

rights-of-way. Local governments enact these schemes through franchises, ordinances, licenses or general permits.

1. Revenue Generation

- Creve Coeur, Missouri
  - All communications providers required to pay 3% occupancy tax on basic local exchange service as described in a 30-year-old taxation ordinance. The “base” to which the tax attaches is limited to the basic local exchange service, and does not attach to advanced services or vertical features
  - Incumbent provider not required to obtain franchise under state law
  - All franchise holders required to pay permit fees, administration fees and 4.5% of gross receipts received from all services not described in the taxation ordinance
  - The effect is that all new telecommunications providers are at a pricing disadvantage to incumbent providers for the provision of advanced services or vertical features
- Portland, Oregon – Requires that an applicant for a permit remit a non-refundable application fee of \$5000, pay the costs incurred by the City in connection with administration of the permit, and pay a license fee of 7% of local exchange access revenue. (See Attached at Section 7.11.140, 1/24/01 Draft).
- Sandy, Utah – Requires payment of costs, a franchise fee of six percent (6%) of gross revenues, and an application fee of \$5000 (See Attached at Sections 2.1 and 2.2, 1/31/01 Draft).
- Santa Fe, New Mexico - Requirement that provider remit fee based on the “appraised real estate value” of the right-of-way.
- Fife, Washington – Requires compensation of five (5%) percent of gross revenues. This is designed “to ensure that the City is compensated for the rights granted, and receives fair market value for use of the public rights-of-way.” Also requires an operator to deposit an application fee of \$5000. (See Attached at Sections 11.01.5.3.1 and § 11.02.2, 2/6/01 Draft).
- Montgomery County, Maryland - Requires compensation of 5% of adjusted gross revenues as compensation for use of the right-of-way. “Adjusted Gross Revenue” is defined as the sum of gross revenues multiplied by the ratio of the number of fiber miles of the facilities used to deliver those services to the total number of fiber miles used by the provider anywhere in the United States; and revenues received by the provider from the lease of fiber capacity or dark fiber constituting part of the facilities. (See Attached at Sections 4.2, 4.2.1, and 4.2.2 11/14/00 ARBROS Franchise Agreement with Montgomery County, MD).
- Laewood, Kansas - Requirement that provider pay city’s administrative costs, and 5% of gross receipts.

- Port Angeles, WA – Requires a permit fee of (0.5%) directly related to the estimated cost of applicant’s proposed facilities. This is unrelated to the costs incurred by the City. (See Master Permit Approval Procedure (page 38).
2. Imposition of Third Tier of Regulation Unrelated to the Management of the Rights-of-Way
- Overland Park, Kansas – Provisions contained in Interim Agreement pending completion of franchise negotiations that carrier may install facilities but not “light” facilities.
  - Berkeley, California -
    - Requirement that permittees submit confidential business information
    - Requirement that permittees submit information that is unrelated to the use of the right-of-way (i.e. excess capacity, number of fiber cables, number and type of conduit)
  - Atlanta, Georgia - Requirement that providers who have a 100 foot or more long street cut repair the entire street lane rather than the area affected
  - Port Angeles, Washington – Requirement that providers wanting a permit must wait 120 days, at which time the city shall grant or deny the “master permit” based on the standard of whether applicant’s application demonstrates adequate technical, financial, and legal resources (See Attached at Section 11.14.020.B.2(b)).
  - Salem, Oregon – The city requires that providers install telecommunications facilities within an existing underground duct or conduit owned by either the city or other providers “whenever surplus capacity exists.” (See attached at Section 10c).
  - Greenwood Village, Colorado – Requirement that providers submit “as-built” location of facilities under electronic format specifically requested by the city (GIC, AUTOCAD) (See Attached).
3. Discriminatory Imposition of Relocation Requirement
- Sound Transit Washington - As a result of the proposed light-rail commuter line to be constructed in the greater Seattle area, the regional transit authority is requiring that Qwest pay for the relocation of telecommunications facilities. The City of Tacoma has its own telecommunications provider who competes with Qwest and other providers. Its facilities are also affected by project, however, the City is not making the municipally owned utility pay for the relocation of its facilities.
  - Minnesota Light Rail - A proposed light rail line is currently being planned in the downtown area. As with the Sound Transit problem, municipally owned utilities are not being forced to pay for their relocations.

#### 4. Technology Discrimination

- Qwest has found in several markets that its wireless operations are treated differently than its wireline operations. Taxes and fees should be technology neutral. As the industry continues to grow and offers new ways to provide services, the technological method should not be the focus of the tax or fee. For example, if local service is to be taxed, the same tax should apply to all local services, regardless of what technology is used to provide the service.

#### 5. Onerous Application Requirements

- Laewood, Kansas - Application requirement that provider give its interpretation of Section 253 and role and rights of cities vs. provider
- Berkeley, California - See above

#### 6. Requirement of In-kind Services

- Portland, Oregon - The city is requiring conduit and facilities for use city use in return for a telecommunications license. Section 7.11.103(c).
- Fife, Washington - The city is requiring conduit or excess capacity in facilities for city use as a condition for a right-of-way permit. Section 11.01.6.2.6.
- Norfolk, Virginia - Every construction permit is subject to the condition that the city shall have free and unrestricted use of one duct for municipal wires and such duct is to be used solely by the city for public purposes. Section 2.2.

### III. **WHAT IS THE EFFECT OF THE PROBLEM?**

#### A. **Customer Service**

The increased regulatory burdens have forced companies to spend large amounts of capital that must be diverted from more productive investments. This has resulted in either a decrease in the ability to provide service, or a complete inability to provide service.

- In Bellevue, Washington Qwest has experience difficulty in obtaining construction permits from the city, has paid exorbitant fees, and has even been denied the right to enter the rights-of-way to repair service and complete new services orders. In addition, the "standard trench" and "grind and overlay" requirements imposed by the city result in substantial increase in costs by Qwest. Because the permit fees in Bellevue are directly connected to Qwest's cost of construction (and unrelated to the costs incurred by the City), Qwest has faced permit fees of over \$8000.

Qwest has experienced over 40 held orders in Bellevue due to permitting delays and costs. Qwest has cancelled orders due to the prohibitive nature of the costs imposed by the city.

- In Greenwood Village, Colorado, the City has placed a moratorium on construction permits being issued. This has increased the "held order" problem.
- In Berkeley, California, Qwest has been unable to satisfy a substantial government contract due to a construction moratorium imposed by the City.

#### B. Customer Cost

When the cities require substantial expenditures by providers wanting to get into the streets, the costs are borne by subscribers.

- In Billings, Montana, Qwest has researched that the proposed ordinance would increase subscriber bills by approximately \$5 per month.
- In Fife, Washington, similar research showed a projected increase of \$4.50 per month.

#### C. Customer Choice

With limited capital, companies will invest their money where it will result in the largest returns -- the market rather than fees and costs. Absent investment by competitive providers, customer choice will be negatively impacted.

- In Kansas City, Kansas, Digital Access, a competitive telecommunications provider, has withdrawn operations from this area based on the fact that the regulatory schemes proposed by the cities prohibit neutral competition.
- In St. Louis, Missouri, McLeod Telecommunications also withdrew its plan to offer competitive local exchange service due to the disparate regulatory schemes imposed by cities such as Creve Coeur.

### IV. WHAT IS THE SOLUTION?

#### A. The Current Situation

As a provider, Qwest's major desire is to clarify the role of both cities and providers to try and achieve some consistency in gaining access to public rights-of-way. To achieve this, Qwest really has only two options, legislation or litigation. Qwest has undertaken both of these paths but has enjoyed only limited success. Litigation is a costly, slow and piecemeal solution. Even with successful litigation, other municipalities refuse to acknowledge the precedent, knowing that delay is on their side. For example, Montgomery County, Maryland is proposing the very same ordinance declared unlawful by a federal district court in *Bell Atlantic-Maryland, Inc. v. Prince George's County, Maryland*, 49 F.

Supp.2d 805 (D. Md. 1999), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000).

Legislation – While legislation clarifying the limited authority of local governments can be helpful, the process is slow and cumbersome and not always sensitive to the goals of the Act. At a minimum, the difficulty of mounting multiple legislative efforts makes it extremely unlikely that this approach could provide carriers with a national solution.

#### B. What Can the FCC Do?

Qwest and other industry providers seek consistency and fairness. To help achieve this, Qwest requests that the FCC promulgate rules that would:

- Alleviate disparate treatment among different providers and technologies and define discrimination and competitive neutrality in the context of Section 253.
- Interpret the reasonable compensation provision of Section 253(c) to require that compensation schemes be cost based. *See City of Vancouver v. Ledcor Indus. Ltd.*, CRTC 2001-23 (Ottawa, Jan. 25, 2001).
- Specify by category legitimate and illegitimate exercises of rights-of-way management authority. *See id.*

A binding set of rules interpreting Section 253 and creating a consistent set of standards where the cities can reasonably exercise their lawful right to manage use of their streets would assist greatly in stopping the pervasive yet piecemeal disputes across the nation. Inconsistent state legislation and city-by-city litigation has not solved the problem.

In the alternative, a strong comprehensive policy statement from the FCC to which local government and courts can look for guidance in drafting and interpreting and/or applying federal (e.g. Section 253) and state and local laws would reduce costly litigation, the frequency and scope of delays, and the foreclosure of consumer choice.

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**QWEST COMMUNICATIONS  
CORPORATION**

**FCC Presentation Regarding Access to  
Public Rights-of-Way and Franchise Issues**

**Sample Provisions**

**March 9, 2001**



**Providers Comments**

SUBSTITUTE

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Sec. 138-21. The Commissioner of Public Works is authorized to establish and implement such administrative rules and procedures necessary to carry out the intent of this chapter.

Sec. 138-22. Non-conforming encroachments.

(a) Structure or properties that encroach into Public Right-of-Way and for which there is not an applicable agreement shall be considered "non-conforming uses." The City may, at the discretion of the Commissioner of Public Works, permit certain non-conforming encroachments. The City may at any time determine that continued encroachment is not in the public interest and may require the removal of said encroachment.

(b) If a non-conforming encroachment ceases to have continuous use, has a change in the type or degree of use, or if the structural or functional soundness of the structure or property deteriorates due to lack of maintenance, damage by fire, flood, wind, or other act of God, it shall no longer be tolerated and shall not be eligible for repair, replacement, or further use until an encroachment agreement has been executed. The City shall have the right and duty to require the removal of any encroachment thus affected.

(c) Past tolerance of an encroachment or failure to enforce the prohibition against encroachment shall not be grounds for continued existence of a non-conforming encroachment.

Sec. 138-23. Obligation to relocate upon notice.

(a) The City reserves the right to perform any public works or public improvements necessary to maintain the Public Right-of-Way. The City may therefore, upon written request to the Permittee, require relocation of the Permittee's equipment-facilities existing in the Public Right-of-Way at the at the Permittee's own expense when the relocation is necessary to maintain the health, safety, or welfare of the public or to improve or maintain the Public Right-of-Way for transportation uses.

(1) Notification, failure to remove. Upon receiving written notice from the City to remove, or relocate facilities which are using or occupying a Public Right-of-Way which the City has to improve, the Permittee shall, within sixty (60) days thereafter, begin arrangements for said removal or relocation in accordance with said written notice from the City. Should the Permittee fail to comply with such notice within a reasonable time sufficient to allow for procedures reasonably necessary for the removal and relocation of the facilities, the City may give the Permittee a final notice directing that such removal be begun begin -not later than ten (10) days from the receipt of such final notice.

(2) Removal or relocation of facilities by the City. If the Permittee refuses or neglects to relocate said equipment-facilities existing in the Public Right-of-

Way within ten (10) days of receipt of such final notice-a reasonable time, or if an emergency affecting public safety or health exists requiring immediate relocation of the Permittee's facilities, to the extent not inconsistent with state and federal law, the City may relocate such facilities the equipment and the Permittee shall pay to the City the reasonable costs incurred in connection with such relocation.

(3) Removal or relocation of facilities for aesthetic purposes-If ~~The~~ relocation of facilities in the Right-Of-Way is for aesthetic purposes or purposes not related to improving the Public Right-Of-Way for transportation purposes or to maintain the Public Right-Of-Way for health or safety reasons, then the cost of such relocation shall be borne by the requesting third party and not by the City or the Permittee.

(4) Removal or relocation of facilities by an act of God-If an act of God necessitates the relocation of the Permittee's facilities located in the Public Rights-Of-Way, the cost of such relocation shall not be borne by the Permittee.

Sec. 138-24. Conditions of Permit.

(a) Encroachment Agreement. It shall be prohibited and shall be unlawful for any ~~person~~Person to erect or maintain any temporary or permanent Right-Of-Way encroachment in the City, unless that encroachment is covered by an encroachment agreement administered by the Department of Public Works.

(b) The City will not ~~grant~~ enter an into an encroachment agreement to any owner of property adjacent to any street or roadway that is part of the street system of the City or Right-Of-Way ~~along~~Way along the limited-access highways of the federal or state aid road system within the City limits or any agent or contractor employed by the owner to make changes to, to alter or to construct an encroachment over, upon or under the Right-Of-Way unless:

(1) Changes to benefit public. In the opinion of the Commissioner of Public Works the proposed alteration, excavation or encroachment will constitute a benefit to the public and, except for permitted temporary disruptions of service, will not adversely impact the ability of the Right-Of-Way to handle vehicular or pedestrian traffic or otherwise to perform their intended function.

(2) Agreement as a condition of a permit. The owners of the adjacent or connected properties abutting the Right-Of-Way seeking a permit to alter, excavate or encroach on the Right-Of-Way enter an agreement with the City, which agreement shall be binding upon the owners of the property abutting the Right-Of-Way and their successors in title in perpetuity or until the agreement is ended by mutual consent of the City and the agreeing parties and which will provide but is not limited to the following:

(4) Where the party seeking the permit has shown due diligence to perform either (1), (2), or (3) of this section and are unable to do so due to the structural necessities of the work to be completed, proper signage must be provided at each pedestrian-accessible intersection, between which lies the permitted closure or obstruction, directing pedestrian traffic to cross to the other side of the street. Signage must be visible to pedestrian traffic both on the side of the street with the obstruction and to pedestrian traffic at intersections with access to the segment of the sidewalk containing the permitted obstruction.

(5) The Commissioner of Public Works is prohibited from accepting, as reason for an inability to comply with items (1), (2), or (3) of this section, that the pedestrian Right-Of-Way must be closed due to a need for vehicular parking on the site of the work being performed necessitating the closure.

(6) All such walkways mandated by this section, shall be maintained by the party responsible on the permit for closure and any damage, or obstructions to this temporary Right-Of-Way shall be repaired and cleared immediately by that party. Permittee is required to display the permit in a conspicuous place so that the public and inspectors can visibly see it.

(Code 1977, §§ 9-3031, 9-3034; Ord. No. 1995-60, § 1, 9-24-95; Ord. No. 1998-82, §§ 1-3, 11-20-98)

~~Sec. 138-68 — Inspection charges to utility companies.~~

~~The Commissioner of Public Works is authorized to develop and publish a schedule of fees for the use of public streets, sidewalks, and Right Of Way for construction, repair, and maintenance of public utilities. Said fees shall be in addition to any franchise fees paid to the City. The fee schedule shall reflect the cost of administration of permitting said activities and conducting field inspection. The fee schedule may change from time to time as a result of changes in the cost of administration and inspection.~~

(Code 1977, § 9-3037)

~~Section 138- 68.1 — Scheduling and Coordination of Excavation.~~

(a) ~~Twelve~~ Twenty-Four Month Plans. In order to facilitate an interactive planning process, Persons desiring to cut or make an opening in the street shall submit a plan in a format ~~specified~~ acceptable to by the Commissioner of Public Works that shows all major excavation work anticipated to be done in the Public Right-Of-Way for the next ~~12~~ twenty-four (24) months. The plan shall include a method of excavation designed to protect to the maximum extent possible the existing infrastructure and minimize the interference with pedestrian and vehicular traffic plans may be revised and updated from time to time by such Person.—The Person submitting the plans shall mark

Any joint application shall identify the lead Person responsible for the requested permitted activity. The lead Person will coordinate the activities of the other Persons participating in the joint project. As an incentive, to encourage joint excavation activities, the City shall implement expedited permit procedures and other fee schedules.

Sec. 138-69. *Rehabilitation and restoration of the pavement.* Charge for opening pavement within five years of resurfacing.

(a) ~~In addition to any other fees or charges as provided in this chapter, w~~Whenever any ~~person~~Person desires to cut or make an opening ~~of 100 linear square feet or more less~~ in any street ~~which has been improved by paving, repaving or resurfacing prior to the expiration of a 5 year period, the person~~ the Person so desiring to make such an opening or cut shall ~~repair the cut to the specifications determined by the Department of Public Works. Persons desiring to make a cut or opening in the street greater than 100 square feet shall mill and resurface the lane affected by the openinopening.~~ ~~gnot be allowed to make such an opening or cut within 12 months after the date the street was paved.~~ In subsequent 12 month periods, the ~~person~~Person so desiring to make an opening or cut shall be required ~~pay the City as outlined below:~~

<u>Time Period</u> <u>Since Resurfacing</u> <u>(months)</u>	<u>Charge</u>
0 - 12	
13 - 24....	\$ 10,000.00
25 - 36....	5,000.00
37 - 48....	3,000.00
49 - 60....	1,000.00
After 60....	No charge

~~( ) The charges to be made under this subsection shall be in addition to all others now provided by law.~~

Sec. 138-70. Work done by public utilities.

The Commissioner of Public Works may require public utilities to make their own cuts, backfills and permanent improvements, but all that work shall be done under the supervision and subject to the approval of the Commissioner of Public Works.

(b) The provisions of this section are in addition to the requirements set forth in O.C.G.A. tit. 25, ch. 9 (O.C.G.A. § 25-9-1 et seq.).  
(Code 1977, § 17-11006)

Sec. 138-74. Emergency Excavations-Nothing contained in this section shall be construed to prevent any Person from taking any action reasonably necessary for the preservation of life or property or for the restoration of interrupted service provided by a utility when such necessity arises during days or times when the Department of Public Works is closed. In the event that any Person takes any action to excavate or cause to excavate the Public Right-of-Way pursuant to this section such Person shall apply for an emergency permit within four hours after the Department of Public Works' offices are first opened. Permits submitted pursuant to this section shall receive an expedited review. The applicant for an emergency permit shall submit a written statement of the basis of the emergency action and described excavation performed and any work remaining to be performed. Persons conducting emergency excavations pursuant to this section shall prominently display a notice of such emergency activity.

~~Secs. 138-74 through~~138-75 Reserved.

## **ARTICLE IV. IMPROVEMENTS WITHIN THE RIGHT-OF-WAY**

### **DIVISION 1. GENERALLY**

Sec. 138-76. Cost and fees of street paving and the improvement of unimproved Right-Of-Way by City assessed against abutting property owners.

Whenever any street or part thereof in the City is originally paved, or the improvement of unimproved Right-Of-Way is accomplished by the City, the cost and fees of street paving and the improvement of unimproved Right-Of-Way shall be assessed against abutting property owners. Whenever such work is by direction of the Council, there shall be added to the total assessable cost of the work a fee for inspection and engineering services furnished by the City, and the total of cost and fee shall be assessed against the abutting property owner. The fee shall be retained by the Chief Financial Officer to cover the cost of inspection and engineering services. The fee shall be established by ordinance and may be found in the City's rules and regulations.  
(Code 1977, § 9-3052)

Sec. 138-77 Engineering and inspection fees for improvements by owner or developer.

When any owner of property or developer thereof shall install any public improvement, such as the grading and paving of streets, sidewalks, the installation of curbs and combination curbs and gutters, either by such owner or developer or by any



AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF BERKELEY, CALIFORNIA  
ADDING CHAPTER 16.10 TO THE BERKELEY MUNICIPAL CODE TO REGULATE THE  
INSTALLATION OF TELECOMMUNICATIONS SYSTEMS WHICH UTILIZE STREETS,  
PUBLIC RIGHTS-OF-WAY, EASEMENTS, OR OTHER PUBLIC PROPERTY;  
REGISTRATION REQUIRED FOR USE OF PRIVATE PROPERTY

BE IT ORDAINED by the Council of the City of Berkeley, California as follows:

Section 1. That Chapter 16.10 of the Berkeley Municipal Code is hereby adopted to  
read as follows:

**Chapter 16.10**

**TELECOMMUNICATIONS CARRIERS**

**Sections**

<b>16.10.010</b>	<b>Purpose</b>
<b>16.10.020</b>	<b>Definitions</b>
<b>16.10.030</b>	<b>Telecommunications Carriers Using Public Property-Registration, Licenses or Franchises, Special Telecommunications Permit and Related Fees Required; Exemptions for Cable Television and OVS Systems and Federal or State Preemption.</b>
<b>16.10.040</b>	<b>Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required</b>
<b>16.10.050</b>	<b>Special Telecommunications Permit-Applicability</b>
<b>16.10.060</b>	<b>Special Telecommunications Permit Application-Contents-Fee</b>
<b>16.10.070</b>	<b>City Determination of Whether Applicant is Subject to Licensing or Franchising-Effect of Failure to File State Exemption Information, Waiver</b>
<b>16.10.080</b>	<b>Applicant Determined Exempt from Licensing or Franchising-City Determination of Application for Special Telecommunications Permit</b>
<b>16.10.090</b>	<b>Telecommunications Carriers Not Exempt from Licensing and Franchising-Application for Special Telecommunications Permit Merged Into License/Franchise Application; Additional Information.</b>
<b>16.10.100</b>	<b>Processing Fees and Compensation Required For License or Franchise</b>
<b>16.10.110</b>	<b>Factors and Process for Approving License or Franchise-Council Approval Required; Term; Non-exclusive Grant; Limited Use Granted</b>
<b>16.10.020</b>	<b>Assignment, Transfer, Lease or Sale of Franchise, License, Telecommunications System, or Telecommunications Facilities</b>
<b>16.10.130</b>	<b>System Construction Schedule/Submittal of Plans</b>
<b>16.10.140</b>	<b>Location of Facilities</b>
<b>16.10.150</b>	<b>Coordination.</b>
<b>16.10.160</b>	<b>Conditions of Use of Streets and Public Rights-of-Ways.</b>
<b>16.10.170</b>	<b>Duty to Remove Telecommunications Facilities from PROW and Public Property.</b>
<b>16.10.180</b>	<b>Construction Standards.</b>

16.10.190	<b>Reservation of Right to Inspect Construction, Documents Related to Construction, and Tests Related to Performance, Technical Integrity and Quality of Signal, Preventive Maintenance and Safety.</b>
16.10.200	<b>Construction Default.</b>
16.10.210	<b>Vacation or Abandonment.</b>
16.10.220	<b>Abandonment in Place.</b>
16.10.230	<b>Facility Agreements</b>
16.10.240	<b>System Technical Data.</b>
16.10.250	<b>Availability of Technical Data.</b>
16.10.260	<b>Retention and Submission of Reports and Records.</b>
16.10.270	<b>Inspection and Review of Books, Records and Other Data.</b>
16.10.280	<b>Indemnity.</b>
16.10.290	<b>Liability Insurance.</b>
16.10.300	<b>Financial Security.</b>
16.10.320	<b>Telecommunications Carriers Seeking Relief from This Ordinance</b>
16.10.340	<b>Telecommunications Carriers or Its Assignees Subject to Present and Future Ordinances and/or Resolutions.</b>
16.10.360	<b>Resolution of Conflicts Between this Ordinance and a Subsequent Franchise Agreement or License</b>
16.10.370	<b>Force Majeure</b>
16.10.380	<b>Notices.</b>
16.10.390	<b>Severability.</b>
16.10.410	<b>Revocation and Termination</b>
16.10.420	<b>Possessory Interest.</b>
16.10.430	<b>Violations.</b>

**16.10.010 Purpose**

The purpose of this ordinance is to more specifically regulate Telecommunications carriers providing telecommunications services using public rights of ways and other public property because other applicable laws provide an insufficient basis to address the frequency, nature and scope of the excavations and encroachments necessitated by telecommunications carriers. The regulations enacted by this ordinance are intended to minimize disruption of vehicular and pedestrian traffic, foster an aesthetically pleasing urban environment and prevent visual blight, compensate the City of Berkeley for the use of its property; reimburse the City for its costs of regulating the installation and maintenance of telecommunications facilities, systems and equipment on public property and public rights of way and determine competing uses of such property. This ordinance is also requires the registration of Telecommunications equipment, facilities and systems installed on private property in order to facilitate joint trenching wherever possible and to minimize disruption of public property and public rights of way. The codification of these requirements in a consistent and comprehensive manner is also intended to create a more predictable regulatory environment and thereby encourage the expansion of telecommunications services and the entrance of all carriers on a competitively equal basis.

**16.10.020 Definitions.**

The following terms apply for purposes of this chapter.

"Affiliated Person" or "Affiliates," means each Person who falls into one or more of the following categories: (i) each Person having, directly or indirectly, a Controlling Interest in a Telecommunications Carrier; (ii) each Person in which a Telecommunications Carrier has, directly or indirectly, a Controlling Interest; (iii) each officer, director, general partner, limited partner holding an interest of five percent (5%) or more, joint venturer, or joint venture partner in a Telecommunications System in the City; and (iv) each Person, directly or indirectly,

does not intend to provide services within the geographical limits of the City of Berkeley, unless the City determines either that the carrier is exempt under state or federal law from the payment of a license fee pursuant to Section 16.10.070

3. The execution of a written franchise subject to this chapter and Chapter 9.60 and the payment of related compensation, where the Telecommunications Carrier intends to provide telecommunications services within the geographical limits of the City, unless the City determines either that the carrier is exempt under state or federal law from the payment of a franchise fee pursuant to Section 16.10.070.

4. A Special Telecommunications Permit and related fees pursuant to Section 16.10.050 et. sequitur.

5. The additional requirements imposed by this chapter on the installation, maintenance, operation, removal and upgrade of the Telecommunications Equipment, facilities, system and related record-keeping, reporting, insurance, indemnity, financial, and other regulatory requirements of this chapter.

6. Any other permits and fees and requirements otherwise imposed by federal state or local law, including excavation or encroachments permits under Title 16 of the Berkeley Municipal Code and any franchises and licenses.

**B. Exemption for Cable Television Systems and OVS Systems Franchised Subject to Chapter 9.56.** Cable Operators using Public Property or PROW solely to operate a Cable Television system shall not be subject to this ordinance but shall comply with Chapter 9.56 and any other applicable provision of local, state or federal law. Nothing in this section shall exempt a cable operator who operates telecommunications services other than a Cable Television system from the provisions of this chapter with respect to such other services.

#### **16.10.040 Required Registration of Telecommunications Carriers; Process; Required Annual Update; Fees Required.**

**A. Duty To Register and Update Registration Forms Annually.** Upon the effective date of this ordinance all Telecommunications Carriers currently engaged in using public property or public rights of way or private property shall complete registration forms provided by the City and pay related fees. Such carriers shall update the forms on such forms on January 1 of each succeeding year and pay the fees imposed in connection therewith.

**B. Registrations Forms and Information Required.** The registrant shall disclose and provide the following information:

1. The identity and legal status of the registrant, including any affiliates.
2. The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.
3. A map, in electronic and/or other form required by the City, of the location of and a description of registrant's existing or proposed Telecommunications Facilities within the City in the form and detail required by the City. Such information shall include whether and to what extent said carrier has existing excess capacity.
4. A description of the Telecommunications Service that the registrant intends to offer or provide, or is currently offering or providing to persons, firms, businesses or institutions within the City, as well as a specific time table or schedule for the provision of each Telecommunications Service.
5. Information satisfactory to the City to enable it to determine whether the registrant is subject to franchising or licensing under this Ordinance.
6. Information satisfactory to the City to enable it to determine that the registrant has applied for and received any certificate of authority required by the PUC to provide Telecommunications Services or Telecommunications Facilities within the City. The Telecommunications Carrier shall state which of the Telecommunications Services, if any,

offered or to be offered within the City are not covered or authorized by said PUC certificate of authority.

7. Information satisfactory to the City to enable it to determine that the registrant has applied for and received all construction permits, operating licenses or other approvals required by the FCC to provide telecommunications Services or Telecommunications Facilities within the City.

8. The identity and address of any and all Persons or entities using any portion of, or all, of the Telecommunications Facilities or Telecommunications System within the City pursuant to agreement, contract, or otherwise and copies of said contracts or agreements.

9. A five-year Business Plan and Five Year Construction Plan for proposed activities within the City.

10. Photographs or artist drawings of all above-ground facilities and their precise proposed locations and dimensions.

11. Such other information as the City may reasonably require.

**16.10.050 Special Telecommunications Permit-Applicability; Application Subject to Prior Notice and Dialogue With the Public Regarding Above-Ground facilities and with Other Telecommunications Carriers regarding Excess Conduit and Joint Installation.**

A. Upon adoption of this chapter, in addition to registration pursuant to section 16.10.040, required annual registration information updates and any other permit or entitlement required by local state or federal law, including any license or franchise which may be required pursuant to this chapter, all Telecommunications Carriers, other than Cable and OVS Operators exempt pursuant to section 16.10.030 B, shall obtain a Special Telecommunications Permit pursuant to section 16.10.050 prior to installing any Telecommunications Facilities on Public Property or PROW and shall pay all fees imposed in connection therewith. Such permit is in addition to any other excavation, encroachment or other permit required by Title 16 of the Berkeley Municipal Code or any other provision of law and shall be required both where such facilities are being installed overhead, aerial in existing conduit owned by other Telecommunications carriers or in new conduit necessitating an excavation of public property or PROW is installed.

B. Telecommunications Carriers shall provide advance notice to the public of the proposed quantity, precise dimensions, design, color, type and location of Pedestals and other above-ground telecommunications facilities and information about noise generated by such facilities and alternatives for reducing the aesthetic impacts of the facilities, including but not limited to size reductions, screening and alternative locations and undergrounding. Such notice is required to include photographs or artists renderings, of all above-ground Pedestals and other visible equipment, from which their size must be apparent. It must also include, a detailed description of the equipment included within the node including: the electronic components, natural gas generator, electrical fans, and the anticipated noise levels during winter and summer months and the emergency backup operations and equipment. The proposed maintenance schedule for such above-ground facilities shall be included. Telecommunications Carrier will provide its non-toll telephone number answered twenty-four (24) hours a day and a telephone number of the City which may be called if the property owner is concerned about the installation. Carrier must respond to any inquiry within 48 hours and shall promptly report to the City what the response has been. The Carrier shall attempt take all reasonable steps to modify its proposed plans to accommodate public concerns prior to filing an application with the City regarding the installation of such facilities.

C Telecommunications Carrier shall first seek to use excess conduit of other carriers prior to seeking construction on or in public property or PROW. It shall also provide reasonable advance notice to other carriers and provide them an opportunity to jointly install

controlling, controlled by, or under common Control with a Telecommunications Carrier; provided that "Affiliated Person" excludes the City, any limited partner holding an interest of less than five percent (5%) in a Telecommunications Carrier, or any creditor of a Telecommunications Carrier, solely by virtue of its status as a creditor, and which is not otherwise an Affiliated Person by reason of owning a Controlling Interest in, being owned by, or being under common ownership, common management, or common Control with a Telecommunications Carrier.

"Assignment" or "Transfer" means any assignment, transfer, sale or other transaction of a franchised or licensed Telecommunications System, or any part thereof, or its corporate or partnership parent, which has the effect of changing the operational, managerial, or financial Control of the Telecommunications System or the Telecommunications Carrier.

"Cables" means any wires, copper, coax, or fiber utilized for Telecommunications purposes.

"Cable operator" means any Person or group of Persons who:

1. Provides Cable Service over a Cable System and directly or through one or more Affiliates owns a Controlling Interest in such Cable System; or
2. Otherwise controls or is responsible for, through any arrangement, the management and operation of such a Cable System.

"Cable System" or "Cable Television System" means a facility consisting of a set of closed transmission paths and associated signal generation, reception and control equipment that is designed to provide Cable Service as defined in the Cable Act and which is provided to multiple subscribers within the City. However, such terms do not include the following:

1. A facility that serves only to retransmit the television signals of one or more broadcast stations; or
2. A facility that serves subscribers without using any public right-of-way; or
3. A facility of a common carrier which is subject, in whole, or in part, to the provisions of Title II of the Communications Act of 1934, except that such facility shall be considered a Cable System (other than for purposes of Section 621(c) of the Cable Act, codified at 47 USC 541) to the extent such facility is used in the transmission of video, voice, or data programming or services directly to subscribers; or
4. Any facilities of any electric utility used solely for operating its electric utility.

"City" means the City of Berkeley, California.

"City Council" means the City Council of the City.

"Consultant" means the entity hired by the Telecommunications Carrier under the supervision of the City to inspect construction or to locate utilities.

"Control" or "Controlling Interest" means actual working control in whatever manner exercised, including, without limitation, working control through ownership, management, debt instruments, or negative control, as the case may be, of the Telecommunications System, or the Telecommunications Carrier. A rebuttable presumption of the existence of Control or a Controlling Interest shall arise from the beneficial ownership, directly or indirectly, by any Person or group of Persons acting in concert (other than underwriters during the period in which they are offering securities to the public) of twenty percent (20%) or more of any Person (which Person or group of Persons is referred to as "Controlling Person"), or being a party to a management contract.

"Easement" means and shall include any public easement or other compatible use created by dedication, or by other means, to the City for public utility purposes or any other purpose whatsoever.

"Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhole or other utility facility within the public way that is or will be available for use for additional Telecommunications Facilities.

"Fiber Cable" or "Fiber Optic Cable" means very thin and pliable cylinders, or strands of glass or plastic, or any future functional equivalent, used or capable of being used to carry signals transmitted by means of modulated light.

equipment proposed to be installed and/or requiring the installation of landscape or other camouflaging techniques to minimize adverse visual impacts and obstructions.

E. Conditions Imposed Including Compliance With Standards in Chapter. City may impose any reasonable conditions on the permit, including the timing, method of construction, and location of the facilities proposed to be installed pursuant to such permit and any public notice which may be required. Any permit granted shall be conditioned upon the Applicant's compliance with standards regarding the installation, maintenance, operation, removal, and upgrade of the Telecommunications Equipment, facilities, system and related noticing, record-keeping, reporting insurance, indemnity, financial, and other regulatory requirements of this chapter.

**16.10.090 Telecommunications Carriers Not Exempt from Licensing and Franchising- Application for Special Telecommunications Excavation Permit Merged Into License/Franchise Application; Additional Information.**

A. Non-exempt carriers; merger of Special Telecommunications Permit application into license/franchise application. Where the City has determined, pursuant to Section 16.10.070, that all or part of a Telecommunications Carrier's activities to install telecommunications equipment or facilities on Public Property and PROW are subject to the procurement of a City license or franchise, or the Carrier has not petitioned for an exemption from such requirements, as provided in this chapter, the application for a Special Telecommunications Permit shall be merged into an application for a license, if no services are being provided within the geographical limits of the City, or into an application for a franchise, if telecommunications services are being provided within the geographical limits of the City.

B. Additional Information Required. In addition to the information supplied in connection with application for a Special Telecommunications Permit, the City may require any additional information which it deems necessary in order to determine whether a license or franchise shall be granted. In the case of an application for a franchise, such information shall include all of the following:

1. Whether the Applicant intends to provide cable service, video dial tone service or other video programming service, and sufficient information to determine whether such services is subject to cable franchising.

2. An accurate map in the electronic and/or other form required by the City showing the location of any existing Telecommunications System(s) in the City that Applicant intends to use or lease.

3. A description of the Telecommunications Services or Telecommunications Facilities that the Applicant will offer or make available to the City and other public, educational and governmental institutions.

4. A description of Applicant's access and line extension policies.

5. The area or areas of the City the Applicant desires to serve and if applicable, a schedule for build-out to the entire franchise area.

**16.10.100 Processing Fees and Compensation Required For License or Franchise.**

Each and every Licensee or Franchisee shall pay a processing fee as determined by the City Council to reimburse the City for its costs in processing the application for a license or franchise. In addition, the applicant shall pay a License/Franchise Fee for the use of the property rights granted to the Licensee/Franchisee, namely, the privilege of using PROW or Public Property to construct, maintain, and operate a Telecommunications System or any portion thereof, as a condition and requirement of each and every License/Franchise. Such fee shall consist of the following components:

A. Minimum Compensation Component. Each and every Licensee/Franchisee which constructs, maintains, and operates a Telecommunications System, or any portion thereof, or

provides a Telecommunications Service, which the City has not determined not to be exempt pursuant to Section 16.10.070, shall pay minimum compensation (the "Minimum Compensation Requirement") determined by the City Council on an annual basis in an amount to be established in the License or Franchise. The Minimum Compensation Requirement shall not exceed the fair market value of the property rights granted to the Franchisee, i.e., the privilege of using PROW or Public Property, and Easements to construct, maintain, and operate a Telecommunications System or portion thereof, which are not exempt in their entirety from the imposition of a compensation requirement by applicable federal or state law. The City may accept in-kind compensation for all or a portion of the Minimum Compensation Requirement of approximately equal value.

B. Additional Compensation. Either at the time of issuance of any License, Franchise, Permit, or other authorization, or any time thereafter, the City may determine whether or not the Minimum Compensation Requirement equates to or is less than the fair market value of the property rights granted to the Licensee, namely, the privilege of utilizing PROW or Public Property to construct, maintain, and operate a Telecommunications System or portion thereof.. If the City determines that said non-exempt property rights possess a fair market value in excess of the Minimum Compensation Requirement, the City may require the Licensee or Franchisee to provide additional compensation to the City, in cash or in-kind services or facilities, which represents in value the difference between the Minimum Compensation Requirement and the fair market value (the "Additional Compensation") (the Minimum Compensation Requirement and the Additional Compensation shall collectively be referred to as the "Total Compensation"). Under no circumstances shall the Total Compensation exceed the fair market value of the non-exempt property rights granted to the Licensee, Franchisee, or holder of the permit or authorization. The City Council may, from time to time, but no more frequently than annually, establish by resolution the Additional Compensation and modify said Additional Compensation based upon increases in the fair market value of the non-exempt property rights granted or conveyed unless the City Council has entered into a written agreement to establish a different compensation for such period.

C. Acceptance of License/Franchise Constitutes Acceptance of License/Franchise Fee Imposed. Execution of the written license or franchise agreement shall constitute an acceptance of the Minimum Compensation and Additional Compensation requirements of this chapter.

**16.10.110 Factors and Process for Approving License or Franchise-Council Approval Required; Term; Non-exclusive Grant; Limited Use Granted.**

The City Manager shall determine whether to recommend that the City Council grant a license or franchise as set forth herein.

A. Additional Factors to be Considered In addition to the factors set forth in Section 16.10.080, the City Manager shall consider the following additional factors in making his recommendations to the City Council as to whether and on what terms to grant a license or franchise:

1. The service that Applicant will provide to the community and region.
2. The effect, if any, on public health, safety and welfare if the Franchise requested is granted.
3. Such other factors-as may demonstrate that the grant to use the PROW will serve the community interest.

B. Procedure The procedure for Council consideration of such license or franchise shall be as set forth in Chapter 9.60.

C. Term The term for which each license or grant is made shall be specified in the license or franchise agreement but in no event shall be greater than any maximum term set by law.