CURTIS, OETTING, HEINZ, GARRETT & SOULE, P. C.
ATTORNEYS AT LAW
130 SOUTH BRIDGE, SUITE 200
ST. LOUIS, MISSOURI 63105
(314) 725-8788
FACSIMILE (314) 725-8789
www.curtisoetting.com

PAUL E. MARTIN

EMAIL ADDRESS
PMARTIN@COHGS.COM

DOCKET FILE COPY ORIGINAL

February 13, 2001

RECEIVED

FEB 14 2001

FCC MAIL ROOM

Office of the Secretary
Federal Communications Commission
445 12th Street S.W.
Washington, DC 20554

Re: In the Matter of City Signal Communications, Inc., Petitions for Declaratory Ruling
CS Docket Nos. 00-235, 00-254, 00-255
Reply Comments of the City of Clayton, Missouri

Dear Secretary:

Enclosed please find an original and four copies of the Reply Comments of the City of Clayton, Missouri, in the captioned matter. We would ask that the Commission accept these for filing as of February 14, 2001. In the event that these comments are received after the February 14, 2001, submission deadline, we would ask the Commission to accept late filing of the comments.

Also, we hereby certify that a complete and accurate copy of these comments has been delivered by first class U.S. Mail, postage prepaid, to Karen Nations, Senior Attorney, Metromedia Fiber Network Services, Inc., at One Meadowlands Plaza, East Rutherford, New Jersey 07073, as of this 13th day of February, 2001. Because the City's role in this matter is a minor one, and because the City's comments are filed in response to those of Metromedia Fiber Network Services only, the City has not provided copies to any other party in this proceeding.

Please contact the undersigned if the Commission has any additional requirements that must be met in relation to this filing.

Sincerely,

Paul E. Martin

PEM/bm
Enclosures

No. of Copies rec'd 0+4
List A B C D E

RECEIVED
FEB 1 4 2001
FCC MAIL ROOM

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	**CS Docket Nos. 00-253, 00-254**
City Signal Communications, Inc.,	)	**and 00-255.**
Petitions for Declaratory Ruling	)	

REPLY COMMENTS OF THE CITY OF CLAYTON, MISSOURI

The City of Clayton, Missouri (the "City"), submits these comments in response to those of Metromedia Fiber Network Services, Inc. ("MFNS"), in the matter of the Petitions for Declaratory Ruling filed by City Signal Communications, Inc.[1] In its comments MFNS essentially concludes that right-of-way ("ROW") management by local government violates the Telecommunications Act of 1996, and in support of that conclusion MFNS cites several examples, including the City, of local government allegedly run amok. The City submits these comments to contest MFNS' one-sided, self-serving misrepresentations about its experience in the City of Clayton and to assert that the City's ROW management is fair, effective and lawful.

History

In or around June, 2000, Level III Communications approached the City of Clayton with the desire to jointly construct with MFNS telecommunications facilities by boring in the public ROW.[2] MFNS' request coincided with similar applications from several other companies desiring ROW access, and as a result the City decided to adopt a uniform ROW policy by which to process ROW access applications and govern ROW

[1] The City also has joined in the Reply Comments of the NATOA Respondents dated February 14, 2001.

[2] Although the joint project was initiated by Level III, the City understood that the company was also promoting the interests of MFNS. Indeed, MFNS concurred in Level III comments concerning the City's ROW policy, see below, and was represented on the joint project by a local attorney. All future references are to MFNS.

users. MFNS and other interested parties requested that the City act promptly in adopting the policy, and the City promised to deliver the policy for legislative consideration by October 2, 2000.

The City met its promise, and prior to Council consideration the City provided the policy to all pending and existing ROW users. Not surprisingly, the policy was not acceptable to the users, and several, including MFNS, requested an opportunity for comment on the proposed legislation. After several weeks of commentary, meetings among staff and with interested companies (including particularly MFNS through local counsel) and multiple revisions, the City passed its ROW policy by adoption of Ordinance No. 5596 on November 14, 2000. A certified copy of the policy is attached as Exhibit 1.

The City's policy applies to all existing and would-be ROW users. It requires uniform registration by all occupants, but it maintains the rights and obligations of those with existing franchises or access agreements. The fee for registration is $50.00. See *Exhibit 1, §20-52.* After registration any company desiring either to construct facilities within the ROW or to perform other ROW work must apply for a ROW permit. Minor ROW disruptions can be approved expeditiously, while the City's public works director retains a limited degree of flexibility to coordinate work in the same area. The fee for a ROW permit is $50.00. See *Exhibit 1, §20-54.* The policy includes review procedures and standards for ROW work See *Exhibit 1, §20-55.* It also requires the payment of rental compensation and a street degradation fee, when applicable, with a set-off for utility taxes paid by the ROW user. See *Exhibit 1, §§20-57 and 20-54(a)(4).*

MFNS was satisfied with the ROW policy at that time of its enactment. In fact its local counsel at a public meeting lauded both the product and the City's effort and responsiveness to the needs of companies desiring access to the public ROW. MFNS never expressed to the City any dissatisfaction with the ROW policy as adopted by City Ordinance No. 5596.

MFNS' Experience in Clayton

MFNS and several other companies promptly followed the requirements of the ROW policy by registering and then applying for ROW permits. MFNS' application contemplated underground boring on the north side of Maryland Avenue. Two other ROW applicants desired trench access on the south side of Maryland. To accommodate all applicants and to promote the goals of the City's ROW policy, the City suggested the possibility of joint trenching on Maryland's south side. MFNS agreed to this proposal, and construction originally was to take place by trenching in Maryland Avenue. It is interesting to note that MFNS acknowledges that joint trenching is an acceptable form of ROW management. See *MFNS Comments, p. 23.*

Trenching would have required the excavation and repair/replacement of eight inches of concrete and two inches of asphalt overlay, with extensive doweling to ensure the integrity of the restored road. Moreover, since Maryland is an arterial City street the project would have required the use of significant safety measures and extensive traffic control to protect motorists and pedestrians. The applicants would have had to plate the open trench on a nightly basis and remove the plate the next day. The applicants would also have to displace and reroute traffic lanes, utilize arrow panels and comply with all requirements of the Manual on Uniform Traffic Control Devices. Because of heavy

vehicular and pedestrian rush hour traffic, the applicants' construction would have been limited to the hours of 9:00 a.m. to 4:00 p.m., thus increasing construction time.

Instead of working in the street the City suggested the option of sidewalk construction. Sidewalk construction would minimize street disruptions. And since restoration would be in the form of slab replacement rather than pavement repair, sidewalk construction would avoid street degradation and result in a more permanent restoration of City facilities.

This option would also benefit the ROW users. It would reduce costs by requiring excavation of a lesser amount of overlay material (five inches of sidewalk v. ten inches of street), and the concrete sidewalk would be replaced rather than restored through doweling. Furthermore, since sidewalk construction would avoid any need for pavement cuts, the companies would not owe the City any degradation fee. Perhaps more importantly, the companies could avoid much of the costs of traffic control and road safety measures (sidewalk construction would entail only the closure of the street's parking lane).

As conditions to sidewalk construction the City requested (1) restoration of the concrete sidewalk, (2) restoration of only three of the 13 trees that would be destroyed during construction, including the construction of three tree grates, (3) the upgrade of ten "cobra-head" light fixtures from 150 watts to 250 watts, and (4) installation of a twenty inch brick paver strip along the street side portion of the reconstructed sidewalk (which would be requested of any private party seeking any kind of construction approval to adjacent property in the City's central business district). After reviewing the sidewalk construction option the would-be ROW users determined that it would be more cost-

effective to install facilities through this method because it would be significantly less expensive than proceeding with the trenching of Maryland Avenue.

MFNS did not complain to the City about this approach. In fact, until the City received the comments of MFNS in this proceeding it was completely unaware of any objections by this particular company to the City's ROW policy in general or to this particular joint trenching project. With this background the City will now address MFNS' comments.

MFNS' Comments

MFNS complains that the City "clearly views the advent of telecommunications competition as the opportunity to complete a number of public works projects, including upgrading of certain city sidewalks and accompanying streetscapes." This hyperbole is inexcusable. Clayton is not asking MFNS to rebuild streets or to install irrigation or sewer systems or to construct new shelters, facilities or "public works projects." Clayton is not requiring MFNS or the other ROW users to install or donate fiber on the City's behalf. Rather the City primarily is asking that MFNS, and all other companies using the ROW, restore the ROW to its previous condition, and ensure the quality and maintenance of such restoration. As to the brick work and the light fixture upgrade, these minimal requests would be made to anyone seeking construction approval for an adjacent project in the central business district, and MFNS voiced no complaint prior to the filing of its comments in this matter.

MFNS complains that "as a condition of excavating . . . the carriers must meet excessive restoration requirements that include replacing a concrete sidewalk with brickwork, and installing trees and other public improvements." Again, the exaggeration

is outrageous. While the City in fact has requested the installation of a brick paver strip along the street side of the disrupted sidewalk, it is not demanding, as is implied by MFNS, replacement of concrete slabs with brick. And yes, the City is requiring the installation of three trees as a replacement of the 13 destroyed by the construction project. This can hardly be characterized as "excessive." The only other "requirement" of the City is the light fixture upgrade. Again, this cannot in good conscience be labeled "excessive." There are no other "public improvements" at issue in this project.

MFNS references the City's streetscape requirements and claims that they have raised linear foot costs "by more than $40.00 per participant in the joint trench." First, MFNS has misled the Commission by implying that the City is requiring compliance with these requirements. This is not the case. The City is not requiring the deployment of new trees at 20 foot intervals, the installation of new (or ornamental) light standards at 44 foot intervals, or the construction of sidewalk drains or tree trenches. All of these are required by the standards referenced by MFNS. Instead the city is requiring a 20 inch brick paver strip, the replacement of three trees and an upgrade to ten light fixtures.

Second, please note that MFNS has not quantified its "$40.00 per linear foot cost increase" or supported it with any affidavit or declaration. The City is at a loss as to how this additional cost has been determined by MFNS, and instead submits that the cost of the sidewalk construction project, even with the very limited brickwork and light fixture requirements, is significantly less than the cost of street trenching. Perhaps MFNS is suggesting that the cost of the sidewalk construction is greater than that of the cost of boring, and the City would concede the general truth of this statement. But MFNS has already admitted the City's authority with regard to joint trenching, and it should not be

allowed to claim that the City's "excessive" restoration requirements are driving up the cost of facilities installation.

Conclusion

In sum, MFNS' comments in the instant case, at least with regard to the City of Clayton, have been exaggerated in the extreme. MFNS has been a willing participant in the City's ROW management, from inception of the regulatory policy to implementation of the current project. Indeed, until the filing of its comments in the instant proceeding MFNS had not made any complaints or voiced any objections with the City, and MFNS' complaints of excessive governmental regulation, at least in the City of Clayton, ring hollow. The City of Clayton simply has not made the outrageous demands suggested by MFNS. Rather the City's ROW policy, and its treatment of would-be ROW users, is premised on the sometimes conflicting goals of facilitating the growing telecommunications industry, bringing technological advances to the community and the region, and protecting the public interest and safety in the integrity, use and beauty of City streets. The City would urge that MFNS' comments in the instant case, at least as they apply to the City, be stricken.

CURTIS, OETTING, HEINZ,
GARRETT & SOULE, P.C.

Kevin M. O'Keefe, MBE#23381
Paul E. Martin, MBE#34428
130 South Bemiston, Suite 200
Clayton, MO 63105
(314) 725-8788
(314) 725-8789 Fax

Attorneys for City of Clayton, Missouri

CLAYTON
MISSOURI

The City of Clayton
10 N. Bemiston Avenue • Clayton, Missouri 63105-3397 • (314) 727-8100 • FAX: (314) 863-0295 • TDD: (314) 290-8435

STATE OF MISSOURI)
COUNTY OF ST. LOUIS) SS
CITY OF CLAYTON)

I, CATHERINE M. MOORE, CITY CLERK WITHIN AND FOR THE CITY OF CLAYTON, MISSOURI, DO HEREBY CERTIFY THAT THE FOREGOING CONSTITUTES A TRUE AND CORRECT COPY OF ORDINANCE #5596 ENTITLED "AN ORDINANCE ESTABLISHING PROCEDURES AND STANDARDS TO MANAGE USE OF THE PUBLIC RIGHTS-OF-WAY AND TO REQUIRE FAIR AND REASONABLE COMPENSATION FOR SUCH USE ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS AND ADOPTING A FEE SCHEDULE FOR THE ADMINISTRATION THEREOF" AS FULLY AS THE SAME APPEARS ON THE RECORDS OF THE CITY IN MY CUSTODY AND CONTROL.

IN WITNESS WHEREOF, I HAVE HEREUNTO SET MY HAND AND AFFIXED THE SEAL OF THE CITY OF CLAYTON, MISSOURI, AT MY OFFICE IN SAID CITY THIS 12TH DAY OF FEBRUARY 2001.

Catherine M. Moore

CATHERINE M. MOORE
CITY CLERK
CITY OF CLAYTON, MISSOURI

Printed on recycled paper.

BILL NO. 5712 **ORDINANCE NO.** 5596

AN ORDINANCE ESTABLISHING PROCEDURES AND STANDARDS TO MANAGE USE OF THE PUBLIC RIGHTS-OF-WAY AND TO REQUIRE FAIR AND REASONABLE COMPENSATION FOR SUCH USE ON A COMPETITIVELY NEUTRAL AND NONDISCRIMINATORY BASIS AND ADOPTING A FEE SCHEDULE FOR THE ADMINISTRATION THEREOF.

WHEREAS, the acquisition, construction and maintenance of public rights-of-way requires the substantial investment of public funds, and such rights-of-way are a valuable public asset; and

WHEREAS, the City has previously regulated the use of public rights-of-way through a variety of ordinances and practices; and

WHEREAS, as a result of recent changes in federal and state law and technology, the City anticipates an increase in commercial requests to use the public rights-of-way for private benefit, especially by telecommunications carriers; and

WHEREAS, the City desires to consolidate and standardize its regulation of commercial users of the rights-of-way and to encourage responsible development of commercial infrastructure; and

WHEREAS, the management procedures, standards, and compensation requirements provided herein will (i) minimize disruption of the primary uses of the public rights-of-way, (ii) minimize damage to the rights-of-way, (iii) maximize the efficient use of available space within the rights-of-way, and (iv) establish a fair and reasonable compensation scheme for private use of the public rights-of-way; and

WHEREAS, the adoption and administration of this Ordinance will cause the City to incur certain costs associated with applications for use of the rights-of-way and the actual use of the rights-of-way by commercial users, and it is therefore appropriate that such users bear the costs of their applications and rights-of-way usage through the taxing of City fees commensurate with the City's incurred costs;

NOW, THEREFORE, BE IT ORDAINED BY THE BOARD OF ALDERMEN OF THE CITY OF CLAYTON, ST. LOUIS COUNTY, MISSOURI, AS FOLLOWS:

Section 1. Article III, Excavations, and Article V, Poles, Conduits and Wire Lines, of Chapter 20, Streets, Sidewalks and Public Ways, of the Municipal Code of the City of Clayton are hereby repealed, and a new

Article III, attached as Exhibit A and incorporated by reference, to be known as the Rights-of-Way Usage Code, is enacted in lieu thereof.

Section 2. The Rights-of-Way Usage Code Fees Schedule attached hereto as Exhibit B, incorporated by reference, is hereby adopted.

Section 3. All ordinances or parts of ordinances in conflict with the provisions of this Ordinance are hereby repealed.

Section 4. This Ordinance shall be in full force and effect both from and after its passage.

Passed this 14th day of November, 2000.

Francis L. Kenney, III, Mayor

Attest:

Catherine Moore, City Clerk

EXHIBIT A

RIGHTS-OF-WAY USAGE CODE
CITY OF CLAYTON, MISSOURI

November 14, 2000

TABLE OF CONTENTS

Section		Page
20-50	Title	1
20-51	Definitions and Word Usage	1
(a)	*Definitions and Usage - General.*	1
(b)	*Applicant.*	1
(c)	*Application.*	1
(d)	*Board of Alderman.*	1
(e)	*City*	1
(f)	*Degradation*	1
(g)	*Degradation Fee*	2
(h)	*Director*	2
(i)	*Facilities*	2
(j)	*Governmental Entity*	2
(k)	*Linear Foot Fee*	2
(l)	*Person*	2
(m)	*Person(s) Having Facilities Within the Rights-of-Way*	3
(n)	*Rights-of-Way or ROW*	3
(o)	*Rights-of-Way (or "ROW") Permit*	3
(p)	*Rights-of-Way (or "ROW") User*	3
(q)	*Rights-of-Way (or "ROW") Work*	3
(r)	*Service*	3
(s)	*Within*	4
20-52.	Registration of Person(s) Having Facilities Within the ROW	4
(a)	*Registration Required*	4
(b)	*Effectiveness of Registration*	4
(c)	*Registration Characteristics*	5
(d)	*Registered Person Subject to Other Laws*	5
(e)	*Failure to Register*	6
(f)	*Registration Exemption*	6
20-53.	Registration Procedures	6
(a)	*Requirements and Processing*	6
(b)	*Contents of Registration Letter*	7
(c)	*Notice of Change*	7
(d)	*Registration Index*	8
(e)	*Termination of Registration*	8
20-54.	Rights-of-Way ("ROW") Permits	8
(a)	*ROW Permit Requirements*	8
(b)	*ROW Permit Review and Determination*	10
(c)	*Appeals*	12

20-55. Work in the Public Rights-of-Way 12
(a) *Jurisdiction, Inspection and Stop Work Orders* 12
(b) *Installation of Facilities* 13
(c) *Relocation of Facilities* 13
(d) *Property Repair and Alterations* 14
(e) *Removal, Abandonment and Transfer of Facilities* 15
(f) *Standards for ROW Work* 15
(g) *Restoring the Rights-of-Way* 17
(h) *Mapping Requirements* 17
(i) *Performance and Maintenance Bond* 18
(j) *Appeals* 18
(k) *Miscellaneous* 19

20-56. Open Books and Records 19

20-57. Rental Fees 20
(a) *Finding and Intent* 20
(b) *Payment to City* 20
(c) *Not a Tax or in Lieu of Any Other Tax or Fee; Credit* 20
(d) *Payments* 21
(e) *No Accord or Satisfaction* 21
(f) *Audit* 21
(g) *Exemption from Rental Fees* 22

20-58. Insurance; Surety; Indemnification; Penalties 22
(a) *Insurance Required* 22
(b) *Qualifications of Sureties* 22
(c) *Policies Available for Review* 22
(d) *Additional Insureds; Prior Notice of Policy Cancellation* 23
(e) *Exemption from Insurance Requirements* 23
(f) *Indemnification* 23
(g) *Relation to Insurance and Indemnity Requirements* 24
(h) *Penalties* 24

20-59. Miscellaneous Provisions 24
(a) *Captions* 24
(b) *Interpretation of Code* 24
(c) *Expense* 24
(d) *Eminent Domain* 24
(e) *Exclusive Contracts and Anticompetitive Acts Prohibited* 24
(f) *No Recourse Against the City* 25
(g) *Rights and Remedies* 25
(h) *Force Majeure* 25
(i) *Public Emergency* 26
(j) *Calculation of Time* 26

(k) *Chapter 536 Review* 26
(l) *Severability* 26

ARTICLE III. RIGHTS-OF-WAY USAGE CODE

Section 20-50. Title.

This Article shall be known and may be cited as the "Rights-of-Way Usage Code."

Section 20-51. Definitions and Word Usage.

(a) *Definitions and Usage - General.*

For the purposes of this Code, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. When not inconsistent with the context, words used in the present tense include the future tense and vice versa, words in the plural number include the singular number, and vice versa, and the masculine gender includes the feminine gender and vice versa. The words "shall" and "will" are mandatory, and "may" is permissive. For convenience, the first letter of terms, phrases, words, and abbreviations defined in this Code or by federal law have been capitalized, but an inadvertent failure to capitalize such letter shall not affect meaning.

(b) *Applicant.*

"Applicant" means the Person applying for and receiving a ROW Permit for ROW Work.

(c) *Application.*

"Application" means that form which an Applicant must use to obtain a ROW Permit to conduct ROW Work.

(d) *Board of Aldermen*

"Board of Aldermen" or "Board" shall mean the governing body of the City.

(e) *City.*

"City" shall mean the City of Clayton, Missouri, and its agencies, departments, agents, and employees acting within their respective areas of authority.

(f) *Degradation.*

"Degradation" means the accelerated depreciation of a portion of the Rights-of-Way caused by excavation in or disturbance of any paved portion of the Rights-of-Way, resulting in the need to repair or maintain such portion of the Rights-of-Way earlier than would be required if the excavation or disturbance had not occurred (excluding concrete slabs or curbs, which shall be replaced rather than restored).

(g) *Degradation Fee.*

"Degradation Fee" means the fee charged by the City to recover the costs associated with a decrease in the useful life of any paved Rights-of-Way caused by excavation or other disturbance. The Degradation Fee shall not apply to concrete slabs or curbs, which shall be replaced rather than restored.

(h) *Director.*

"Director" means the City's Public Works Director or such other person designated to administer and enforce this Code.

(i) *Facilities.*

"Facilities" means a network or system used for providing or delivering a Service and consisting of one or more lines, pipes, irrigation systems, wires, cables, fibers, conduit facilities, poles, vaults, pedestals, boxes, appliances, antennas, transmitters, gates, meters, appurtenances, or other equipment.

(j) *Governmental Entity.*

"Governmental Entity" means any county, township, city, town, village, school district, library district, road district, drainage or levee district, sewer district, water district, fire district or other municipal corporation, quasi-municipal corporation or political subdivision of the State of Missouri or any other state, any agency or instrumentality of the State of Missouri or any other state or the United States, and any cooperative district allowed by law.

(k) *Linear Foot Fee*

"Linear Foot Fee" shall mean a compensation fee approved by the Board of Aldermen and established in the City's pertinent schedule of fees from time to time for the rent of a portion of the Rights-of-Way by a Person Having Facilities Within the Rights-of-Way. The Linear Foot Fee shall be calculated on the length, in linear feet, of the Rights-of-Way in or on which Facilities are located.

(l) *Person.*

"Person" shall mean an individual, partnership, limited liability corporation or partnership, association, joint stock company, trust, organization, corporation, or other entity, or any lawful successor thereto or transferee thereof, but such term does not include the City.

(m) *Person(s) Having Facilities Within the Rights-of-Way*

Person(s) Having Facilities Within the Rights-of-Way means any Person having a possessory interest in, with the right of physical access (as permitted by this Code) to, Facilities located Within the Rights-of-Way. The term does not include the City, the Metropolitan St. Louis Sewer District or any Governmental Entity unless the entity is providing a Service in a proprietary capacity.

(n) *Rights-of-Way or ROW.*

"Rights-of-Way" or "ROW" shall mean the surface, the air space above the surface, and the area below the surface of any public street, highway, lane, path, alley, sidewalk, boulevard, drive, bridge, tunnel, parkway, waterway, public easement, or sidewalk in which the City now or hereafter holds any property interest, which, consistent with the purposes for which it was dedicated, may be used for the purpose of installing and maintaining Facilities. "Rights-of-Way" shall not include the City's proprietary property, such as city-owned or operated buildings, parks, street lights or other similar property. No reference herein to "Rights-of-Way" shall be deemed to be a representation or guarantee by the City that its interest or other right to control the use of such property is sufficient to permit its use for Service purposes.

(o) *Rights-of-Way (or "ROW") Permit.*

"Rights-of-Way (or "ROW") Permit" means a permit granted by the City to a ROW User for ROW Work.

(p) *Rights-of-Way (or "ROW") User.*

"Rights-of-Way (or "ROW") User" means a Person performing ROW Work Within the Rights-of-Way. A ROW User shall not include ordinary vehicular or pedestrian traffic or any Governmental Entity that has entered into an inter-local agreement with the City regarding the use and occupancy of the Rights-of-Way.

(q) *Rights-of-Way (or "ROW") Work.*

"Rights-of-Way (or "ROW") Work" means action by a ROW User to (i) install, change, replace, relocate, remove, maintain or repair Facilities Within the Rights-of-Way, or (ii) to conduct work of any kind Within or adjacent to the Rights-of-Way that results in an excavation, obstruction, disruption, damage or physical invasion or impact of any kind to the Rights-of-Way or the use thereof. The routine inspection of Facilities shall not be considered ROW Work unless the inspection requires the conduct of any of the activities or actions noted herein.

(r) *Service.*

"Service" means providing or delivering an economic good or an article of commerce, including, but not limited to gas, telephone, cable television, Internet, open video systems, alarm

systems, steam, electricity, water, telegraph, data transmission, petroleum pipelines, sanitary sewerage or any similar or related service, to one or more Persons located within or outside of the City using Facilities Within the Rights-of-Way.

(s) *Within*

"Within" Rights-of-Way means in, along, under, over, or across Rights-of-Way.

Section 20-52. Registration of Person(s) Having Facilities Within the ROW.

(a) *Registration Required.*

(1) Any Person desiring to become a Person Having Facilities Within the ROW and any Person Having Facilities Within the ROW must register with the City.

(2) Any Person having or applying for a Cable Franchise from the City under the Cable Communications Regulatory Code must register hereunder. Such a Person maintains all rights, privileges and obligations established by its Cable Franchise and shall also remain subject to the Cable Communications Regulatory Code. To the extent that any term of such Person's Cable Franchise conflicts with the Rights-of-Way Usage Code, the terms of the Cable Franchise shall prevail. To the extent that the Cable Communications Regulatory Code conflicts with the Rights-of-Way Usage Code, the more stringent shall prevail.

(3) Any Person that provides or intends to provide video programming by means of an open video system pursuant to certification approved by the Federal Communications Commission must register hereunder but shall also remain subject to the applicable provisions of the Cable Communications Regulatory Code. To the extent that the Cable Communications Regulatory Code conflicts with the Rights-of-Way Usage Code, the more stringent shall prevail.

(4) As of the effective date of this Code, any Person Having Facilities Within the ROW pursuant to a duly-issued, lawful and applicable license or franchise shall register hereunder. Such Person maintains all rights, privileges and obligations established by its license or franchise. To the extent that any terms of such Person's license or franchise conflicts with the Rights-of-Way Usage Code, the terms of the license or franchise shall prevail.

(b) *Effectiveness of Registration.*

Registration hereunder by an eligible Person shall remain effective for so long as that Person remains eligible, unless terminated by the Person or the City hereunder. Any registration of an ineligible Person shall be void from the date of ineligibility.

(c) *Registration Characteristics.*

(1) A valid registration hereunder authorizes the issuance of ROW Permits to the registered Person in accordance with this Code. It does not expressly or implicitly authorize ROW Work without a ROW Permit, or work on private property without owner consent through eminent domain or otherwise (except for use of compatible easements pursuant to federal law), or to use publicly or privately owned Facilities without a separate agreement with the owners.

(2) A valid registration hereunder shall not eliminate the need to obtain any franchise, license, or permit for the privilege of transacting and carrying on a business within the City as may be generally required by the ordinances and laws of the City other than this Code, or for attaching devices to poles or other structures, whether owned by the City or other Person.

(3) A valid registration grants no exclusive or vested rights to occupancy Within the Rights-of-Way other than those granted by this Code or the administration thereof.

(4) The right to obtain ROW Permits shall be subordinate to any prior lawful occupancy of the Rights-of-Way, and the City reserves the right to designate where Facilities are to be placed Within the Rights-of-Way.

(d) *Registered Person Subject to Other Laws.*

(1) A Person required to register shall at all times be subject to and shall comply with all applicable federal, state, and local laws and shall at all times be subject to all lawful exercise of the police power of the City, including but not limited to all powers regarding zoning, supervision of construction, assurance of equal employment opportunities, control of Rights-of-Way, and consumer protection.

(2) Registration hereunder shall not deprive any Person of any rights or obligations imposed by any previously existing franchise, license or other contract, nor shall it impose any obligations on any such Person additional to those included in any previously existing franchise, license or other contract, except to the extent allowed by law.

(3) Nothing in this Code shall be construed to prohibit the grant or renewal of any franchise by the City as may be allowed or required by state or federal law.

(4) Nothing in this Code shall be construed or deemed to supercede any applicable state or federal law or any applicable regulation issued by a state or federal agency, including but not limited to the Missouri Public Service Commission and the Federal Communications Commission. In the event of any conflict between such laws or regulations and this Code, the applicable state or federal law or regulation shall apply.

(e) *Failure to Register.*

Any Person who has not registered within ninety (90) days of the effective date of this Code shall nonetheless be subject to all requirements of this Code, including but not limited to its provisions regarding ROW Permits, construction and technical standards and fees, except as otherwise provided herein. In its discretion and to the extent allowed by law, the City at any time may: (i) require such Person to register within thirty (30) days of receipt of a written notice to such Person from the City that registration is required; (ii) require such Person to remove its Facilities from the Rights-of-Way and restore the affected area to a condition satisfactory to the City within a specific time period; (iii) direct municipal personnel to remove the Facilities from the Rights-of-Way and restore the affected area to a condition satisfactory to the City and charge the Person the costs therefor, including by placing a lien on the Person's property as provided in connection with abating nuisances; or (iv) take any other action it is entitled to take under applicable law. Additionally, such Person may also be subject to the imposition of penalties as provided herein.

(f) *Registration Exemption.*

(1) A Person may be exempted from registration by written decision of the city manager provided that the Person's use of the Rights-of-Way is *de minimus* and provided further that the Person enters into a license or franchise agreement with the City. *De minimus* use includes wireless services using Facilities that (i) have physical dimensions no greater than one (1) foot in height, width and depth, (ii) require no excavation in the Rights-of-Way, (iii) require no additional wire or other conduit to be attached or strung between poles or other structures and (iv) consist exclusively of Facilities attaching to either pre-existing or subsequently approved Facilities or structures.

(2) Exemption from registration does not authorize the exempt Person to perform any ROW Work unless the Person obtains a ROW Permit as provided herein. Neither does exemption relieve such Person from the payment of any applicable tax, license or fee, other than rental fees as provided in Section 20-57 hereof, provided, however, that if an exempt Person's desired use of the Rights-of-Way exceeds the *de minimus* conditions noted above, said Person shall be subject to the payment of rental fees and all other requirements of this Code pertaining to Facilities located Within the Rights-of-Way.

Section 20-53. Registration Procedures.

(a) *Requirements and Processing.*

(1) Registration shall be accomplished in the form of a letter to the City filed with the city clerk.

(2) To be valid, the registration letter must be signed by an authorized representative of the registering Person, contain all required information and be accompanied by a filing fee approved by the Board of Aldermen and established in the City's pertinent schedule of fees.

(3) At any time the City determines a registration letter does not comply with this Code, the City may return it to a point of contact identified therein, with a written explanation of the reason(s) for such return. Filing fees shall not be refunded. Failure to return a registration letter shall not validate an incomplete or otherwise invalid or void registration letter.

(b) *Contents of Registration Letter.*

A registration letter shall contain or be accompanied by the information required herein. All such information received by the City shall remain confidential insofar as permitted by the Missouri Open Meetings Law and other applicable state and federal law. The information required shall include:

(1) Name, address and legal status of the registering Person;

(2) Name, title, address, telephone number, e-mail address and fax number of individual(s) authorized to serve as the point of contact between the City and the registering Person so as to make contact possible at any time (i.e. 24 hours per day, 7 days per week);

(3) Description of the general uses made or to be made of the Facilities located Within the Rights-of-Way by the registering person, e.g., provision of Service(s), transfer or lease of Facilities (or portion thereof, including bandwidth) to another Person, use of the Facilities to transverse the City, construction of Facilities to be used at a later date, etc.;

(4) Description of all Services provided or to be provided by the registering Person to any Person located in the City through Facilities located Within the Rights-of-Way, and an explanation of the registering Person's legal qualifications to provide such Services, including copies of supporting documentation such as relevant certificates or orders from the Federal Communications Commission and/or Missouri Public Service Commission, or pertinent rules or statutes;

(5) Name and address of any and all other Persons providing Service(s) to any Person located in the City through the registering Person's Facilities located Within the Rights-of-Way, and a general description of such Service(s); and

(6) Current certificates of insurance in accordance with this Code.

(c) *Notice of Change.*

Within thirty days of any changes in the information set forth in or accompanying its registration letter, a registered Person shall notify the City of any such change. Such notices shall be submitted and processed in the same manner as an initial registration, except the filing fee established in Section 20-53(a)(2) shall not be required.

(d) *Registration Index.*

The city clerk shall maintain an index of all registered Persons and their point(s) of contact.

(e) *Termination of Registration.*

(1) The City shall have the right to terminate a registration for a substantial and ongoing failure to comply with this Code or for defrauding or attempting to defraud the City. To invoke the provisions of this Section, the city manager shall give the Person written notice of such intent. If within thirty (30) calendar days following such written notice from the City, the Person has not completed corrective action or corrective action is not being actively and expeditiously pursued to the satisfaction of the city manager, the city manager may commence a proceeding to consider terminating the Person's registration, giving written notice of the reasons therefor.

(2) Prior to terminating a registration, the city manager shall hold a hearing, after giving at least ten (10) calendar days' notice to the Person, at which time the Person shall be given an opportunity to be heard. Following the hearing, the city manager may determine whether to terminate the registration based on the information presented at the hearing, and other information of record. If the city manager determines to terminate a registration, the decision shall be in writing setting forth the reasons therefor. The city manager may make such decision conditional on a Person's failure to resolve outstanding problems or take appropriate steps to resolve such problems within a specific period of time. A copy of such decision shall be provided to the Person.

(3) Once a registration has been terminated by the city manager, the Person may not register again except upon express written approval by the city manager, which approval shall be withheld absent clear and convincing evidence that the Person has remedied all previous violations and is in full compliance with all laws, and will not in the future violate this Code or defraud the City.

Section 20-54. Rights-of-Way ("ROW") Permits.

(a) *ROW Permit Requirements.*

(1) Any Person desiring to perform ROW Work must first apply for and obtain a ROW Permit, in addition to any other building permit, license, easement, franchise, or authorization required by law. If any ROW Work must be performed on an emergency basis, the Person conducting the work shall as soon as practicable notify the City of the location of the work and shall apply for the required ROW Permit as soon as practicable following the commencement of the work, not to exceed the third business day thereafter. The Director may design and issue general permits for necessary emergency repair work for several different locations or throughout the City.

(2) No Person Having Facilities Within the ROW who has failed to register with the City shall be granted a ROW Permit, except as otherwise provided or allowed by ordinance, franchise, license or written contract with the City.

(3) All Applications for ROW Permits shall be submitted to the Director. The Director may design and make available standard forms for such Applications, requiring such information as allowed by law and as the Director determines in his or her discretion to be necessary and consistent with the provisions of this Code and to accomplish the purposes of this Code. Each Application shall at minimum contain the following information for the proposed ROW Work, unless otherwise waived by the Director:

a. The name, address and telephone number of a representative whom the City may notify or contact at any time (i.e., 24 hours per day 7 days per week) concerning the work;

b. If different from the Applicant, the name of the Person on whose behalf the proposed work is to be performed;

c. A description of the proposed work, including a conceptual master plan and, when applicable, an engineering site plan or other technical drawing showing the nature, dimensions and location of the Applicant's proposed work or Facilities, their proximity to other Facilities that may be affected by the proposed work, and the number of street crossings and their locations and dimensions;

d. Projected commencement and termination dates and anticipated duration of the work or, if such dates are unknown, a representation that the Applicant shall provide the Director with reasonable advance notice of such dates once they are determined;

e. If the Applicant is, or is acting on behalf of, a Person Having Facilities Within the ROW or a Person desiring to become a Person Having Facilities Within the ROW, verification that the Applicant or such Person has registered with the City and that the information included in that registration is accurate as of the date of the Application; and

f. Copies of any required certificates of insurance or performance/ maintenance bonds.

(4) Each such Application shall be accompanied by the following payments:

a. An application fee, as approved by the Board of Aldermen and established in the City's pertinent schedule of fees, to cover the cost of processing the Application;

b. Any applicable Degradation Fee, as approved by the Board of Aldermen and established in the City's pertinent schedule of fees, but the Director may waive the Degradation Fee for any excavation in the Rights-of-Way undertaken within twelve calendar months immediately preceding the scheduled improvement or reconstruction of such Rights-of-Way; and

c. Any other amounts otherwise due to the City from the Applicant, including but not limited to prior delinquent permit fees and costs, delinquent rental fees, and any loss,

damage or expense suffered by the City because of the Applicant's prior excavations of the Rights-of-Way or for any emergency actions taken by the City, but the Director may modify this requirement to the extent the Director determines any such fees to be in good-faith dispute or beyond the ability of the Applicant to control.

(b) *ROW Permit Review and Determination.*

(1) The Director shall review each Application for a ROW Permit and, unless the Application is denied pursuant to paragraph (6) hereof, shall issue the ROW Permit upon determining that the Applicant (i) has submitted all necessary information, (ii) has paid the appropriate fees and (iii) is in full compliance with this Code and all other City ordinances. In order to avoid excessive processing and accounting costs to either the City or the Applicant, the Director shall have authority to establish procedures for processing of Applications and periodic payment of fees.

(2) It is the intention of the City that interference with or disruption of the Rights-of-Way should be minimized. Upon receipt of an Application for a ROW Permit, the Director shall determine whether any portion of the Rights-of-Way will be affected by the proposed ROW Work and whether the interference or disruption will be more than minor in nature. In determining whether the proposed ROW Work is more than minor in nature the Director shall consider the nature and scope of the work, its location and duration, and its effect on the Rights-of-Way and the use thereof.

a. If the Applicant can show to the Director's reasonable satisfaction that the work involves no or only minor interference, disruption or damage to the Rights-of-Way, or that the work involves time-sensitive maintenance, then the Director may promptly grant the ROW Permit.

b. If the Director determines that the effect on the Rights-of-Way will be more than minor in nature and no exemption under the above paragraph (a) or any other provision of this Code applies, the Director shall schedule and coordinate the work and grant the ROW Permit accordingly. When reasonable and necessary to accomplish the goals of this Section, the Director may postpone issuance of a ROW Permit, and may give public notice of the Application in an attempt to identify whether other Person(s) intend to do work in the same area within a reasonable period of time, so that all ROW Work in the area can be coordinated. Due regard shall be accorded Applicants that are required by any law, rule, regulation, license or franchise to provide Service to the area defined in the Application.

c. Applicants shall participate in any joint planning, construction and advance notification of such work, including coordination and consolidation of any excavation of or disturbance to the Rights-of-Way, as directed by the Director. When deemed necessary to accomplish the goals of this Section and to the extent permitted by law the City reserves the right, when feasible and reasonable, to require the sharing of Facilities by ROW Users. Applicants shall cooperate with each other and other ROW Users and the City for the best, most efficient, most aesthetic and least obtrusive use of the Rights-of-Way.

d. The Director shall establish procedures allowing Applicants to ascertain whether existing capacity may be available from other Persons utilizing the Rights-of-Way along the intended path of any proposed work. The Director shall also maintain indexes of all ROW Permits issued, both by Person and by the affected Rights-of-Way.

(3) Each ROW Permit shall include:

a. Projected commencement and termination dates or, if such dates are unknown at the time the ROW Permit is issued, a provision requiring the ROW User to provide the Director with reasonable advance notice of such dates once they are determined;

b. Length of affected Rights-of-Way, number of road crossings and identification and description of any pavement or curb cuts included in the work;

c. Information regarding scheduling and coordination of work, if necessary;

d. The location of any of the Applicant's Facilities, both those proposed and existing, and the location of any known Facilities owned by another Person that may be affected by the proposed work; and

e. Such conditions and requirements as are deemed reasonably necessary by the Director (i) to protect structures and other Facilities in the Rights-of-Way from damage, (ii) for the proper restoration of such Rights-of-Way, structures and Facilities, (iii) for the protection of the public and the continuity of pedestrian and vehicular traffic and (iv) for the protection of the public health, safety and welfare.

(4) An Applicant receiving a ROW Permit shall promptly notify the Director of any material changes in the information submitted in the Application. The Director may issue a revised ROW Permit or require that the ROW User reapply for a ROW Permit in accordance with all requirements of this Code.

(5) ROW Permits inure to the benefit of the Applicant, and the rights granted thereunder may not be assigned or transferred to any other Person without the express written consent of the Director.

(6) The Director may deny an Application, if denial is deemed to be in the public interest, for reasons including but not limited to the following:

a. Delinquent fees, costs or expenses owed by the Applicant;

b. Failure to return the Rights-of-Way to its previous condition under previously issued ROW Permits or after prior excavations by the Applicant;

c. Unreasonable disruption to existing use of the Rights-of-Way by the public, the City or public utilities;

d. For reasons of environmental sensitivity, as defined by applicable federal, state or local law, of land within the scope of the Application;

e. A lack of capacity of the Rights-of-Way to accommodate additional work or Facilities;

f. Failure to provide information required pursuant to this Code; or

g. The Applicant being in violation of the provisions of this Code or other applicable City ordinances.

(7) For the purposes of Subsection 20-54(b)(6), the term "Applicant" shall also include, when applicable, the Person on whose behalf the Applicant is to perform the ROW Work. The Director may consider good-faith disputes with, or circumstances beyond the control of, the Applicant or such Person in determining whether to grant or deny the Application.

(c) *Appeals.*

Applicants may appeal any final decision of the Director to the city manager within five (5) days thereof. The city manager shall act on the appeal within fifteen (15) business days.

Section 20-55. Work in the Rights-of-Way.

(a) *Jurisdiction, Inspection and Stop Work Orders.*

(1) All Facilities and ROW Work shall be subject to inspection by the City and the supervision of all federal, state and local authorities having jurisdiction in such matters to ensure compliance with all applicable laws, ordinances, departmental rules and regulations.

(2) The Director shall have full access to all portions of the ROW Work and may issue stop work orders and corrective orders to prevent unauthorized work, including work not meeting the standards established in subsection (f) hereof. Such orders:

a. May be delivered personally or by certified mail to the address listed on the Application for the ROW Permit, the Person in charge of the construction site at the time of delivery or the registered Person's point of contact;

b. Shall state that work not authorized by the ROW Permit is being carried out, summarize the unauthorized work and provide a period of not longer than thirty (30) days to cure the problem, which cure period may be immediate if certain activities must be stopped to protect the public safety; and

c. May be enforced by equitable action in the Circuit Court of St. Louis County, Missouri, and in such case the Person involved in the work shall be liable for all costs and expenses incurred by the City in enforcing such orders, including reasonable attorney's fees in addition to any and all penalties established in this Code.

(b) *Installation of Facilities.*

(1) In conjunction with the City's long-standing policy favoring underground construction, no Person may erect, construct or install new poles or other Facilities above the surface of the Rights-of-Way without the express written permission of the City. Such permission may be granted through a ROW Permit when other similar Facilities exist above-ground or when physical conditions are such that underground construction is impossible, impractical or economically unfeasible, as determined by the City, and when in the City's judgment the above-ground construction has minimal aesthetic impact on the area where the construction is proposed.

(2) During installation of Facilities and to the extent authorized by law, existing underground conduits shall be used whenever feasible and permitted by the owner thereof.

(3) In the case of new construction or property development, the developer or property owner shall give to all Persons registered hereunder reasonable written advance notice of the particular date on which open trenching will be available for installation of Facilities. Costs of trenching and easements required to bring Facilities within the development shall be borne by the developer or property owner; except that if the Facilities are not installed within five (5) working days of the date the trenches are available, as designated in the notice given by the developer or property owner, then once the trenches are thereafter closed, the cost of new trenching shall be borne by the Person installing the Facilities.

(c) *Relocation of Facilities.*

(1) In the event of an emergency, or where Facilities create or are contributing to an imminent danger to health, safety, or property, the City may, to the extent allowed by law, remove, relay, or relocate the pertinent parts of such Facilities without charge to the City for restoration or repair. The City shall attempt to notify the owner of the Facilities prior to taking such action, but the inability to do so shall not prevent same. Thereafter, the City shall notify the owner of the Facilities as soon as practicable.

(2) Should the grades or boundaries of the Rights-of-Way be changed at any time, a ROW User shall, if necessary, at its own cost and expense, relocate or change its Facilities so as to conform with the new grades or boundaries. This requirement shall not apply when the ROW User holds a valid easement that existed prior to the date when the area in question became Rights-of-Way. The ROW User shall bear the burden of establishing to the City's satisfaction the fact of the pre-existing easement.

(3) At the City's direction, all Facilities shall be moved underground and the cost shall be solely the obligation of the owners (or as otherwise allowed or required by law).

(4) Any ROW User shall, on the request of the City or any Person authorized by the City, temporarily relocate Facilities to permit the moving of buildings or oversized vehicles.

(5) Any ROW User shall, by a reasonable time specified by the City, protect, support, disconnect, relocate, or remove, at its own expense, discrete portions of its Facilities when required by the City by reason of traffic conditions; public safety; Rights-of-Way construction, maintenance or repair (including resurfacing or widening); change of Rights-of-Way grade; construction, installation or repair of sewers, drains, water pipes, power lines, signal lines, tracks, or any type of government-owned communications system, public work or improvement or any government-owned utility; Rights-of-Way vacation; or for any other purpose where the convenience of the City would be reasonably served thereby.

(6) If any action under paragraphs (4) or (5) is reasonably required of a ROW User to accommodate a Person or another ROW User, the ROW User shall, after reasonable advance written notice, take action to effect the necessary actions requested, and the actual cost, reasonably incurred, of such actions shall be paid by the person or ROW User upon whose behalf the action is requested. The ROW User taking such action shall have the authority to require such payment in advance.

(7) Rather than relocate Facilities as requested or directed, a ROW User may abandon the facilities if approved by the City as provided in a subsection (e) hereof.

(8) No action hereunder shall be deemed a taking of property, and no Person shall be entitled to any compensation therefor. No location of any Facilities Within the Rights-of-Way shall be a vested interest.

(d) *Property Repair and Alterations.*

(1) During any ROW Work, the Person doing the work shall protect from damage any and all existing structures and property belonging to the City and any other Person. Any and all Rights-of-Way, public property, or private property disturbed or damaged during the work shall be repaired or replaced by the Person doing the work or the Person on whose behalf the work is being done, and such Person shall immediately notify the owner of the fact of the damaged property. Such repair or replacement shall be completed within a reasonable time specified by the Director and to the Director's satisfaction.

(2) Any alteration to the existing water mains, sewerage or drainage system or to any City, state or other public structures or facilities in the Rights-of-Way required on account of the construction, installation, repair or maintenance of Facilities Within the Rights-of-Way shall be made at the sole cost and expense of the owner of such Facilities.

(e) *Removal, Abandonment and Transfer of Facilities.*

(1) If a registration is terminated the City may require that the Person Having Facilities Within the ROW remove its Facilities from the Rights-of-Way at the Person's expense. If the Person Having Facilities Within the ROW fails to do so within a reasonable period of time, the City may, to the extent permitted by law, have the removal done at the Person's expense. In removing its Facilities the Person shall refill, at its own expense, any excavation that shall be made by it and shall leave all public ways and places in as good condition as prevailed prior to the removal of its Facilities. The City shall inspect and approve the condition of the Rights-of-Way after removal. The liability, indemnity, insurance and bonding requirements as provided herein shall continue in full force and effect during and after the period of removal and until full compliance by the Person with the terms and conditions of this paragraph and the requirements of this Code.

(2) Alternatively, the City may permit the abandonment, without removal, of any Facilities as provided herein.

a. The City may permit the abandonment, without removal, of the Facilities if the Director determines that abandonment will not result in interference with the use or maintenance of the Rights-of-Way or if ownership of the Facilities is transferred as provided herein.

b. The City may decide that the ownership of the Facilities shall revert to the City, or to such Person as directed by the City. In either case the owner of the Facilities, if required by the City and permitted by law, shall submit a written instrument, satisfactory in form to City, transferring to the City, or to such Person as directed by the City, ownership of the Facilities. The City may sell, assign, or transfer all or part of the Facilities reverting to the City.

(3) If a Person Having Facilities Within the ROW discontinues use of any Facility for a continuous period of twelve (12) months, or if any Facilities have been installed in the Rights-of-Way without complying with the requirements of this Code, the Facilities may be deemed abandoned. For the purpose of this paragraph, discontinuance of use shall mean the cessation of the uses or Services identified in the Person's registration with the City; provided, however, that this section shall not apply to temporary discontinuances if the Person notifies the City of the temporary discontinuance and the estimated date of resumption of the Facilities' use, if known. After notice and a reasonable opportunity to be heard or to cure, the City may remove or transfer such abandoned Facilities as provided above.

(f) *Standards for ROW Work.*

(1) Except for emergency work as provided in Section 20-54(a)(1), ROW Work in the Rights-of-Way shall be performed only upon issuance and in accordance with the requirements of a ROW Permit. At all times during the work, ROW Permits shall be conspicuously displayed at the work site and shall be available for inspection by the Director.

(2) If at any time it appears that the duration or scope of the ROW Work shall differ from that allowed by the ROW Permit, the ROW User shall inform the Director. The Director may issue a revised ROW Permit or require that the ROW User reapply for a ROW Permit in accordance with all requirements of this Code.

(3) ROW Users shall not open or encumber more of the Rights-of-Way than is reasonably necessary to complete the ROW Work in the most expeditious manner or allow excavations to remain open longer than is necessary to complete the work.

(4) All ROW Work that affects vehicular or pedestrian traffic shall be properly signed, barricaded, and otherwise protected at the ROW User's expense. The ROW User shall be responsible for providing adequate traffic control to the area surrounding the work as determined by the Director.

(5) The ROW User shall perform the ROW Work at such times that will allow the least interference with the normal flow of traffic and the peace and quiet of the neighborhood, as permitted by the Director. Unless otherwise provided by the Director in the Permit, non-emergency work on arterial and collector streets may not be accomplished during the hours of 7:00 a.m. to 8:30 a.m. and 4:00 p.m. to 6:00 p.m. in order to minimize disruption of traffic flow.

(6) The ROW User shall notify the City no less than three (3) working days in advance of any ROW Work that would require any street closure or would reduce traffic flow to less than two (2) lanes of moving traffic for more than four (4) hours. Except in the event of an emergency as reasonably determined by the ROW User, no such closure shall take place without notice and prior authorization from the City.

(7) All ROW Work shall be in accordance with all applicable sections of the Occupational Safety and Health Act of 1970, the National Electrical Safety Code, and other federal, state, or local laws and regulations that may apply, including, without limitation, local health, safety, construction and zoning codes, and laws and accepted industry practices, all as hereafter may be amended or adopted. In the event of a conflict among codes and standards, the most stringent code or standard shall apply (except insofar as that code or standard, if followed, would result in Facilities that could not meet requirements of federal, state or local law).

(8) All Facilities shall be installed and located to cause minimum interference with the rights and convenience of property owners, other ROW Users and the City. Facilities shall not be placed where they will disrupt or interfere with other utility facilities or public improvements, or obstruct or hinder in any manner the various utilities serving the residents and businesses in the City or public improvements.

(9) All Facilities shall be of good and durable quality.

(10) All ROW Work shall be conducted in accordance with good engineering practices, performed by experienced and properly trained personnel so as not to endanger any Person

or property or to unreasonably interfere in any manner with the Rights-of-Ways or legal rights of any property owner, including the City, or unnecessarily hinder or obstruct pedestrian or vehicular traffic.

(11) All safety practices required by law shall be used during ROW Work, including commonly accepted methods and devices to prevent failures and accidents that are likely to cause damage, injury, or nuisance to the public.

(12) Any contractor or subcontractor of a ROW User must be properly licensed under laws of the State and all applicable local ordinances, and each contractor or subcontractor shall have the same obligations with respect to its work as a ROW User would have if the work were performed by it. A ROW User (i) must ensure that contractors, subcontractors and all employees performing ROW Work are trained and experienced, (ii) shall be responsible for ensuring that all work is performed consistent with applicable law, (iii) shall be fully responsible for all acts or omissions of contractors or subcontractors, (iv) shall be responsible for promptly correcting acts or omissions by any contractor or subcontractor, and (v) shall implement a quality control program to ensure that the work is properly performed.

(g) *Restoring the Rights-of-Way.*

(1) The ROW User shall maintain its restoration of any affected Rights-of-Way for twelve (12) months following completion of the ROW Work and as reasonably determined by the Director. During this period the ROW User shall, upon notification from the Director, correct all restoration work to the extent necessary as required by the Director. Said work shall be completed within a reasonable time, not to exceed thirty (30) calendar days from receipt of the Director's notice unless otherwise permitted by the Director.

(2) The Director shall have the authority to extend the guarantee period for up to an additional twelve (12) months from the date of the new restoration if, prior to the end of the twelve (12) month period, the Director has reasonable cause to believe that the ROW User's restoration may be subject to failure and provides written notice to the ROW User.

(3) The twelve (12) month guarantee period shall be applicable to failure of the surface of the Rights-of-Way as well as failure below the surface. Payment of a Degradation Fee shall not relieve the ROW User of the obligation to complete the necessary right-of-way restoration.

(h) *Mapping Requirements.*

After the completion of ROW Work the ROW User shall provide to the City as-built drawings, maps or other comparable records as determined by the Director, drawn to scale and certified to the City as reasonably depicting the location of all Facilities constructed pursuant to the ROW Permit. When available to the ROW User, maps and drawings provided will be submitted in AUTOCAD.DXF, AUTOCAD.DWG, MICROSTATION DGN (or comparable, as allowed by the Director) automated formats, or in hard copy otherwise.

(i) *Performance and Maintenance Bonds.*

(1) Prior to any ROW Work a ROW User shall establish in the City's favor a performance and maintenance bond in the amount of $5,000.00 to ensure the restoration of the Rights-of-Way. The bond shall continue in full force and effect for a period of twelve (12) months following completion of the work. The Director shall have the authority to extend the maintenance bond period for up to an additional twelve (12) months in the same manner as provided in Section 20-55(g)(2) hereof. The Director may waive these bond requirements when the work involves no or only minor disruption or damage to the Rights-of-Way.

(2) In the event a ROW User fails to complete the ROW Work in a safe, timely, and competent manner, or if the completed restorative work fails within the time period for the bond (as determined by the Director), then after notice and a reasonable opportunity to cure there shall be recoverable, jointly and severally from the principal and surety of the bond any damages or loss suffered by the City as a result, including the full amount of any compensation, indemnification, or cost of removal or abandonment of any property of the ROW User and the cost of completing work Within or restoring the Rights-of-Way, plus a reasonable allowance for attorneys' fees, up to the full amount of the bond. The City may also recover against the bond any amount recoverable against a security fund or letter of credit where such amount exceeds that available under a security fund or letter of credit.

(3) Upon completion of ROW Work to the satisfaction of the Director and upon lapse of the bond period, including any extension by the Director, the City shall eliminate the bond.

(4) The bond shall be issued by a surety with an "A" or better rating of insurance in Best's Key Rating Guide, Property/Casualty Edition, shall be subject to the approval of the City Attorney and shall contain the following endorsement:

> "This bond may not be cancelled, or allowed to lapse, until sixty (60) days after receipt by the City, by certified mail, return receipt requested, of a written notice from the issuer of the bond of intent to cancel or not to renew."

(5) In lieu of the bond required herein, the ROW User may establish in the City's favor such other security as the city manager may determine to be commensurate with the noted bonding requirements, including but not limited to an annual bond to be maintained in the minimum amount of $25,000.00.

(j) *Appeals.*

Applicants may appeal any final decision of the Director to the city manager within five (5) days thereof. The city manager shall act on the appeal within fifteen (15) business days.

(k) *Miscellaneous.*

(1) Upon failure of a ROW User to commence, pursue or complete any ROW Work required by law or by the provisions of this Code to be done in any street, within the time prescribed and to the reasonable satisfaction of the City, the City may, at its option, after thirty (30) days notice, cause such work to be done and the ROW User shall pay to the City the cost thereof in the itemized amounts reported by the City to the ROW User within thirty (30) days after receipt of such itemized report.

(2) Upon ten (10) days written notice and with the supervision of the City, or as otherwise provided by law, a ROW User shall have the authority to trim trees that overhang Rights-of-Way of the City so as to prevent the branches of such trees from coming in contact with its Facilities, at its own expense subject to the supervision and direction of the City. Nothing in this paragraph shall authorize the trimming of trees on private property without permission of the property owner. All cut materials shall be properly disposed.

(3) During ROW Work by a ROW User the City shall have the right to install, and to thereafter maintain, at its own cost in any excavation to or other applicable disturbance of the ROW any parallel facilities of its own that do not unreasonably interfere with the operations of other Facilities.

(4) Nothing in this Code shall be in preference or hindrance to the right of the City and any board, authority, commission or public service corporation of the City to use or occupy the Rights-of-Way or to perform or carry on any public works or public improvements of any description.

Section 20-56. Open Books and Records.

(a) Persons subject to rental fees as provided in Section 2-57 hereof shall maintain sufficient records to document accurate payment of such rental fees, including but not limited to such plans, records or maps showing the approximate location and length, of all Facilities located Within the Rights-of-Way.

(b) The City shall have the right to inspect at a location in the metropolitan St. Louis area, all records that are reasonably necessary to monitor compliance with the terms of this Code. A Person Having Facilities Within the ROW shall be responsible for collecting and producing such information and by registering affirms that it will do so.

(c) The city manager may require provision or retention of additional information, records, and documents from time to time, as may be reasonably necessary or appropriate to the performance of any of the rights, functions or duties of the City in connection with this Code.

(d) All records and information referenced herein shall be subject to inspection and copying by the City, at no cost to the City, to ensure Code compliance. All records and information received by the City shall remain confidential insofar as permitted by the Missouri Open Meetings

Law and other applicable state and federal laws. If any records cannot be copied for security or other reasons, the Person Having Facilities Within the ROW shall nonetheless make such records available for City inspection and shall reimburse the City for all reasonable costs incurred by the City in inspecting those records.

(e) If any records are too voluminous then the Person may request that the inspection take place at some other location outside the metropolitan St. Louis area, provided that such Person must pay all reasonable travel expenses incurred by the City in inspecting those records.

Section 20-57. Rental Fees.

(a) *Finding and Intent.*

The City finds that Rights-of-Way are valuable public property acquired and maintained at great expense to taxpayers. The City further finds that the grant of permission to locate Facilities Within the Rights-of-Way is a valuable property right and eliminates the need to invest substantial capital in the private location of such Facilities. Any Person that places Facilities Within the Rights-of-Way after the effective date of this Code, and any Person that leaves existing Facilities Within the Rights-of-Way more than 90 days after the effective date of this Code, shall be deemed to have agreed to pay compensation for such use of the Rights-of-Way as established herein. It is the intent of this section that the rental fees provided for herein be applied to and be paid by only those Persons Having Facilities Within the Rights-of-Way.

(b) *Payment to City.*

(1) As compensation for use of the Rights-of-Way, any Person Having Facilities Within the ROW shall pay to the City annual fees for the rent of the affected Rights-of-Way in the amount of the greater of either (i) a Linear Foot Fee approved by the Board of Aldermen and established in the City's pertinent schedule of fees from time to time, or (ii) a minimum fee approved by the Board of Aldermen and established in the City's pertinent schedule of fees from time to time.

(2) If a Person Having Facilities Within the ROW has or is permitted to install Separate Facilities Within the ROW, then for the purpose of rental fees such Separate Facilities shall be treated as discrete Facilities, each of which shall be subject to the compensation requirements of this section. The term "Separate Facilities" means any existing or new Facilities under common ownership or control that occupy different cross-sectional areas within the same linear portion of the ROW. Separate Facilities include any such Facilities that require distinct and separate ROW access for purposes or installation, change, replacement, relocation, removal, maintenance or repair.

(c) *Not a Tax or in Lieu of Any Other Tax or Fee; Credit.*

(1) The rental fees are not a tax, license or fee subject to any requirement of voter approval, but rather constitute a charge for special and individualized use of public property.

(2) Rental fees are in addition to all other fees and all taxes and payments that a Person may be required to pay under any federal, state, or local law, including any applicable property and amusement taxes.

(3) To promote economic development, any Person obligated to pay rental fees shall be granted a credit for all sums paid to the City by such Person for applicable occupational license fees, as provided in Sections 16-35 and 16-36 of the Clayton City Code, as amended, up to the amount of the rental fees. In no event shall such a credit result in a refund from the City.

(d) *Payments.*

(1) The rental fees shall be paid quarterly to the City and shall commence as of the later of the effective date of this Code or the first day on which a Person Having Facilities Within the ROW places Facilities Within the Rights-of-Way. The City shall be furnished at the time of each payment with a statement certified by the payer's chief financial officer or comparable officer, or by an independent certified public accountant, reflecting the total amount of rental compensation for the payment period. Payments shall be made to the City no later than forty-five (45) days following the end of each calendar quarter.

(2) In the event any rental fee or other payment due is not made on or before the date specified herein, interest charges shall also be due, computed from such due date, at an annual rate equal to the commercial prime interest rate of the City's primary depository bank during the period such unpaid amount is owed, plus a penalty of two percent (2%) of the amount.

(e) *No Accord or Satisfaction.*

No acceptance of any payment by the City shall be construed as a release or an accord and satisfaction of any claim the City may have for further or additional sums payable as rental fees under this Code or for the performance of any other obligation.

(f) *Audit.*

The City shall have the right to inspect all reasonably necessary records and the right to audit and to recompute any amounts determined to be payable under this Code. Persons subject to rental fees hereunder shall be responsible for providing the records to the City at an office located within the metropolitan St. Louis area except as provided in Section 20-56(e). Such records shall be maintained for at least five (5) years. The City's audit expenses shall be borne by the Person audited if the rental fees paid during the audit period are less than 95% of the amount owed according to the audit. Any additional amounts due to the City as a result of the audit shall be paid within thirty (30) days following written notice to the Person by the City of the underpayment, which notice shall include a copy of the audit report. If recomputation results in an additional amount to be paid to the City, such amount shall be subject to interest and penalties as specified in subsection (d)(2) above.

(g) *Exemption from Rental Fees.*

(1) Persons Having Facilities Within the ROW pursuant to a duly-issued, lawful and applicable license or franchise shall be exempt from this section for the duration of such license or franchise.

(2) The City may enter into an agreement with a Person having or intending to have Facilities Within the Rights-of-Way by which the Person, as an in-kind rental payment, provides Facilities to the City, or operates and maintains Facilities on behalf of the City, in lieu of the payment of rental fees, in whole or in part, under this section, provided, however, that the value of any such in-kind rental payment shall be reasonably commensurate to the amount that such Person would have paid as a rental fee under this section.

Section 20-58. Insurance; Surety; Indemnification; Penalties.

(a) *Insurance Required.*

All ROW Users shall maintain, for the duration of any ROW Work and, when applicable, for as long as the ROW User has Facilities Within the Rights-of-Way, at least the following liability insurance coverage: worker's compensation and employer liability insurance to meet all requirements of Missouri law and commercial general liability insurance with respect to the construction, operation, and maintenance of the Facilities, and the conduct of the ROW User's business in the City, in the minimum amounts of:

(1) $2,000,000 for property damage resulting from any one accident;

(2) $5,000,000 for personal bodily injury or death resulting from any one accident; and

(3) $2,000,000 for all other types of liability.

These insurance requirements shall not be construed to limit the liability of any Person.

(b) *Qualifications of Sureties.*

All insurance policies shall be with sureties qualified to do business in the State of Missouri, with an "A" or better rating of insurance by Best's Key Rating Guide, Property/Casualty Edition, and in a form approved by the City.

(c) *Policies Available for Review.*

All insurance policies shall be available for review by the City, and a ROW User having Facilities within the Rights-of-Way shall keep on file with the City current certificates of insurance.

(d) *Additional Insureds; Prior Notice of Policy Cancellation.*

All general liability insurance policies shall name the City, its officers, boards, board members, commissions, commissioners, agents, and employees as additional insureds and shall further provide that any cancellation or reduction in coverage shall not be effective unless thirty (30) days' prior written notice thereof has been given to the city clerk. A ROW User shall not cancel any required insurance policy without submission of proof that it has obtained alternative insurance that complies with this Code.

(e) *Exemption from Insurance Requirements.*

The city manager may exempt in writing from the requirements of Sections 20-58 (a) through 20-58(d) any self-insured ROW User, provided that the ROW User demonstrates to the city manager's satisfaction that the ROW User's self-insurance plan is commensurate with said requirements and that the ROW User has sufficient resources to meet all potential risks, liabilities and obligations contemplated by the requirements of this Code. The city manager may require a security fund or letter of credit as a condition to a self-insured's exemption.

(f) *Indemnification.*

(1) Any ROW User granted a ROW Permit, and any Person Having Facilities Within the Rights-of-Way, as partial consideration for the privilege granted, shall, at its sole cost and expense, indemnify, hold harmless, and defend the City, its officials, boards, board members, commissions, commissioners, agents, and employees, against any and all claims, suits, causes of action, proceedings, and judgments for damages or equitable relief arising out of (i) any ROW Work, including but not limited to the construction, maintenance, repair or operation of Facilities, (ii) failure to secure consents from landowners, or (iii) any actions taken or omissions made by the Person pursuant to the authority of this Code.

(2) The foregoing indemnity provisions include, but are not limited to, the City's reasonable attorneys' fees incurred in defending against any such claim, suit, or proceeding prior to the Person assuming such defense. The City shall notify a Person of claims and suits as soon as practicable, but failure to give such notice shall not relieve a Person of its obligations hereunder. Once a Person assumes such defense, the City may at its option continue to participate in the defense at its own expense.

(3) Notwithstanding anything to the contrary contained in this Code, the City shall not be so indemnified or reimbursed in relation to any amounts (i) attributable to the City's own negligence, willful misconduct, intentional or criminal acts, or (ii) attributable to the City acting in a proprietary capacity to deliver Service(s) within the City.

(g) *Relation to Insurance and Indemnity Requirements.*

Recovery by the City of any amounts under insurance, a performance bond, or otherwise does not limit a Person's duty to indemnify the City in any way; nor shall such recovery relieve a Person of amounts owed to the City, or in any respect prevent the City from exercising any other right or remedy it may have.

(h) *Penalties.*

Any Person violating any provision of this Code shall, upon conviction, be punished by a fine not to exceed $1,000.00 or by imprisonment not to exceed 90 days, or by both such fine and imprisonment. Each day the violation continues may be charged as a separate offense.

Section 20-59. Miscellaneous Provisions.

(a) *Captions.*

The captions to sections throughout this Code are intended solely to facilitate reading and reference to the sections and provisions of this Code. Such captions shall not affect the meaning or interpretation of this Code.

(b) *Interpretation of Code.*

The provisions of this Code shall be liberally construed to promote the public interest.

(c) *Expense.*

Any act that a Person is or may be required to perform under this Code, or applicable law shall be performed at the Person's expense, without reimbursement by the City, unless expressly provided to the contrary in this Code, or applicable law.

(d) *Eminent Domain.*

Nothing herein shall be deemed or construed to impair or affect, in any way or to any extent, the power of eminent domain held by the City or any other Person.

(e) *Exclusive Contracts and Anticompetitive Acts Prohibited.*

(1) Unless otherwise allowed by law, no Person shall enter into or enforce an exclusive contract for the provision of Services with any other Person, or demand the exclusive right to serve another Person or location, as a condition of extending service to that Person or location or any other Person or location.

(2) No Person shall engage in acts that have the purpose or effect of limiting competition for the provision of Services in the City, except for such actions as are expressly authorized by law.

(f) *No Recourse Against the City.*

Without limiting such immunities as the City or other Persons may have under applicable law, no Person shall have any recourse whatsoever against the City or its officials, members, boards, commissions, agents or employees for any loss, costs, expense, liability, or damage arising out of any action undertaken or not undertaken pursuant to any provision or requirement of this Code or because of the enforcement of this Code or the City's exercise of its authority pursuant to this Code, or other applicable law, unless such recourse is authorized by state or federal statute, this Code, or other ordinance.

(g) *Rights and Remedies.*

(1) The rights and remedies reserved to the City by this Code are cumulative and shall be in addition to and not in derogation of any other rights and remedies which the City may have with respect to the subject matter of this Code.

(2) The City hereby reserves to itself the right to intervene in any suit, action or proceeding involving any provision of this Code.

(3) Specific mention of the materiality of any of the provisions herein is not intended to be exclusive of any others for the purpose of determining whether any failure of compliance hereunder is material and substantial.

(4) No course of dealing between any Person and the City, or any delay on the part of the City in exercising any rights hereunder, shall operate as a waiver of any such rights of the City or acquiescence in the actions of such Person in contravention of such rights except to the extent expressly waived in writing. No Person shall be relieved of its obligation to comply with any of the provisions of this Code by reason of any failure of the City to enforce prompt compliance. Nor shall any inaction by the City be deemed to waive a provision or render void any provision of this Code.

(h) *Force Majeure.*

A Person shall not be deemed in violation of this Code where performance was hindered by war or riots, civil disturbances, floods, or other natural catastrophes beyond the Person's control, and a registration shall not be terminated or a Person penalized for such noncompliance, provided that the Person takes prompt and diligent steps to bring itself back into compliance and to comply as soon as reasonably possible under the circumstances without unduly endangering the health, safety, and integrity of employees or property, or the health, safety, and integrity of the public, Rights-of-Way, public property, or private property.

(i) *Public Emergency.*

In the event of a public emergency or disaster as determined by the City acting through such officials as may be available given the emergency conditions, a ROW User immediately shall make Facilities, employees, and property, as may be reasonably necessary, available for use by the City or other civil defense or governmental agency designated by the City for the term of such emergency or disaster for emergency purposes. In the event of such use, the ROW User shall waive any claim that such use by the City constitutes a use of eminent domain, provided that the City shall return use of the Facilities, employees, and property to the ROW User promptly after the emergency or disaster has ended.

(j) *Calculation of Time.*

Unless otherwise indicated, when the performance or doing of any act, duty, matter, or payment is required under this Code, and a period of time is prescribed and is fixed herein, the time shall be computed so as to exclude the day of the act, event, or default after which the designated period of time begins to run and include the last day of the prescribed or fixed period of time, unless it is a Saturday, Sunday, or legal holiday, in which event the period runs until the next day which is neither a Saturday, Sunday or legal holiday. If the period is less than seven (7) days, intermediate Saturday, Sunday and legal holidays shall be excluded in the computation. This paragraph shall not apply in the context of obligations which continue on a daily basis.

(k) *Chapter 536 Review.*

Any Person aggrieved by a final determination of the City made pursuant to this Code may file a petition for review pursuant to Chapter 536 of the Revised Statutes of Missouri, as amended, in the Circuit Court of the County of St. Louis. Such petition shall be filed within thirty (30) days after the final determination of the City.

(l) *Severability.*

If any term, condition, clause, sentence or provision of this Code shall, to any extent, be held to be invalid or unenforceable, the remainder hereof shall be valid in all other respects and continue to be effective. In the event of a subsequent change in applicable law so that the provision which had been held invalid is no longer invalid, said provision shall thereupon return to full force and effect without further action by the City and shall thereafter be binding.

EXHIBIT B

RIGHTS-OF-WAY USAGE CODE FEE SCHEDULE

Fee	Code Section	Amount
Registration Fee:	§20-53(a)(2)	$50.00
ROW Work Permit Fee:	§20-54(a)(4)(a)	$50.00
Degradation Fee:	§20-54(a)(4)(b)	(Linear feet of the perimeter of the cut) x ($1.25)* x (Number of years to next overlay)

*Public Works' Estimate of Annual Cut Maintenance Cost

Linear Foot Fee:	§20-57(b)	$1.90**
Minimum Annual Fee:	§20-57(b)	$5,000.00**

**This amount shall be adjusted beginning January 1, 2002, and every 2 years thereafter, to reflect price changes in accordance with the Consumer Price Index published by the Bureau of Labor Statistics of the U.S. Department of Labor in accord with this paragraph. The index number shown for St. Louis County, Missouri, titled "ALL ITEMS" and under the heading of "CPI-U" for the first half of 2000, which index shall be the base number, and the corresponding index number available for the year prior to the recalculation date shall be the current index number. From the quotient thereof, there shall be subtracted the integer 1 (one) and any resulting positive number shall be multiplied by 100 (one hundred) and then deemed to be the percentage increase in the cost of living. Said percentage shall then be multiplied by the previous annual payment rate and the resultant figure shall constitute the applicable payment rate. No adjustment shall be made to reduce any applicable payment rate. If the designated Consumer Price Index is not available for use as the "current index number" for the period provided, the city manager shall use another appropriate standard cost of living index.