.
- 13.15.050 Review.
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- 13.15.130 Maintenance of facilities.
- 13.15.140 Location of facilities.
- 13.15.150 Relocation or removal of facilities.
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- 13.15.170 Failure to remove or relocate.
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- 13.15.430 Construction permit – Deficiency.
- 13.15.440 Preemption

**13.15.010 Purpose and Scope.**

A. The purpose of this chapter is to set forth the procedures and requirements for obtaining and maintaining a franchise to construct, install, operate, maintain, remove, repair or replace facilities within the right-of-way for the provision of utility services or telecommunications services to the public.

B. Cable television franchises are separately regulated under Chapter 6.17 BMC.

**13.15.020 Definitions.**

The definitions in Chapter 13.16 BMC apply equally to this chapter. The following definitions also apply:

"Affiliate" means a person that owns or controls, is owned or controlled by, or is under common ownership or control with another person.

"Department" means the public works department.

"Director" means the city's public works director and his or her designee.

"Facility" or "facilities" means the plant, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, pedestals, power meters, antennas, radios, electronics, cables, wires, plant, and other appurtenances and equipment located under, on or above the surface of the ground within the right-of-way and used or to be used for the purpose of providing utility services or telecommunications services.

"Franchise" means the initial authorization, or renewal thereof, approved by an ordinance of the city which authorizes the franchisee to construct, install, operate, maintain, remove, repair or replace facilities in the right-of-way for the provision of utility services or telecommunications services to the public. For purposes of this Chapter 13.15, the term "franchise" does not include cable television franchises which are separately regulated under Chapter 6.17 BMC.

"Franchisee" means any person obtaining a franchise pursuant to this chapter.

"Person" means and includes corporations, companies, governmental entities, 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 the city.

"Right-of-way" means the land acquired or dedicated for public roads and streets but does not include:

1. State highways;
2. Land dedicated for roads, streets, and highways not opened and not improved for motor vehicle use by the public;
3. Vacated rights-of-way, except utility easements retained in the vacation process.
4. Structures, including poles and conduits, located within the right-of-way;

5. Federally granted trust lands or forest board trust lands;
6. Lands owned or managed by the state parks and recreation commission; or
7. Federally granted railroad rights-of-way acquired under 43 U.S.C. Sec. 912 and related provisions of federal law that are not open for motor vehicle use.

"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, but does not include "cable service" as that term is defined in Chapter 6.17 BMC.

"Utility services" mean the generation, transmission or distribution of electric energy, natural gas, steam or liquid fuels.

#### **13.15.030 Franchise.**

A. The city may grant any person, by ordinance, a nonexclusive franchise to install, construct, operate, maintain, remove, repair or replace facilities in the right-of-way for the provision of utility services or telecommunications services to the public. The grant of a franchise shall be made pursuant to the procedures, terms, and conditions set forth in this Chapter 13.15. No provision of this Chapter 13.15 requires the granting of a new franchise if, in the opinion of the city council, the granting of an additional franchise is not in the public interest, unless otherwise required by law.

B. It is unlawful for any person to install, construct, operate, maintain, remove, repair or replace facilities in the right-of-way for the provision of utility services or telecommunication services without first obtaining a franchise pursuant to this Chapter 13.15.

C. The city may, in its sole discretion and except as otherwise prohibited by law, authorize other governmental entities to install, construct, operate, maintain, remove, repair or replace facilities in the right-of-way for public service by agreement entered into under the Interlocal Cooperation Act, Chapter 39.34 RCW, in lieu of following the procedures and requirements of this chapter.

#### **13.15.040 Application.**

A. Applications for new franchises shall be submitted to the director and shall include the following information:

1. Applicant's name, address, and telephone number and the name, address and telephone number of the duly authorized officer or employee of the applicant. If the application is submitted by an agent of the applicant (i.e., by someone other than a

duly authorized officer or employee of the applicant), the following information shall also be provided: (a) the agent's name, address and telephone number; and (b) documentation of the agent's authority to submit the application on behalf of the applicant;

2. Applicant's business structure, e.g., corporation, limited liability company, partnership, sole proprietorship;

3. Identification of the service area for which the franchise is requested, including a map of the area to be covered by the franchise and specific locations of the initial build out and, if known, proposed future build out locations, including which proposed facilities will be underground, ground based or aerial. A city-wide franchise area may be requested;

4. Description of the services that the applicant expects to provide within the city, including whether the services will be provided to the general public, to commercial and/or residential customers, or to other utilities or telecommunications providers;

5. Description of the type(s) of facilities to be installed in the right-of-way;

6. Description of applicant's previous experience providing the proposed services and facilities, including a list of all other franchises awarded applicant in the State of Washington;

7. The name, address and telephone number of any person, other than applicant, who will have any ownership interest in, or commercial use of, the proposed facilities;

8. Proof that applicant possesses all governmental licenses, certificates or authorizations that are necessary to lawfully conduct the proposed franchise activities;

9. Explanation of whether applicant proposed services or any portion thereof will be subject to tax under Chapters 6.04 or 6.06 of the Bellingham Municipal Code;

10. Information demonstrating applicant's financial capacity to construct, maintain and operate the proposed franchise facilities in compliance with the requirements of this chapter, as may be shown by its operations in other cities, financial statements, or other means; and

11. A statement as to whether applicant has had any franchise revoked or been held to be in violation of any franchise and, if so, a full explanation of the reasons for such violation and/or revocation and the steps taken by the applicant to cure all resulting harms and prevent their reoccurrence.

B. Applications to renew existing franchises shall be submitted to the director and shall include the following information:

1. The information described in subpart A(1) of this section.
2. A description of any proposed changes to applicant's franchise service area; and
3. A description of any material changes to the types of facilities that it proposes to install or operate in the right-of-way.

C. Applications to amend an existing franchise shall include a description of the proposed amendments and the reasons therefor.

D. Applications to transfer an existing franchise shall include the information described in subpart A(1), (2), (6), (8), (9), (10) and (11) with respect to the proposed transferee.

E. Applications shall include the applicable application fee.

F. Applications shall contain the notarized signature of an officer, employee or agent of applicant who is authorized to submit such application and to bind applicant to the contents thereof.

G. With the exception of fees, the director may waive, expand, or alter the application content requirements contained in this section when he or she reasonably determines that such information would materially assist the City in determining whether to grant or deny the application.

#### **13.15.050 Review.**

A. Within 30 days of submittal, the director shall notify the applicant if the application is incomplete. Upon receipt of a complete application, the director shall forward the application along with his or her recommendation to city council.

B. City council shall act upon a complete application within 120 days of the date the applicant submitted the complete application, except with the agreement of the applicant or where city council action cannot reasonably be obtained within the 120-day period.

C. A proposed ordinance for the grant, amendment to or renewal of a franchise shall be published once a week for four (4) successive weeks in the city official newspaper before it shall be placed on first reading by city council.

D. In considering whether to grant or deny a franchise application, council shall consider the following factors:

1. The legal, technical and financial capacity of the applicant to construct, install, operate, maintain, remove, repair and replace the proposed franchise facilities in accordance with the requirements of this Chapter 13.15;

2. The capacity of the right-of-way to accommodate the proposed franchise facilities;
3. The applicant's performance record in the city or other cities in which it holds a franchise; and
4. Any other factors reasonably determined by council to be in the public interest, except as otherwise provided herein or by state or federal law.

E. In accordance with RCW 35.99.040 and the 47 USC § 332(c)(7), council's decision on an application for a franchise for the provision of telecommunications services shall not:

1. Impose requirements that regulate the services or business operations of the service provider, except where otherwise authorized in state or federal law;
2. Conflict with federal or state laws, rules, or regulations that specifically apply to the design, construction, and operation of facilities or with federal or state worker safety or public safety laws, rules, or regulations;
3. Regulate the services provided based upon the content or kind of signals that are carried or are capable of being carried over the facilities, except where otherwise authorized in state or federal law;
4. Unreasonably deny the use of the right-of-way by a service provider for installing, maintaining, repairing, or removing facilities for telecommunications services or cable television services;
5. Prohibit the placement of all wireless or of all wireline facilities within city rights-of-way;
6. Prohibit or have the effect of prohibiting the ability of the applicant to provide telecommunications services within city limits; or
7. Regulate the placement, construction or modification of personal wireless service facilities on the basis of the environmental effects of radio frequency emissions to the extent that such facilities comply with Federal Communication Commission regulations concerning such emissions.

F. Franchises granted hereunder shall be by ordinance and shall contain substantially similar terms as exist in other franchises, taking into consideration the relevant characteristics of each applicant. Persons who are granted franchises shall be required in such franchise agreements to comply with the provisions of this chapter, except as specifically negotiated otherwise for good cause demonstrated to the city's reasonable satisfaction.

G. The reasons for any denial of a franchise shall be supported by substantial evidence contained in a written record.

H. Council's decision shall be final and not subject to administrative appeal. An applicant adversely affected by the final action denying a franchise, or by an unreasonable failure to act on an application as set forth in this section, may commence a judicial action within 30 days to seek relief, which shall be limited to injunctive relief.

**13.15.060 Acceptance.**

The franchise shall not become effective unless and until the applicant files a written acceptance thereof with the city clerk in the form approved by the office of the city attorney within the timeframe required specified in the franchise ordinance. Upon written acceptance, the franchise ordinance shall be deemed to constitute a contract between the franchisee and the city.

**13.15.070 Term.**

A franchise shall be for a term set by city council provided such term shall not exceed 25 years, subject to renewal as provided herein.

**13.15.080 Renewal.**

A franchise may be renewed upon application made not more than three (3) years prior to the expiration of the existing franchise. The application and decision thereon shall conform to the City's franchise procedures and requirements existent at that time.

**13.15.090 Fees.**

A. Franchise applications are subject to an administrative processing fee to be set by city council by periodic resolution. The fee shall apply to applications for new franchises and applications to amend, transfer or renew existing franchises.

B. Additional franchise fees may be determined by negotiation between the city and the prospective franchisee, to the extent permitted under applicable state and federal law.

**13.15.100 Responsibility and operational control.**

Each franchisee is wholly responsible for all facilities installed within the right-of-way under its franchise, and shall maintain full operational control over such facilities, regardless of whether the franchisee is the sole owner or user of such facilities. The purpose of this requirement is to ensure that each franchisee possesses and maintains authority over its facilities sufficient to ensure that they are constructed, installed, operated, maintained, removed, repaired and replaced in compliance with the requirements of this chapter and subject to all obligations contained herein.

**13.15.110 Interference with right-of-way.**

Franchisees shall not unreasonably interfere with the use of the right-of-way by the city, the general public or any persons authorized to use or be present in the right-of-way.

**13.15.120 Repair of damages.**

Each franchisee shall promptly repair any and all damage to city property or city improvements caused by its negligent or substandard work during the term of a franchise whether such work was performed by franchisee or its independent contractor(s). At the City's option, the City may repair such damages and franchisee shall promptly reimburse the city for all such costs reasonably incurred.

**13.15.130 Maintenance of facilities.**

Each franchisee shall maintain its facilities in good and safe condition and in compliance with all applicable laws and regulations.

**13.15.140 Location of facilities.**

Franchise facilities shall be constructed, installed, and located in accordance with the following terms and conditions:

A. Facilities shall be located, erected and maintained so as not to endanger or interfere with the lives of persons, or interfere with any existing improvements or unnecessarily hinder or obstruct the free use of the right-of-way.

B. Facilities shall be located so as to cause minimum interference with the proper use of streets, alleys and other public ways and places, and so 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 franchisees.

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 franchisee shall be a vested interest, and such poles or structures shall be removed or modified by the franchisee 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 director shall determine to be just and reasonable, if the director 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 48 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 31st 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.

**13.15.150 Relocation or removal of facilities.**

Within 90 days of written notice by the city, or such longer time period as the city shall allow when relocation is not practicable within 90 days, a person subject to this chapter shall at its own expense (or at the city's expense when required under RCW 35.99.060) 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 entity; or (C) the vacation of a public street or release of a utility easement.

### **13.15.160 Removal of unauthorized facilities.**

Within 90 days of written notice by the city, or such longer time period as the city shall allow when removal is not practicable within 90 days, the franchisee shall, at its sole expense, remove any unauthorized facilities from the right-of-way. Facilities shall be deemed unauthorized and subject to removal under this section 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, provided that the City may, in its sole discretion, allow the franchisee to abandon facilities in place. No facility may be abandoned in place without the express written consent of the City, which may be granted in the form of a public works permit. By approving abandonment, the City in no way accepts ownership of or responsibility for the abandoned facility.

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 small cell 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.

### **13.15.170 Failure to remove or relocate.**

If the franchisee fails to timely remove or relocate any facilities as required in this chapter, the city may cause such removal or relocation and charge the franchisee for the costs incurred and the franchisee shall promptly reimburse such costs, provided that the City shall not invoke its rights under this section when the city determines, in its sole discretion, that doing so would pose an unreasonable risk to property, human health, public safety or the environment.

### **13.15.180 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, safety or environmental emergency, without advance notice to franchisee, and charge the franchisee for the costs incurred and the franchisee shall promptly reimburse such costs, provided that the City shall not invoke its rights under this section when the city determines, in its sole discretion, that doing so would pose an unreasonable risk to property, human health, public safety or the environment.

### **13.15.190 Damage to franchise facilities.**

The city shall not be liable for any damage to or loss of franchisee facilities within the right-of-way unless such damage or loss was proximately caused by the sole negligence of the city or its employees acting within the scope of their employment. Nothing herein

shall be construed to render the city vicariously liable for the acts or omissions of the city's independent contractors.

### **13.15.200 Insurance.**

A. Each franchisee shall obtain and maintain the following insurance throughout the term of the franchise, naming the city as an additional insured, protecting both the franchisee and the city against damages of any kind that may arise in connection with the services or work performed under the franchise and/or this chapter:

1. Commercial general liability insurance with limits not less than \$2,000,000 per occurrence, which shall:
  - a. Provide additional insured coverage to the city and its officers and employees;
  - b. Apply on a primary and noncontributory basis;
  - c. Include a waiver of subrogation rights against the city;
  - d. Include coverage for bodily injury and property damage for premises/operations, products/completed operations, personal/advertising injury, contractual, independent contractors, and employers'/stop gap liability and shall not exclude SXU/subsidence perils or any similar perils; and
  - e. Require the carrier to provide 30-days' written notice to the city prior to cancellation.
2. Commercial automobile liability insurance with a combined single limit of not less than \$1,000,000;
3. Workers compensation insurance for Washington State as required by Title 51 RCW; and
4. When deemed necessary by the office of the city attorney, pollution liability insurance in an amount deemed necessary by the office of the city attorney. The pollution policy shall be written on an occurrence basis and shall provide coverage for all claims, including investigation, defense, or settlement costs and expenses for bodily injury and property damage (including natural resources damages and loss of use of tangible property that has not been physically injured) arising out of pollution conditions caused or made worse by the franchisee's work, whether performed by franchisee or by its contractors or subcontractors of any tier, including clean-up costs for a newly caused condition or a historical condition that is made worse. The franchisee shall be named insured and the city and its officers, employees and consultants shall be included as additional insureds.

B. The franchisee shall provide the city with current certificates of insurance, together with copies of all necessary endorsements or blanket policy provisions evidencing the coverages required herein.

C. The office of the city attorney may in its discretion require or accept greater, lessor or different insurance coverages than those required herein based on its assessment of the risks involved with any particular franchise.

D. Failure to maintain the required insurance shall be a basis terminate the franchise.

**13.15.210 Indemnification.**

Franchisee shall, at its sole expense, 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 the negligence or willful misconduct 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 franchisee or its officers, agents, employees, or contractors of any tier and whether or not such acts or omissions were authorized or contemplated by the franchise or applicable law; and/or (B) arising out of or alleged to arise out of any failure by franchisee or its officers, agents, employees or contractors of any tier 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 franchisee from its duty of defense against liability or of paying any judgment entered against the city, its officers, or its employees.

**13.15.220 Performance bond.**

Within 30 days after a grant herein, franchisee shall submit to the office of the city attorney, which shall be filed with the city finance department 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 office of the city attorney in an amount reasonably determined by the office of the city attorney, conditioned that such person shall well and truly observe, fulfill, and perform each term and condition of its 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 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 obligation for the duration of its 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 from such person's exercise of any privilege herein granted.

**13.15.230 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, 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 20 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 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 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 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.

**13.15.240 Assignments or transfers of franchise.**

A. A franchise granted under this chapter may not be transferred or assigned without the prior written consent of city council granted by ordinance. No consent shall be required, however, for a transfer in trust, by mortgage or by assignment of any rights, title or interest of the franchisee in the franchise in order to secure indebtedness.

B. A franchisee and the proposed assignee or transferee shall provide and certify the following to the city not less than 120 days prior to the proposed date of any assignment or transfer requiring the consent of city council hereunder:

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.

C. No assignment or 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 franchise granted hereunder.

D. Any transfer or assignment of a franchise without the prior written consent of the city as required herein shall make the franchise subject to termination by city council.

#### **13.15.250 Change of ownership or control.**

Any transactions which singularly or collectively result in change of 50 percent or more of the ownership or working control of the franchisee, or of the ownership or control of affiliated entities which 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 BMC 13.15.240. 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 the franchisee shall not require city approval, provided notice thereof is timely provided to the city.

#### **13.15.260 Civil penalties and additional relief.**

A. Any person violating or failing to comply with any of the provisions of this chapter or any franchise issued pursuant hereto or permit required hereunder shall have committed a civil infraction subject to a civil penalty of not more than \$250.00 per day for each day of violation. In addition, abatement may be ordered.

B. 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 or franchise issued pursuant thereto or permit required herein shall be liable for any and all damages arising from such violation.

C. Notwithstanding any other provision in this chapter, the city may seek legal or equitable relief to enjoin any acts or practices and abate any condition which constitutes or will constitute a violation of the applicable provisions of this chapter or any franchise issued pursuant hereto or any permit required hereunder when civil penalties are inadequate to effect compliance.

D. In addition to the penalties set forth in this section, violation of any provision of this chapter or franchise issued pursuant hereto or permit required hereunder may also result in the revocation or termination of the franchise as provided herein.

**13.15.270 Revocation.**

A franchise granted hereunder may be revoked for the following reasons:

A. Construction or installation of facilities without obtaining the required construction permit under this chapter or the required small cell permit under Chapter 13.16 BMC.

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.

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.

K. Violation of any provision of this chapter or any franchise granted hereunder or any construction permit required herein.

L. Violation of Chapter 13.16 BMC or any small cell permit required thereunder.

**13.15.280 Revocation – Notice and duty to cure.**

In the event that the city believes that grounds exist for revocation of a franchise, the city shall give the franchisee 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 franchisee a reasonable period of time not exceeding 30 days to furnish evidence that:

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

B. rebuts the alleged violation or noncompliance; or

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

**13.15.290 Revocation – Department action and hearing.**

In the event that the franchisee fails to cure any violation identified by the city in a written notice issued pursuant to this chapter, the director shall refer the apparent violation or noncompliance to the city council, along with the director's recommendation regarding the sanction to be imposed in accordance with section 13.15.300. The city council shall provide such person with notice and a reasonable opportunity to be heard concerning the matter.

**13.15.300 Revocation – Standards for revocation or lesser sanctions.**

If city council determines that the franchisee has violated or failed to comply with the provisions of this chapter or of a franchise agreement or permit required thereunder, the city council 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.

**13.15.310 Construction.**

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 locate laws.

**13.15.320 Construction permit – Required.**

A. Other than as exempted by this Chapter or other applicable law, no franchisee or person acting under the authority granted to a franchisee shall construct or install facilities within the right-of-way or engage in ground disturbance activities within the right-of-way without first obtaining a construction permit for such work pursuant to this Chapter 13.15 or, where applicable, a small cell permit pursuant to Chapter 13.16.

B. When necessary to address an imminent threat to public health, safety or the environment, franchisees may perform work prior to obtaining a permit as required under subpart A above, provided that in such cases the franchisee shall notify the department and apply for a permit for such work as soon as practicable.

C. The director may waive the requirement to obtain a construction permit under this Chapter 13.15 if the work to be performed will not substantially impact the right-of-way.

#### **13.15.330 Construction permit – Application.**

The director shall specify, in writing, construction permit application submittal requirements and provide official application forms. The director may waive specific submittal requirements determined to be unnecessary for review of any particular application. The director may require additional material when the director determines such material is needed to adequately assess the proposed project.

#### **13.15.340 Construction permit – Review.**

A. The department shall act upon the permit application within 30 days of receipt of a complete application. For purposes of this section, "act" means that the department issues its decision to grant, condition, or deny the application or notify the applicant in writing of the amount of additional time that will be required to make the decision and the reasons for this time period. The department's decision shall be based on its determination of whether the proposed work complies with the franchise under which such work is to be performed and all applicable laws, codes and regulations.

B. The construction permit shall list the franchisee and the contractor performing the work. Franchisee and its contractor are jointly and severally responsible for all work under the construction permit and any code violations in conjunction with the work. All work, whether performed by franchisee or its contractor, shall be deemed to be the work of franchisee for all purposes under the franchise, including all insurance, performance bond and indemnification obligations thereunder.

#### **13.15.350 Construction permit – Compliance.**

All construction practices and activities shall be in accordance with the construction 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.

**13.15.360 Construction permit – Display.**

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.

**13.15.370 Construction permit – 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 franchisee 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 construction permit requirements.

**13.15.380 Construction permit – Noncomplying work.**

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

**13.15.390 Construction permit – Completion of construction.**

All construction activities shall be promptly pursued to completion so as to minimize disruption of the right-of-way. All construction work must be completed within 120 days of the date of issuance of the construction permit.

**13.15.400 Construction permit – Restoration of improvements.**

Upon completion of the work, or sooner when required by the City in its sole judgement, the permittee shall promptly repair or replace any and all public and private property improvements, fixtures, structures and facilities in the right-of-way or otherwise damaged during the course of the work, restoring the same as nearly as practicable to its condition before the start of construction. If permittee fails to commence or complete repairs within the timeframe required by the city in a written notice, the City may undertake such repairs using its own forces or contractors and charge such costs to permittee. The city may undertake emergency repairs without notice to permittee at permittee's expense.

**13.15.410 Construction permit – 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 shall be replaced or restored as nearly as may be practicable to the condition existing prior to performance of work.

B. Nothing herein shall be construed to relieve permittee of the obligation to obtain a street tree permit to the extent required under Chapter 13.40 BMC.

**13.15.420 Construction permit – Inspection.**

- A. Upon completion of construction, permittee shall provide the city with a written notice of completion.
- B. The department may inspect the facility.
- C. The department shall issue a notice of deficiency to the permittee if, after inspection, it is determined that the facility is not in compliance with the terms of the permit.

**13.15.430 Construction permit – Deficiency.**

- A. A notice of deficiency issued by the department shall:
  - 1. State the basis for the department's determination that the work is not in compliance with the permit, this chapter, or franchise agreement;
  - 2. Give permittee reasonable time to correct the deficiency, provided, however, that if the notice of deficiency concerns a risk to public health or safety the department may require immediate compliance; and
  - 3. State the department's remedies if permittee fails to take corrective action, which may include, without limitation, removal of the noncompliant work or facility at permittee's expense.
- B. Compliance with notice of deficiency.
  - 1. Permittee shall timely comply with a notice of deficiency.
  - 2. If permittee should fail to timely comply with a notice of deficiency, the department may take the corrective action set forth in the notice.

**13.15.440 Preemption**

The provisions of this Chapter shall not apply to any franchisee or applicant to the extent that such provision, as applied, is in direct conflict with, and preempted by, state or federal law.

**Section 2.** Chapter 6.17 BMC Cable Television is amended as follows:

**6.17.220 Construction and technical standards.**

- A. Compliance with Construction and Technical Standards. Company shall construct, install, operate and maintain its system in a manner consistent with all laws, ordinances, state and municipal construction standards, FCC technical and construction standards, and any other standards the company commits itself to comply with as part of its

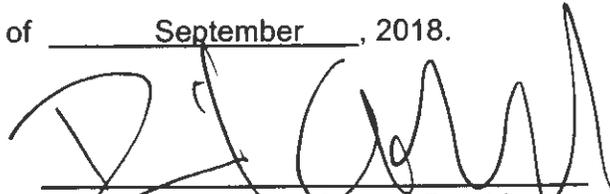
application. In addition, company shall provide the city, upon request, with a written report of the results of company's annual proof-of-performance tests conducted pursuant to FCC standards and requirements.

B. Other than as exempted by applicable law, no franchisee or person acting under the authority granted to such franchisee shall construct or install facilities within the right-of-way without first obtaining a construction permit therefor in accordance with the construction permit procedures and requirements contained in Chapter 13.15 BMC, provided, that the public works director may waive the requirement to obtain a permit if the work to be performed will not substantially impact the right-of-way.

CB. Additional Specifications.

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**PASSED** by City Council this 10<sup>th</sup> day of September, 2018.



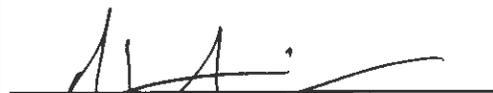
Roxanne Murphy, Council President  
Dan Hammill, Council President  
Pro Tempore

**APPROVED** by me this day 18 of September, 2018.



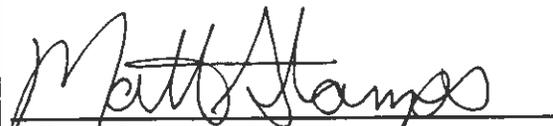
Kelli Linville, Mayor

**ATTEST:**



Brian Henshaw, Finance Director

Andrew Stinson  
**APPROVED AS TO FORM:**



Office of the City Attorney

**Published:**

September 14, 2018

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