

ORDINANCE NO.: 89-2007
INTRODUCED BY: Mayor and Council

AN ORDINANCE AMENDING CHAPTER 901, "STREET OPENINGS AND CURB CUTTING", OF THE CODIFIED ORDINANCES TO ADOPT A NEW CHAPTER 901, ENTITLED "USE OF PUBLIC RIGHT-OF-WAY BY SERVICE PROVIDERS"; AND DECLARING AN EMERGENCY.

WHEREAS, due to increased demand for use of the public rights-of-way by utility and other service providers and users, this Council finds it necessary to adopt a new Chapter 901 of Part Nine, "Streets and Public Services Code", of the Codified Ordinances of the City and for the further reasons set forth in proposed new Section 901.01(a) of said Code attached hereto as Exhibit A;

NOW, THEREFORE, Be It Ordained by the Council of the City of Richmond Heights, State of Ohio; that:

Section 1. Chapter 901, "Street Openings and Curb Cutting", of Title One, "Street and Sidewalk Areas", of Part Nine, "Street and Public Services Code", of the Codified Ordinances of the City of Richmond Heights is hereby amended to read as set forth in the attached Exhibit A which is fully incorporated by reference herein.

Section 2. Former Chapter 901, "Street Openings and Curb Cutting", of Part Nine, "Streets and Public Services Code", of the Codified Ordinances of the City of Richmond Heights is hereby repealed.

Section 3. It is found and determined that all formal actions of the Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and that all deliberations of the Council and any of its committees that resulted in such formal action were in meetings open to the public in compliance with all legal requirements.

Section 4. This Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and general welfare and it is necessary for this Ordinance to be in effect immediately upon its passage in order to protect the public health, safety, aesthetics, property values and general welfare of the community at the earliest possible time due to the immediate and increased desire of utility and other service providers to use the public rights-of-way for their facilities;

WHEREFORE, this Ordinance shall take effect and be in force from and after the date of passage by vote of five members of the Council and its approval by the Mayor.

PASSED: _____

Daniel J. Ursu, Mayor

APPROVED: _____

ATTEST: _____

Betsy Traben
Clerk of Council

David H. Roche
President of Council

EXHIBIT “A” TO ORDINANCE NO. 89-2007

CHAPTER 901

Use of Public Right-of-Way by Service Providers

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901.01 SCOPE OF CHAPTER; DEFINITIONS.

(a) The purpose and intent of this Chapter is to:

- (1) Manage reasonable access to the City’s Right-of-Way by utility and other Service Providers and ensure their compliance with the ordinances, rules and regulations of the City.
- (2) Conserve the limited physical capacity of the Right-of-Way held in trust by the City for the benefit of the public.
- (3) Assure that the City fairly and responsibly protects the public health, safety and welfare.
- (4) Enable the City to discharge its public trust consistent with rapidly evolving federal and State regulatory policies, industry competition and technological development.

(b) For the purpose of this Chapter, and the interpretation and enforcement thereof, the following words and phrases shall have the following meanings, unless the context of the sentence in which they are used shall indicate otherwise:

- (1) 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.
- (2) Capital Improvement means an addition made to enhance the value or extend the useful life of an existing System or Facilities, including Construction, Reconstruction, installation, rehabilitation, renovation, improvement, enlargement and extension of Facilities, but not including ordinary or Routine Maintenance.
- (3) City means the City of Richmond Heights, Ohio.

- (4) Construct, Constructing, Construction, etc. means installing, repairing, replacing or removing any Facility, regardless of the methods employed, including Excavation.
- (5) Construction Permit or Permit means a permit issued pursuant to Section 901.08 of this Chapter.
- (6) Emergency means an unforeseen occurrence or condition calling for immediate action.
- (7) Excavate, Excavating or Excavation means cutting, sawing, breaking, drilling into, boring under, or otherwise altering any Public Street or sidewalk pavement, and/or digging, drilling into or boring under any unpaved portion of the Right-of-Way, including any other work or activity which disturbs the existing surface or subsurface structure, composition, or soil compaction.
- (8) Excess Capacity means the volume or capacity in any existing or future Facility in the Right-of-Way that is or will be available for use for additional Facilities.
- (9) Facilities or Facility means the plant, equipment and property, including but not limited to, cables, fibers, wires, lines, pipes, conduits, ducts, pedestals, antennae, electronics, poles, pipes, mains, plant, equipment and other appurtenances located under, on or above the surface of the ground in the Right-of-Way of the City and used or to be used to operate a System to transmit, receive, distribute, provide or offer a service, publicly or privately.
- (10) Lane Obstruction means the blocking or diverting of vehicular and/or pedestrian traffic from a street or sidewalk for the purpose of Constructing, Excavating, maintaining or operating any Facility, including (A) the lifting or removing of manhole or handhole covers, and (B) the opening or accessing of at-grade or pole-mounted cabinets, pedestals, transformers, power supplies, amplifiers, splice enclosures, traps or other Facilities.
- (11) Mayor means the Mayor or his or her designee.
- (12) New Service Orders means the connection from the Service Provider's existing Facilities on private property for the purpose of providing a new Service to a customer in the City.
- (13) Occupancy, Occupy or Use means, with respect to the Right-of-Way, to place a tangible thing in the Right-of-Way for any purpose, including, but not limited to, Constructing, repairing, positioning, maintaining or operating lines, poles, pipes, conduits, ducts, equipment or other structures, appurtenances or Facilities necessary to operate, or relating to, a System for the delivery of Services or private services over the Right-of-Way.
- (14) ODOT means the Ohio Department of Transportation.
- (15) Other Ways means the highways, streets, alleys, Utility Easements or other rights-of-way within the City, but under the jurisdiction and control of a governmental entity other than the City.

- (16) Overhead Facilities means utility poles and wires, cables and other such equipment running between and on such poles, including the underground supports and foundations for such Facilities.
- (17) Person means and includes corporations, companies, associations, joint stock companies or associations, firms, partnerships, limited liability companies, trusts and individuals and includes their lessors, trustees and receivers.
- (18) Public Easement means any easement under the jurisdiction and control of the City and acquired, established, dedicated or devoted for public purposes, including utility purposes.
- (19) Public Street means the paved and unpaved portion of any street, road, boulevard, drives, highway, freeway, parkway, lane court, alley or other Right-of-Way in which the City has an interest in law or equity and which has been acquired, established, dedicated or devoted to street purposes.
- (20) Public Way Fee means a fee levied to recover the costs incurred by the City and associated with the Occupancy or Use of a Right-of-Way as provided in Chapter 4939 of the Ohio Revised Code.
- (21) PUCO or Public Utilities Commission of Ohio means the State Administrative agency, or lawful successor, authorized to regulate and oversee certain Public Service Providers and Services in the State of Ohio.
- (22) Reconstruct, Reconstruction, etc. means substantial physical change to or Capital Improvement of all or a portion of an existing System or Facilities including, but not limited to, the addition or alteration of Facilities to accommodate the provision of an additional Service or Services, and a change in location, or additional locations, of Facilities along the same Right-of-Way involving Construction in Public Streets, Utility Easements, or Right-of-Way.
- (23) Right-of-Way means the surface of, and the space within, through, on, across, above or below, any Public Street, public road, public highway, public freeway, public lane, public path, public alley, public court, public sidewalk, public boulevard, public parkway, public drive, Public Easement and any other land dedicated or otherwise designated for a compatible public use, which is owned or controlled by the City but excludes a private easement.
- (24) Routine Maintenance means repair, upkeep, replacement or restoration of existing Facilities located in the Right-of-Way that requires no more than three (3) working days to complete, is not an Emergency and does not include Excavation of the Right-of-Way.
- (25) Service means the offering of water, sewer, electric, gas, telephone, telecommunications, cable television, video, information or other utility-like service for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the Facilities used.
- (26) Service Provider means any Person who, pursuant to the consent to Occupy or Use the Right-of-Way pursuant to Section 901.02 of this Chapter, directly or indirectly owns, controls, operates or manages Facilities within the City's Right-of-Way, used or to be used for the

purpose of operating a System to: (i) offer Service to the public within the City or outside of the City's boundaries or (ii) transmit, receive, distribute or provide telecommunications or other services between or among private buildings or facilities where there is no service offered to the public.

- (27) State means the State of Ohio.
- (28) Surplus Space means that portion of the Usable Space on a utility pole that has the necessary clearance from the Facilities of other Public Service Providers using the pole, as required by the orders and regulations of PUCO and other applicable State and local orders and regulations, to allow its use by an additional Service Provider for a pole attachment.
- (29) System means a network of Facilities for the transmission and/or distribution of a particular Service.
- (30) Trenchless Technology means the use of directional boring, horizontal drilling and micro-tunneling and other techniques in the Construction of underground portions of Facilities that result in the least amount of disruption and damage to the Right-of-Way as possible.
- (31) Underground Facilities means that portion of a System located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities.
- (32) Usable Space means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the PUCO.
- (33) Utility Easement means any easement owned by a Service Provider and acquired, established, dedicated or devoted for the purpose of providing Service to the public.

901.02 CONSENT TO OCCUPY OR USE THE RIGHT-OF-WAY.

(a) Consent Required to Occupy Right-of-Way. No Person shall Occupy or Use the Right-of-Way without obtaining prior consent from the City to do so.

(b) Persons Required to Apply for Consent to Occupy or Use Right-of-Way.

- (1) The following Persons shall apply to the City for consent to Occupy or Use the Right-of-Way on a form provided by the Mayor if such Person:
 - (A) Does not currently have an existing System or Facilities in the City's Right-of-Way and desires to Construct a System or Facilities in the Right-of-Way;
 - (B) Had an existing System or Facilities in the Right-of-Way on July 2, 2002 and does not have presumed initial consent under Section 901.02(c)(1) below; or
 - (C) Has initial presumed consent or City consent to Occupy or Use the Right-of-Way for an existing System or Facilities, but is planning
 - (i) a Capital Improvement or Reconstruction of existing Facilities; or
 - (ii) to Construct additional Facilities or an additional System anywhere in the City.

(c) Initial Consent Presumed.

- (1) A Person with existing Facilities in the Right-of-Way on July 2, 2002 Chapter shall be presumed to have initial consent for those Facilities to Occupy or Use the Right-of-Way if such Person:
 - (A) is subject to jurisdiction by the PUCO;
 - (B) has a valid franchise agreement with the City to provide Cable Services or other Services in the City, and/or
 - (C) is any other Person whose existing Facilities lawfully Occupied the Right-of-Way on July 2, 2002.
- (2) Initial presumed consent for Occupancy or Use of the Right-of-Way is limited to the Service Provider's existing Facilities.
- (3) Any Service Provider with initial presumed consent to Occupy or Use the Rights-of-Way shall file an Initial Registration with the City within ninety (90) days of the effective date of this Chapter, on a form provided by the Mayor, which shall include the information required by Section 901.02(d) of this Chapter.
- (4) A Person with initial presumed consent must comply with the requirements of this Chapter with respect to the ongoing Occupancy or Use of the Right-of-Way including, but not limited to, the Insurance, Indemnity, Performance Bond and Registration requirements of Sections 901.04(a), (b) and (c) and 901.05 of this Chapter.

(d) Application for Consent to Occupy or Use the Right-of-Way and Initial Registration of Service Providers with Initial Presumed Consent. The application for Consent to Occupy or Use the Right-of-Way and/or initial registration pursuant to Section 901.02(c) for Service Providers with initial presumed consent to Occupy or Use the Right-of-Way shall include the following information with respect to the applicant's or Service Provider's planned or existing System and/or Facilities in the Right-of-Way as well as plans for any planned Capital Improvements or Reconstruction for the following twelve (12) months:

- (1) The identity, legal status and federal tax identification number of the applicant, including all Affiliates of the applicant or Service Provider that will Use or Occupy the Right-of-Way or are in any way responsible for Facilities located in the Right-of-Way.
- (2) The name, address and telephone number of the local officer, agent or employee responsible for the accuracy of the application or initial registration and available at all reasonable times to be notified in case of emergency.
- (3) A general description of the Service provided or to be provided by the applicant or Service Provider over its System or Facilities. Where Services are or will be provided by a nonaffiliated provider, the applicant or Service Provider shall identify that provider.
- (4) A description of the type of transmission medium used, or to be used, by the applicant or Service Provider to operate a System.
- (5) A map and/or description of the existing or proposed Facilities in the City's Right-of-Way, all in sufficient detail to identify:

- (i) the location and route of the applicant's or Service Provider's Facilities or proposed Facilities.
 - (ii) the location of all known existing Overhead and/or Underground Facilities in the Right-of-Way along the route or proposed route of the applicant's or Service Provider's Facilities or proposed Facilities that is sufficient to show the impact of the applicant's Facilities on other existing Facilities.
 - (iii) the location of all known overhead and underground Utility Easements.
 - (6) Evidence that the applicant or Service Provider has complied, or will comply, with the Indemnification, Insurance, Performance Bond and Construction Bond requirements of this Chapter.
 - (7) Information sufficient to determine that the applicant or Service Provider has received any certificate of authority required by the PUCO, FCC or other applicable State or Federal Agency to operate a System and provide Services in the City.
 - (8) Written acknowledgement of receipt of a copy of this Chapter.
 - (9) Such other information as the Mayor may reasonably require relevant to the Provider's Use or intended Use of the Right-of-Way.
- (e) City Consent or Denial for Occupancy or Use of the Right-of-Way.
- (1) The City shall grant or deny, in writing, a Person's application for consent to Occupy or Use the Right-of-Way within sixty (60) days of the date on which the Person filed the application with the City.
 - (A) The City may withhold, deny or delay its consent to a Person's application to Occupy or Use the Right-of-Way based on the Person's failure to possess the financial, technical and managerial resources necessary to protect the public health, safety and welfare, or for other reasons based on the health, safety and welfare of the City and in accordance with Ohio law.
 - (B) If the City denies a Person's application to Occupy or Use the Right-of-Way, the City shall provide its reasons in writing for denying the application, and shall provide any information reasonably requested by that Person necessary to obtain the City's consent to Occupy or Use the Right-of-Way.
 - (2) The City's grant of consent for a Person to Occupy or Use the Right-of-Way shall be in the form of a Right-of-Way Occupancy Certificate which shall set forth the specific terms of the City's consent for such Person to Occupy or Use the Right-of-Way.

(f) Application to Existing Franchise or Agreement. For purposes of this Chapter, an effective Franchise or Agreement shall be deemed consent authorizing the Occupancy or Use of the Right-of-Way to the extent described in the Franchise. Any Occupancy or Use of the Right-of-Way beyond that authorized by the Franchise or Agreement shall require additional consent for such additional Occupancy or Use. Service Providers shall comply with all other provisions

of this Chapter except if there is a direct conflict between a specific provision in the Franchise or Agreement and the provisions of this Chapter, the Franchise or Agreement shall control.

901.03 ANNUAL REGISTRATION OF SERVICE PROVIDERS.

(a) Annual Registration Required. All Service Providers with consent to Occupy or Use the Right-of-Way as provided in Section 901.02 shall register with the City each calendar year between January 1 and January 31 on a form provided by the Mayor. [Service Providers who file an Initial Registration after _____ but before _____ need not file an Annual Registration for calendar year _____.]

(b) Purpose of Annual Registration. The purpose of Annual Registration is to assist the City in monitoring use of the Right-of-Way; to maintain an accurate and current database of information concerning Service Providers that Occupy or Use the Right-of-Way; and to assist the City in managing the Right-of-Way in a manner that best serves the public health, safety and welfare.

(c) Information Required for Annual Registration. Registration forms will be provided by the City and shall require the following information:

- (1) Any material changes to the information the Service Provider provided the City in the application for consent to Occupy or Use the Right-of-Way or Initial Registration, including, but not limited to:
 - (A) The identity, legal status, and federal tax identification number of the Service Provider, including any Affiliates.
 - (B) The name, address and telephone number of the local officer, agent or employee responsible for the accuracy of the Service Provider's registration statement and available at all reasonable times to be notified in case of emergency.
- (2) Evidence that the Service Provider is in compliance with the Insurance, Indemnity and Performance Bond requirements pursuant to Section 901.04 of this Chapter.
- (3) Information regarding, and a preliminary Construction schedule and completion date for, any Capital Improvements the Service Provider plans in the Right-of-Way for the following twelve (12) months.
- (4) Any other information the Mayor may reasonably require relevant to the Service Provider's Occupancy or Use of the Right-of-Way.

(d) Facilities Maps. The City shall have the right to access and review all the Service Provider's maps and/or as-built plans showing the location of its Facilities in the City's Rights-of-Way, upon ten (10) days notice to the Service Provider.

(e) Registration to be Kept Current. In addition to Annual Registration, each Service Provider shall keep the required registration information current at all times and shall provide the City with notice of changes to that information within fifteen (15) days following the date on which the Service Provider has notice of such change.

901.04 INSURANCE, BOND AND INDEMNIFICATION.

(a) Service Provider Insurance. As a condition of the consent to Occupy or Use the Right-of-Way, a Service Provider must secure and maintain, at a minimum, the following liability insurance policies insuring the Service Provider and naming the City, its elected and appointed officers, officials, agents, employees and representatives as additional insureds:

- (1) Comprehensive general liability insurance with limits not less than
 - (A) Five Million Dollars (\$5,000,000) for bodily injury or death to each Person;
 - (B) Five Million Dollars (\$5,000,000) for property damage resulting from any one accident; and
 - (C) Five Million Dollars (\$5,000,000) for all other types of liability.
- (2) Automobile liability for owned, non-owned and hired vehicles with a limit of Three Million Dollars (\$3,000,000) for each Person and Three Million Dollars (\$3,000,000) for each accident.
- (3) Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars (\$1,000,000).
- (4) Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than Three Million Dollars (\$3,000,000).
- (5) The liability insurance policies required by this Section shall be maintained by the Service Provider throughout the period of time during which the Service Provider is Occupying or Using the Right-of-Way, or is engaged in the removal of its Facilities. Each such insurance policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until sixty (60) days after receipt by the City, by registered mail, of a written notice addressed to the Mayor of such intent to cancel or not to renew."

- (6) Within sixty (60) days after receipt by the City of said notice, and in no event later than thirty (30) days prior to said cancellation, the Service Provider shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Section.
- (7) Upon written application to, and written approval by, the Mayor, a Service Provider may be self-insured to provide all of the same coverages as listed in this Section; except that all coverages for Workers' Compensation shall be in compliance with State law. No approval for self-insurance shall be given until the Mayor has made a complete review of the Service Provider's financial ability to provide such self-insurance. As part of the review process, the Mayor may require, and the self-insurance applicant shall provide, any and all financial documents necessary to make a valid determination of the applicant's ability to meet the needs of this Chapter.

(b) General Indemnification. Each application for consent to Occupy or Use the Right-of-Way, and each annual registration, shall include, to the extent permitted by law, the Service Provider's express undertaking to defend, indemnify and hold the City and its elected

and appointed officers, officials, employees, agents, representatives and subcontractors harmless from and against any and all damages, losses and expenses, including reasonable attorney's fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the negligent, careless or wrongful acts, omissions, failures to act or misconduct of the Service Provider or its Affiliates, officers, employees, agents, contractors or subcontractors relating to the Service Provider's Occupancy or Use of the Right-of-Way, whether such acts or omissions are authorized, allowed or prohibited by this Chapter.

(c) Performance Bond. As a condition of consent to Occupy or Use the Right-of-Way, and to ensure the full and complete compliance with, and performance under this Chapter, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the Service Provider to comply with the codes, ordinances, rules, regulations or permits of the City, each Service Provider shall, in the amount of Fifty Thousand Dollars (\$50,000) or such lesser amount as the Mayor may determine to be necessary (i) provide an unconditional letter of credit, or other instrument acceptable to the City, or (ii) furnish and file with the City a Performance Bond running to the City in the required amount from a company licensed to do business in the State of Ohio; which performance bond or letter of credit or other instrument shall be maintained at the sole expense of the Service Provider so long as any of the Service Provider's Facilities are located within the City's Right-of-Way.

- (1) Before claims are made against the Performance Bond or letter of credit or other instrument, the City shall give written notice to the Service Provider:
 - (A) describing the act, default or failure to be remedied, or the damages, cost or expenses which the City has incurred by reason of the Service Provider's act or default;
 - (B) providing a reasonable opportunity for the Service Provider to remedy the existing or ongoing default or failure, if applicable;
 - (C) providing a reasonable opportunity for the Service Provider to pay any monies due the City before the City makes a claim against the Performance Bond or letter of credit or other instrument;
 - (D) that the Service Provider will be given an opportunity to review the act, default or failure described in the notice with the Mayor.
- (2) Service Providers shall maintain the full value of the Performance Bond or letter of credit or other instrument regardless of claims against the Performance Bond or letter of credit or other instrument made by, or paid to, the City.
- (3) Any draw upon the Performance Bond or letter of credit to recover the City's costs related to a Service Provider's use of the Right-of-Way shall be considered Public Way Fees as that term is defined in this Chapter and Chapter 4939 of the Ohio Revised Code and shall be assessed by the Mayor in accordance with Chapter 4939 and any other applicable law.

901.05 GENERAL RIGHT-OF-WAY USE REGULATIONS.

(a) Rights Conveyed. Consent granted to or initially presumed of a Service Provider to Occupy or Use the Right-of-Way under Section 901.02:

- (1) shall be limited to a grant to Occupy or Use the specific Right-of-Way and defined portions thereof including the specific System or Facilities and location along the Right-of-Way;
- (2) shall not confer any exclusive right, privilege, license or franchise to Occupy or Use the Right-of-Way of the City to operate a System for delivery of Services or any other purposes; and
- (3) shall not convey any right, title or interest in the Right-of-Way, but shall be deemed consent only to Occupy or Use the Right-of-Way for the limited purposes granted by the consent. Further, no consent shall be construed as any warranty of title.

(b) Maintenance of Facilities. Each Service Provider shall maintain its System or Facilities in good and safe condition and in a manner that complies with all applicable federal, State and local requirements.

(c) Safety Procedures. A Service Provider or other Person acting on its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as necessary and in accordance with applicable State and local requirements for the safety of all members of the general public and to prevent injury or damage to any Person, vehicle or property by reason of such work in or affecting such Right-of-Way or property.

(d) Interference with the Rights-of-Way. No Service Provider may locate or maintain its Facilities so as to unreasonably interfere, as determined by the Mayor, with the use of the Right-of-Way by the City, by the general public or by other Persons authorized to use or be present in or upon the Right-of-Way. All such Facilities shall be moved by the Service Provider, temporarily or permanently, as determined by the Mayor.

(e) Damage to Public and Private Property. No Service Provider nor any Person acting on the Service Provider's behalf shall take any action or permit any action to be done which may impair or damage any City Property, Right-of-Way, Other Ways or other public or private property located in, on or adjacent thereto.

(f) Restoration of Right-of-Way, Other Ways and City Property.

- (1) When a Service Provider, or any Person acting on its behalf, does any Construction, Reconstruction, Excavation, Routine Maintenance, Emergency Work or any other work in or affecting any Right-of-Way, Other Ways or City Property, it shall, after the work is completed and at its own expense, promptly remove any obstructions from and restore such ways or property, within ten (10) to thirty (30) days, at the Mayor's discretion, to as good a condition as existed before the work was undertaken, unless otherwise directed by the City.
- (2) If weather or other conditions prevent the complete restoration required by this Section, the Service Provider shall temporarily restore the affected ways or property as directed by the Mayor, at the Service Providers' sole expense. The Service Provider shall promptly undertake and complete the

required permanent restoration when weather or other conditions no longer prevent permanent restoration.

(g) Duty to Provide Information. Within ten (10) days of a written request from the Mayor, each Service Provider shall:

- (1) furnish the City with documentation sufficient to show that the Service Provider has complied with all requirements of this Chapter.
- (2) make available for inspection by the City, at reasonable times, all books, records, maps and other documents, maintained by the Service Provider with respect to its Facilities in the Right-of-Way.

(h) Leased Capacity. A Service Provider shall have the right, without prior City approval, to lease capacity or bandwidth to an unaffiliated Service Provider, provided:

- (1) The Service Provider shall notify the City of the lease agreement within thirty (30) days of such lease agreement.
- (2) The lessee has complied with the applicable requirements of this Chapter.

(i) Assignments or Transfers of Consent. Consent to Occupy or Use the Right-of-Way may be, directly or indirectly, transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the Service Provider, by operation of law or otherwise, without consent of the City; provided that with respect to any transactions (including transactions between Affiliated entities) that singularly or collectively result in a change of twenty-five percent (25%) or more of the ownership or ultimate working control of a Service Provider, of the ownership or working control of the Service Provider's Facility, or of control of the capacity or bandwidth of the Service Provider's System, Facilities or substantial parts thereof, the transferor and transferee shall comply with the following:

- (1) Notify the City of the proposed transfer before the date of transfer; and
- (2) The transferee shall fully comply with this Chapter within sixty (60) days of the transfer, including, but not limited to providing the City with all information required by the Initial Registration required by Section 901.02(d) of this Chapter.

(j) Revocation of Consent. Subject to Section 901.05(k), consent granted by the City to Occupy or Use the Right-of-Way of the City, or a Construction Permit, may be revoked for any one of the following reasons:

- (1) Construction, Reconstruction or operation or Excavation at an unauthorized location.
- (2) Construction, Reconstruction or operation in violation of City safety and/or Construction requirements.
- (3) Material misrepresentation or lack of candor by or on behalf of a Service Provider in any application or registration required by this Chapter.
- (4) Failure to relocate or remove Facilities, or failure to restore the Right-of-Way, as required by this Chapter.
- (5) Insolvency or bankruptcy of the Service Provider.
- (6) Violation of material provisions of this Chapter.

(k) Notice of Violation and Duty to Cure. In the event that the Mayor believes that grounds exist for revocation of consent to Occupy or Use the Right-of-Way or Construction Permit, he or she shall give the Service Provider 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 Service Provider a reasonable period of time not exceeding thirty (30) days to furnish evidence:

- (1) That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance;
- (2) That rebuts the alleged violation or noncompliance; and/or
- (3) That a lesser penalty or sanction would better serve the public interest.

901.06 LOCATION, RELOCATION AND REMOVAL OF FACILITIES.

(a) Location of Facilities. All Facilities shall be Constructed, Reconstructed, installed and located in accordance with the following terms and conditions:

- (1) Overhead Facilities. A Service Provider with permission to install Overhead Facilities shall install its Facilities on pole attachments to existing utility poles only, and then only if Surplus Space is available. Except for Overhead Facilities as provided herein, no Facilities shall be located above ground in a Right-of-Way without the express written permission of the Planning Commission.
- (2) Underground Facilities. Whenever the existing electric, cable, telecommunications and other similar Facilities are located underground in a Right-of-Way, a Service Provider with permission to Occupy the same Right-of-Way with the electric, cable, telecommunications or other similar Facilities, must also locate its Facilities underground. Facilities shall be installed within an existing compatible underground duct or conduit whenever Excess Capacity exists within such Facility.

(b) Relocation or Removal of Facilities. Within thirty (30) days following written notice from the City, a Service Provider shall, at its expense, temporarily or permanently remove, relocate, change or alter the position of any Facilities in the Right-of-Way whenever the City determines that such removal, relocation, change or alteration is reasonably necessary for:

- (1) The Construction, Reconstruction, maintenance or installation of any City or other public improvement in or upon the Right-of-Way.
- (2) The operations of the City or other governmental entity in or upon the Right-of-Way.

Notwithstanding the above, no Service Provider shall be required to bear the expense of removal, relocation, change or alteration of position of any Facilities if such requirement would be prohibited by law.

(c) Removal of Unauthorized Facilities. Within thirty (30) days following written notice from the City, any Service Provider or other Person that owns, controls or maintains any unauthorized System, Facility or related appurtenances in the City's Right-of-Way shall, at its own expense, remove those Facilities or appurtenances from the Right-of-Way or shall, at the City's option, arrange to sell the System, Facilities or appurtenances to the City. After the thirty (30) days have expired, the City may remove the Facilities or appurtenances from the Right-of-

Way at the other party's expense. A System or Facility is unauthorized and subject to removal in the following circumstances:

- (1) Upon revocation of the Service Provider's consent to Occupy or Use the Right-of-Way;
- (2) If the System or Facility was Constructed, Reconstructed, operated or maintained without the consent to do so, except as otherwise provided by this Chapter;
- (3) Upon abandonment of a Facility in the Right-of-Way of the City, with the exception of underground facilities abandoned in a manner authorized and approved by the Mayor;
- (4) If the System or Facility was Constructed or Reconstructed, or any Excavation of a Right-of-Way was performed, without prior issuance of a required Construction Permit, except as otherwise provided by this Chapter;
- (5) If the System or Facility was Constructed, Reconstructed, operated or maintained, or any Excavation of a Right-of-Way was performed, at a location not permitted pursuant to the City's consent for the Provider to Occupy or Use the Right-of-Way or Construction Permit; or
- (6) If the Service Provider fails to comply with, or cure a violation of, a material requirement of this Chapter.

(d) Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any Facilities, or stop work on any Construction, Reconstruction, or Excavation, located in the Right-of-Way, as the Mayor may determine to be necessary, appropriate or useful in response to any need to protect the public health, safety or welfare.

901.07 NOTICE OF WORK, ROUTINE MAINTENANCE AND EMERGENCY WORK.

(a) Notice of Work. Except in case of Emergency, as provided in Section 901.07(c), or for Routine Maintenance as provided in Section 901.07(b), no Service Provider, or any Person acting on the Service Provider's behalf, shall commence any work in the Right-of-Way of the City or Other Ways without twenty-four (24) hours advance notice to the City, obtaining a Construction Permit pursuant to Section 901.08, if required, and complying with the consent and registration requirements of Section 901.02.

(b) Routine Maintenance and New Service Orders.

- (1) A Service Provider need not obtain a Construction Permit or notify the City prior to or after commencing any Routine Maintenance or New Service Orders that do not include the Construction in, or Excavation or Lane Obstruction of, a Right-of-Way or closing of a Public Street.
- (2) For Routine Maintenance and New Service Orders that require the Service Provider to cause a Lane Obstruction in a Public Street for more than four (4) hours, the Service Provider shall provide the City with forty-eight (48) hours advance notice prior to commencing the Routine Maintenance or New Service Order, and shall submit a drawing showing the planned traffic maintenance and indicating how the Service Provider will meet all

requirements of ODOT's Manual of Traffic Control Devices or other applicable ODOT regulations.

- (3) A Service Provider performing Routine Maintenance shall otherwise comply with the requirements of this Chapter.

(c) Emergency Work. In the event of the need for any unexpected repair or Emergency work, a Service Provider may commence such Emergency response work as required under the circumstances, provided that for Emergency work that requires Excavation of a Right-of-Way or Lane Obstruction or closing of a Public Street, the Service Provider shall notify the Mayor as promptly as possible before commencing such Emergency work, or as soon as possible thereafter if advance notice is not practicable.

901.08 CONSTRUCTION PERMIT AND STANDARDS.

(a) Construction Permit.

- (1) No Construction Permit is required for Routine Maintenance and New Service Orders that do not include Excavation in a Public Street.
- (2) No Person shall commence or continue with the Construction or Reconstruction of Facilities or Excavation in the Right-of-Way without obtaining a Construction Permit from the Mayor as provided in this Section, including but not limited to the following circumstances:
 - (A) The Construction of a new System or Reconstruction of Facilities to provide a new Service;
 - (B) The extension of a Service Provider's System in the Right-of-Way in an area of the City not currently serviced by that Service Provider; not including New Service Orders unless a Public Street will be Excavated;
 - (C) The relocation or replacement of more than two hundred (200) lineal feet of a Service Provider's existing System or Facilities in the Right-of-Way;
 - (D) Any Construction, Reconstruction or replacement of Facilities or New Service Orders in the Right-of-Way requiring more than one (1) working day to complete; or
 - (E) Any Construction, Reconstruction or New Service Orders requiring the Excavation of a Public Street.
- (3) No Construction Permit shall be issued for the Construction or Reconstruction of Facilities, or Excavation, in the Right-of-Way unless the Service Provider has obtained consent from the City to Use or Occupy that portion of the Right-of-Way and filed a current registration pursuant to Sections 901.02 and 901.03 of this Chapter.
- (4) The Mayor may waive or modify, as reasonably required, the construction permit requirements for Service Providers with Underground Facilities whose routine maintenance of Facilities requires Excavation.

(b) Construction Permit Applications. Applications for Construction Permits shall be submitted upon forms provided by the City and be accompanied by relevant drawings, plans and specifications in sufficient detail and include the following information:

- (1) A preliminary construction schedule.
- (2) Above-Ground Facilities. If the applicant is proposing to Construct or Reconstruct Overhead Facilities:
 - (A) evidence that Surplus Space is available for locating its Facilities on existing utility poles along the proposed route;
 - (B) the location and route of all Facilities to be located or installed on existing utility poles.
- (3) Underground Facilities.
 - (A) If the applicant is proposing new Underground Facilities in existing ducts, pipes or conduits in the Right-of-Way, information in sufficient detail to identify:
 - (i) the Excess Capacity currently available in such ducts or conduits before the installation of the applicant's Facilities.
 - (ii) the Excess Capacity, if any that will exist in such ducts or conduits after installation of the applicant's Facilities.
 - (B) If the applicant is proposing new Underground Facilities in new ducts or conduits to be Constructed in the Right-of-Way:
 - (i) the location and depth proposed for the new ducts or conduits; and
 - (ii) the Excess Capacity that will exist in such ducts or conduits after installation of the applicant's Facilities.
 - (C) 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 in the Right-of-Way. Included with the installation shall be magnetic and florescent tape placed at a minimum of one (1) foot to a maximum of two (2) feet above the entire Facility as installed for the purpose of locating the Facility during future Construction activities, or other such location device as approved by the Mayor. The tape shall be marked with the type of Facility installed.
 - (D) The location of all known existing underground utilities, conduits, ducts, pipes, mains and installations that are in the Right-of-Way along the underground route proposed by the applicant.
- (4) The location(s), if any, for interconnection with the Facilities of other Service Providers.
- (5) The construction methods to be employed to protect existing structures, fixtures and Facilities in or adjacent to the Right-of-Way.
- (6) The structures, improvements, Facilities and obstructions, if any, that the applicant proposes to temporarily or permanently remove or relocate, and any necessary plans for their restoration.
- (7) The impact of Construction or Reconstruction of Facilities on trees and landscaping in 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, landscaping or areas disturbed during Construction.

- (8) Information to establish that the applicant has obtained all other governmental approvals and permits to Construct and operate the Facilities and to offer or provide the Services.
- (9) An attestation that the Facilities will be Constructed or Reconstructed, or the Right-of-Way Excavated, in accordance with all applicable codes, rules and regulations.
- (10) Any other information the Mayor may reasonably request related to the Service Provider's application for a Construction Permit.

(c) Construction Codes. Facilities shall be Constructed, Reconstructed and Excavated in accordance with all applicable federal, State and local codes, rules, regulations and technical codes including, but not limited to, the National Electrical Safety Code.

(d) Issuance of Permit. Within ten (10) business days after submission of all plans and documents required of the applicant, the Mayor, if satisfied that the applications, plans and documents comply with all requirements of this Chapter, shall issue a Construction Permit authorizing the Construction or Reconstruction of the Facilities, or Excavation in the Right-of-Way, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as the Mayor may deem necessary or appropriate. The ten (10) business day period shall begin after the Mayor deems all submissions to be complete and in accordance with the requirements of this Chapter.

(e) Modification of Construction Schedule. The Service Provider may modify the construction schedule at any time provided that forty-eight (48) hours advance notice is given to the Mayor. The Service Provider shall further notify the Mayor and the Ohio Utility Protection Service (OUPS) not less than forty-eight (48) hours in advance of any Excavation or work in the Right-of-Way.

(f) Least Disruptive Technology. To the extent reasonably possible, all Facilities shall be Constructed or Reconstructed in the manner resulting in the least amount of damage and disruption of the Right-of-Way. Unless otherwise authorized by the Mayor for good cause, Service Providers Constructing or Reconstructing Underground Facilities shall utilize Trenchless Technology, including, but not limited to, horizontal drilling, directional boring, and microtunneling, if technically and/or technologically feasible.

(g) Compliance with Permit. All Construction practices and activities shall be in accordance with the Construction Permit and approved final plans and specifications for the Facilities. The Mayor shall have access to the work and such further information as he or she may require to ensure compliance with such requirements. Field changes may be approved by the Mayor if such changes are determined to be necessary due to site conditions or other changed circumstances.

(h) Display of Permit. The Service Provider 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 the Mayor whenever Construction work is occurring.

(i) Noncomplying Work. Upon order of the Mayor, all work that does not comply with the Permit, the approved plans and specifications for the work, or the requirements of this Chapter, shall immediately cease and be immediately removed and/or corrected by the Service Provider.

(j) Record Drawings. Within sixty (60) days after completion of Construction, the Service Provider shall provide the City with two (2) complete sets of plans, drawn to scale and certified to the City as accurately depicting the location of all Facilities Constructed pursuant to the Permit. If required by the City, the Service Provider shall submit the Record Drawings in a digital format compatible with the City's computer software, in accordance with Section 901.05(f).

(k) Restoration of Improvements. Upon completion of any Construction work, the Service Provider shall promptly repair any and all Rights-of-Way, property improvements, fixtures, structures and Facilities which were damaged during the course of Construction, and restore them as nearly as practicable to their prior condition.

(l) Landscape Restoration.

- (1) All trees, landscaping and grounds removed, damaged or disturbed as a result of the Construction, Reconstruction, installation, maintenance, repair or replacement of Facilities must be replaced or restored as nearly as may be practicable, to the condition existing prior to performance of work, except to the extent that tree trimming is necessary to prevent the interference of tree branches with Overhead Facilities.
- (2) All restoration work within the Right-of-Way shall be done in accordance with landscape plans approved by the Mayor.

(m) Construction and Completion Bond. Prior to issuance of a Construction Permit the Service Provider shall deposit with the City a Construction Bond written by a corporate surety acceptable to the City equal to at least one hundred percent (100%) of the estimated cost of Constructing or Reconstructing the Service Provider's Facilities or Excavation in the Right-of-Way of the City, or such lesser amount as the Mayor may determine to adequately protect the City's interest.

- (1) The Construction Bond shall remain in force until eighteen (18) months after substantial completion of the work, as determined by the Mayor, including restoration of Right-of-Way and other property affected by the Construction.
- (2) The Construction Bond shall guarantee, to the satisfaction of the City:
 - (A) timely completion of Construction;
 - (B) Construction in compliance with applicable plans, permits, technical codes and standards;
 - (C) proper location of the Facilities as specified by the City;
 - (D) restoration of the Right-of-Way and other property affected by the Construction;
 - (E) the submission of Record Drawings, in written and digital format, after completion of the work as required by this Chapter; and

- (F) timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.
- (3) In lieu of filing a Construction Bond with the City for each Construction Permit, a Service Provider with the approval of the Mayor may file an Annual Construction Bond (or Annual Bond) in the form described above in an amount that the Mayor may determine will adequately protect the City's interests as described above.
- (4) Any draw upon the Construction Bond to recover the City's costs related to a Service Provider's use of the Right-of-Way shall be considered Public Way Fees as that term is defined in Chapter 4939 of the Ohio Revised Code and shall be assessed by the Mayor in accordance with Chapter 4939 and any other applicable law.

(n) Responsibility of Owner. The owner of the Facilities to be Constructed or Reconstructed and, if different, the Service Provider, are responsible for performance of and compliance with all provisions of this Section.

901.09 RECOVERY OF CITY COSTS OF MANAGING THE RIGHT-OF-WAY.

(a) Purpose. The purpose of this Section 901.09 is to provide for the recovery of all direct and indirect costs and expenses actually incurred by the City and associated with a Service Provider's Occupancy or Use of the Right-of-Way and related to the enforcement and administration of this Chapter.

(b) Recovery of Costs. Any City costs related to a Service Provider's Occupancy or Use of the Right-of-Way and recovered pursuant to this Chapter shall be considered Public Way Fees as that term is defined in this Chapter and Chapter 4939 of the Ohio Revised Code. Public Way Fees shall be assessed by the Mayor in a manner that is in accordance with Chapter 4939 of the Ohio Revised Code and any other applicable law.

- (1) City costs related to a Service Providers' Occupancy or Use of the Right-of-Way which may be recovered include, but are not limited to, administrative costs associated with applications for consent to Occupy or Use the Right-of-Way, initial and annual registration and issuance and enforcement of construction permits.
- (2) City costs related to a Service Provider's use of the Right-of-Way and recovered pursuant to this Chapter from the Performance Bond, letter of credit and/or Construction Bond shall be considered Public Way Fees and shall be assessed by the Mayor in accordance with Chapter 4939 and any other applicable law.

(d) Regulatory Fees and Compensation Not a Tax. The regulatory fees and costs provided for in this Chapter are separate from, and additional to, any and all federal, State, local and City taxes as may be levied, imposed or due from a Service Provider, its customers or subscribers, or on account of the lease, sale, delivery or transmission of Services.

901.10 MISCELLANEOUS PROVISIONS.

(a) Variance. Upon application of a Service Provider, the Planning Commission shall hear and decide requests for a variance from a requirement, or requirements, of this Chapter. In determining the merits of an application for a variance, the Planning Commission shall consider all relevant factors including, but not limited to, the purpose of the requirement from which a variance is requested, whether the requirement is necessary or appropriate to protect the interests of the City, the health safety and welfare of the City's residents, the purposes and intent of this Chapter and the extent of the hardship the Service Provider will bear if the Planning Commission does not grant the requested variance. The Planning Commission shall issue a written decision setting forth its reasons for granting or denying the variance.

(b) Preemption by State and Federal Law. Except as may be preempted by applicable State or Federal laws, rates, regulations, and orders, this Chapter shall apply and be controlling over each Service Provider with Facilities in the Rights-of-Way.

(c) Exemption for City-Owned or Operated Facilities. Except as otherwise required by law, nothing in this Chapter shall be construed to apply the provisions of this Chapter to Facilities owned or operated by the City or any of its operations.

(d) Private Facilities. Persons who wish to use the Right-of-Way of the City for Facilities that provide service not available to the general public shall obtain consent from the City pursuant to Section 901.02, register pursuant to Section 901.03, obtain a Construction Permit (if applicable) pursuant to Section 901.07 and comply with all provisions of this Chapter.

(e) Application to Existing Code Provisions. In the event of a direct conflict between any provision of this Chapter and any other section of the City's Codified Ordinances, the provisions of this Chapter shall apply.

(f) 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, that decision shall not affect the validity of the remaining portions hereof.

(g) Remedies. Nothing in this Chapter shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Chapter.

901.99 PENALTIES AND OTHER REMEDIES.

(a) Criminal Penalties. Any Person found guilty of violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Chapter shall be guilty of a misdemeanor of the fourth (4th) degree. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues.

(b) Civil Violations and Forfeiture.

(1) In lieu of the criminal penalties set forth above, the Mayor may make an initial finding of a civil violation by the Service Provider for violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Chapter.

- (2) The Civil Forfeiture shall be in an amount payable to the City of not less than \$100.00 nor more than \$500.00 for each offense. A separate and distinct offense shall be deemed committed each day on which a violation occurs or continues.
- (3) An action for civil forfeiture shall be commenced by providing the Service Provider with written notice describing in reasonable detail the Service Provider's alleged violation of one or more provisions of this Chapter and the amount of the penalty that will be assessed against it.
- (4) The Service Provider shall have fifteen (15) days subsequent to receipt of the notice of violation in which to correct the violation before the City may assess penalties against the Service Provider. The time in which to cure the violation may be extended by the City if additional time is required to correct the violation; provided that the Service Provider commences corrective action within seven (7) days of the notice of violation and proceeds with reasonable diligence.
- (5) The Service Provider may dispute the alleged violation by providing the City with written notice within five (5) days of receipt of the notice of violation, setting forth in reasonable detail the reasons for its dispute. The City shall set a date for hearing of the alleged violation no sooner than thirty (30) days and no later than sixty (60) days from receipt of the notice of dispute.
- (6) The City shall issue a written decision on the Service Provider's alleged violation within thirty (30) days of the hearing, which decision shall be final and subject to the administrative appeal procedures under Ohio law. If the City finds after hearing that the alleged violation(s) did occur, the penalty shall be assessed starting fifteen (15) days from the notice of violation and shall continue until the violation has been corrected.

(c) Other Remedies. Nothing in this Chapter shall be construed as limiting any judicial remedies that the City may have, at law or in equity, for enforcement of this Chapter.