

TIGARD MUNICIPAL CODE

Chapter 15.06 FRANCHISED UTILITY ORDINANCE

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Article I. General Terms and Conditions

- 15.06.010 Short Title

This chapter shall be known and referred to as the Tigard Franchised Utility Ordinance. (Ord. 06-11)

- 15.06.020 Definitions

As used in this chapter:

“Emergency” means a circumstance in which immediate repair to damaged or malfunctioning facilities is necessary to restore lost service or prevent immediate harm to persons or property.

“Franchise” means the privilege conferred on a person by the city to place and operate portions of a utility system in, over or under rights-of-way.

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Franchises shall be conferred by ordinance or resolution and confirmed by a franchise agreement.

“Gross revenues” means revenues earned within the city, less net uncollectibles, from the sale of electrical energy, gas, telecommunications, water, or sanitary sewage disposal and treatment service, and for the use, rental, or lease of utility facilities of the utility engaged in such business.

1. “Gross revenues” shall not include proceeds from the sale of bonds, mortgage or other evidence of indebtedness, securities or stocks.

2. To the extent that the city’s authority to tax gross revenues of an entity is limited by ORS 221.410 through 221.655, the city shall apply the statutory limitations to the definition of “gross revenues.”

“Person” means every natural person, firm, co-partnership, association, corporation or entity, but not including special districts or county service districts.

“Right-of-way” includes city streets, roads, bridges, alleys, sidewalks, trails, paths, and all other public ways and areas managed by the city. “Right-of-way” also includes public utility easements to the extent that the easement allows use by the utility operator planning to use or using the public utility easement. “Right-of-way” includes the subsurface under and airspace over these areas. “Right-of-way” does not include the airwaves for purposes of CMRS, broadcast television, DBS and other wireless providers, or easements or other property interests owned by a single utility or entity.

“Sidewalk” means an area specifically delineated and constructed for pedestrian use located behind a curb but within the rights-of-way

or within an easement specifically established for that purpose.

“Street” or “alley” means every way or place open as a matter of right to the use of the public for vehicular or pedestrian traffic between right-of-way lines.

“Telecommunications facility” means any physical component of a telecommunications system located within or attached to the rights-of-way.

“Telecommunications system” means a system of fibers, lines, cables, antennas, microwave links, or other conduit and supporting structures and equipment constructed or used for the purpose of transmitting audio, video, digital or other forms of electric or electronic signals or information. “Telecommunications system” does not include a cable communications system. However, if a portion of a cable communications system is also used for telecommunications other than cable communications, the system is both a cable communications system and a telecommunications system. “Telecommunications system” does not include a system used for the transmission of electric power solely for power purposes, even if a portion of the system is used to communicate information about the power system for use by the system operator. “Telecommunications system” does not include mobile telecommunications equipment (e.g. cellular phones, hand-held or vehicle-mounted radios) but does include fixed antennas and other fixed equipment used to convey signals to or from mobile telecommunications equipment.

“Utility facility” means any physical component of a utility system located within or attached to the rights-of-way.

“Utility operator” means any person that places or maintains any portion of a utility system within the rights-of-way.

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“Utility system” means a system owned and operated by a person to deliver or transmit electricity, natural gas, telecommunications, water, sewer, storm sewer or other goods or services by means of pipes, wires, transmitters, or other facilities permanently located within or attached to the rights-of-way to or from customers within the corporate boundaries of the City of Tigard. “Utility system” also includes transmission of these products or services through the City of Tigard whether or not customers within the city are served by those transmissions. “Utility system” does not include any agency of the federal government. (Ord. 06-11)

15.06.030 Purpose

The purpose and intent of this chapter is to:

A. Permit and manage reasonable access to the rights-of-way of the city for utility purposes on a competitively neutral basis and conserve the limited physical capacity of those rights-of-way held in trust by the city.

B. Assure that the city’s current and ongoing costs of granting and regulating private access to and the use of the rights-of-way are fully compensated by the persons seeking such access and causing such costs.

C. Secure fair and reasonable compensation to the city and its residents for permitting private use of the rights-of-way.

D. Comply with the provisions of the Communications Act of 1934 as they apply to local governments. (Ord. 06-11)

15.06.040 Jurisdiction

The requirements of this chapter shall apply to all rights-of-way under the jurisdiction of the City of Tigard, dedicated by plat or deed, created by user, or the use thereof controlled by the city

pursuant to agreements with Washington County or the Oregon Department of Transportation. (Ord. 06-11)

15.06.050 Franchise Required

A. Any person that places or maintains a utility system in any portion of the right-of-way without a franchise is subject to all other provisions of this chapter, including the payment of the right-of-way usage fee pursuant to Section 15.06.100.

B. The city may grant a franchise allowing use of any right-of-way for any portion of a utility system.

C. To the extent the terms of a franchise are inconsistent with the provisions of this chapter, the terms of the franchise shall prevail. (Ord. 06-11)

15.06.060 Grant of Franchise

A. The City Council shall grant by resolution a utility franchise to any person providing utility services which has submitted an application, meets the requirements of this chapter, and agrees to sign the city’s standard franchise agreement without modification. The franchise shall not be effective until the applicant signs the city’s standard Utility Franchise Agreement substantially in the form approved by the City Council. The City Council shall approve the form of the standard Utility Franchise Agreement by resolution.

B. The City Council may grant utility franchises in any other circumstance by ordinance. Any franchise ordinance shall not be effective until a franchise agreement is entered into by the city and the franchisee.

C. Nonexclusivity. All utility franchises shall be nonexclusive. (Ord. 06-11)

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15.06.070 Privilege Granted

The franchise shall grant a privilege to use rights-of-way consistent with the requirements of this chapter. The franchise does not convey any right, title or interest in the right-of-way. (Ord. 06-11)

15.06.080 Term

Unless otherwise specified in the franchise agreement and resolution or ordinance, franchises shall be in effect for 10 years but in no case shall exceed 15 years. (Ord. 06-11)

15.06.090 Franchise Fee

A. Any person applying for a franchise (including an application for renewal) shall pay an application fee to cover the cost of processing the application. The City Council shall establish the fee by resolution.

B. The franchise agreement may provide for payment of a franchise fee as compensation for use of rights-of-way and reimbursement of the city's cost of administering the program created in this chapter. The franchise fee is separate and distinct from any other legally authorized federal, state or local taxes or fees, except to the extent that payment of a franchise fee shall count as a credit to the right-of-way usage fee.

C. The fees imposed by this chapter are not subject to the property tax limitations of Article XI, Sections 11(b) and 11(19) of the Oregon Constitution and are not fees imposed on property or property owners by fact of ownership and are not new or increased fees for purposes of those subsections.

D. The franchise fee shall be payable semi-annually on or before March 15th for the six-month period ended December 31st, and September 15th for the six-month period ended

June 30th, unless otherwise stated in the resolution authorizing the franchise. The franchisee shall pay interest at the rate of nine percent per year for any payment made after the due date. (Ord. 06-11; Ord. 02-05)

15.06.100 Right-of-Way Usage Fee

A. All persons using a utility system or facility in the right-of-way to provide service to customers within the City of Tigard shall pay a right-of-way usage fee that is the greater of: (1) the applicable percentage of gross revenues set forth in subsection B of this section; or (2) the linear foot fee set by council resolution pursuant to subsection C of this section, subject to any applicable limitations imposed by federal and state statutes, including the privilege tax limitations set forth in ORS 221.410 through 221.655, on the schedule set forth in subsection E of this section or as specified in a franchise agreement.

B. The right-of-way usage fee percentage applicable to each class of utility shall be as follows:

Telecommunications	5.0%
Electric	5.0%
Natural Gas	5.0%
Water	5.0%
Sanitary Sewer	5.0%

C. The City Council is hereby authorized to establish by resolution a right-of-way usage fee calculated based on the total linear feet of a utility operator's facilities in the rights-of-way.

D. Right-of-way usage fee payments shall be net of any franchise fee payments received by the city, but in no case will be less than zero dollars.

E. Unless otherwise agreed to by the city, the right-of-way usage fee shall be payable semi-

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annually on or before March 15th for the six-month period ended December 31st, and September 15th for the six-month period ended June 30th. The utility shall pay interest at the rate of nine percent per year for any payment made after the due date. (Ord. 12-04 §§1, 2; Ord. 08-21-A; Ord. 06-11)

15.06.110 Application Standards for Joint Telecommunications/Cable Franchises

Persons or entities providing cable television and telecommunications services over the same network under a franchise negotiated, approved and recommended by the Metropolitan Area Communications Commission (MACC) and ratified by the City Council will be presumed to have met the application requirements for a telecommunications franchise issued by the city. The telecommunications franchise and MACC franchise will be of equal term and the franchisee can rely on the insurance certificates and surety bonds pursuant to the MACC franchise. This provision does not exempt MACC franchisees from the requirements to submit an application, obtain a franchise, pay the franchise fee, and otherwise comply with the requirements of this chapter. (Ord. 06-11)

Article II. Application and Renewal Process

15.06.120 Application

Any person seeking a franchise shall submit to the city manager a letter of application presenting the following:

A. Information identifying the applicant and describing the utility system the applicant proposes to operate in the rights-of-way. The initial application shall include engineering plans, specifications and a network map showing the anticipated location and route of proposed facilities in the right-of-way, including both

existing and proposed facilities. If any of the facilities are owned by others, that information should be provided.

B. Information establishing that the applicant has obtained or is in the process of obtaining all other required governmental approvals to construct and operate the system and to offer or provide the services proposed, including, if applicable, any PUC filings or approvals.

C. The application fee. (Ord. 06-11)

15.06.130 Denials

Any denial of a franchise application shall be in writing and state the reasons for the denial. The city may deny an application for a franchise:

A. If the applicant has not complied with all application requirements and standards; or

B. If the applicant has a record of non-compliance. (Ord. 06-11)

15.06.140 Renewal

A franchisee that desires to renew a franchise shall submit a letter requesting renewal including the information set forth in Section 15.04.120 to the city manager no less than 180 days before expiration of the franchise. (Ord. 06-11)

Article III. Obligations of Franchise

15.06.150 Assignment or Transfer of Franchise

A. A franchise may not be transferred or assigned to another person unless such person is authorized under all applicable laws to own or operate the utility system and the transfer or assignment is approved by all agencies or organizations required or authorized under federal

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or state laws to approve such transfer or assignment. The franchisee shall provide the city with written notice of any transfer or assignment within 20 days of requesting approval from any state or federal agency.

B. If a franchise is assigned or transferred, the assignee or transferee shall become responsible for all facilities of the existing transferee at the time of transfer. A transfer or assignment of a franchise does not extend the term of the franchise. (Ord. 06-11)

15.06.160 Leased Capacity

A utility operator may lease capacity on or in its systems to others, provided that the utility operator provides the city with the name and business address of any lessee. All persons leasing capacity on or in a utility system and providing services to others using that capacity are subject to the provisions of this chapter. (Ord. 06-11)

15.06.170 Duty to Provide Information, Audit Responsibility

Within 30 days of a written request from the city, a utility operator shall furnish the city:

A. Information sufficient to demonstrate that the utility operator is in compliance with this chapter or its franchise agreement.

B. Access to all books, records, maps, and other documents, maintained by the utility operator with respect to its facilities in rights-of-way so that the city may perform an audit. Access shall be provided within the Portland, Oregon, metropolitan area unless prior arrangement for access elsewhere has been made with the city.

C. If the city's audit of the books, records and other documents maintained by the utility operator demonstrate that the utility operator has underpaid the franchise fee or right-of-way usage

fee by five percent or more in any one year, the utility operator shall reimburse the city for the cost of the audit and shall pay interest as specified in Sections 15.06.090 and 15.06.100 from the original due date. (Ord. 06-11)

15.06.180 Insurance

A. All utility operators shall maintain in full force and effect commercial general liability insurance covering bodily injury and property damage on an "occurrence" form (1996 ISO or equivalent) acceptable to the city. Such insurance shall cover all risks arising directly or indirectly out of the utility operator's activities or work under this chapter, including all subcontractors to any tier. The policy or policies of insurance maintained by the utility operator shall provide at least a general aggregate limit of \$5 million with a per occurrence limit of \$3 million, insuring the utility operator and naming the city as an additional insured with respect to this chapter on the policy. The utility operator shall cause a certificate of insurance to be provided to the city recorder.

B. As an alternative, a utility operator may provide and keep in force self-insurance in an equal amount to the insurance required to be obtained from a third-party insurer. The utility operator shall provide proof of self-insurance acceptable to the city if it chooses to self-insure.

C. The procuring of required insurance or self-insurance shall not be construed to limit utility operator's liability. Notwithstanding said insurance or self-insurance, the utility operator shall be obligated for the total amount of any damage, injury, or loss caused by negligence or neglect connected with this chapter.

D. There shall be no cancellation, material change, exhaustion of aggregate limits or intent not to renew insurance coverage without 30 days written notice to the city. Any failure to comply

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with this provision will not affect the insurance coverage provided to the city. A 30 days' notice of cancellation provision shall be physically endorsed on the policy.

E. The utility operator's coverage shall be primary to the extent permitted by law and insurance maintained by the city is excess and not contributory insurance as to the insurance required by this chapter. (Ord. 06-11)

15.06.190 Indemnification

Each utility operator shall defend, indemnify and hold the city and its officers, employees, agents and representatives harmless from and against any and all liability, causes of action, claims, damages, losses, judgments and other costs and expenses, including attorney fees and costs of suit or defense (at both the trial and appeal level, whether or not a trial or appeal ever takes place) that may be asserted by any person or entity in any way arising out of, resulting from, during or in connection with, or alleged to arise out of or result from the negligent, careless, or wrongful acts, omissions, failure to act, or other misconduct of the utility operator or its affiliates, officers, employees, agents, contractors, subcontractors, or lessees in the construction, operation, maintenance, repair, or removal of its facilities, and in providing or offering services over the facilities, whether such acts or omissions are authorized, allowed, or prohibited by this chapter or by a franchise agreement. Upon notification of any such claim the city shall notify the utility operator and provide the utility operator with an opportunity to provide defense regarding any such claim. (Ord. 06-11)

15.06.200 Construction Permits

A. Except in the event of an emergency, no person shall construct or install any utility facilities within a right-of-way without first

obtaining a construction permit pursuant to Chapter 15.04.

B. In the event of an emergency, a utility operator may conduct work in the rights-of-way after providing notice to the city. The utility operator shall apply for a permit for such work as soon as reasonably practicable, but not more than 48 hours after commencing work, and shall furnish any required maps and materials within 30 days of commencing work. (Ord. 06-11)

15.06.210 Facilities

All utility facilities in the right-of-way shall be constructed, installed, and maintained in accordance with all applicable federal, state, and local statutes, codes, ordinances, rules and regulations. All facilities shall comply with applicable design standards imposed by regulation or construction permit. No facility may be placed on any city facility without the express written consent of the city. The city may require separate payment for rental of space on city facilities. For purpose of this section, a right-of-way, street or sidewalk is not a facility, but structures, including poles, conduit, boxes, and equipment, are facilities. (Ord. 06-11)

15.06.220 Location of Facilities

All facilities located within the right-of-way shall be constructed, installed and located in accordance with the following terms and conditions, unless otherwise specified in a franchise agreement.

A. Whenever all existing electric utilities, cable facilities or telecommunications facilities are located underground within a right-of-way of the city, the city may require a utility operator with permission to occupy the same right-of-way to locate its facilities underground.

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B. Whenever all new or existing electric utilities, cable facilities and telecommunications facilities are located or relocated underground within a right-of-way of the city, the city may require a utility operator that currently occupies the same right-of-way to relocate its facilities underground concurrently with the other affected utilities to minimize disruption of the right-of-way. (Ord. 06-11)

15.06.230 Interference With Rights-of-Way

No utility operator may locate or maintain its utility facilities so as to unreasonably interfere with the use of the rights-of-way by the city, by the general public or by other persons authorized to use or be present in or upon the rights-of-way. All use of rights-of-way shall be consistent with city codes, ordinances and regulations. (Ord. 06-11)

15.06.240 As-Built Drawings

The utility operator shall provide the city with two complete sets of engineered plans in a form acceptable to the city showing the location of all its utility facilities within rights-of-way after initial construction of its system and, to the extent available, shall provide the city two updated complete sets of as-built plans annually, upon request by the city. (Ord. 06-11)

15.06.250 Coordination of Construction

All utility operators shall make a good faith effort to coordinate their construction schedules with those of the city and other users of the rights-of-way.

A. Prior to January 1st of each year, utility operators shall provide the city with a schedule of known construction work for that year in the city's rights-of-way or that may affect the rights-of-way.

B. Utility operators shall meet with the city at least once each calendar year, at the request of the city, to schedule and coordinate work in rights-of-way. The city shall share information on plans for other construction projects within rights-of-way.

C. All construction projects within rights-of-way shall be coordinated as ordered by the city engineer or designee, to minimize public inconvenience, disruption, or damages. (Ord. 06-11)

15.06.260 Relocation or Removal of Facilities

The utility operator shall temporarily or permanently remove, relocate, change or alter the position of any utility facility within a right-of-way when requested to do so in writing by the city. The removal, relocation, change or alteration shall be at the utility operator's expense when the removal, relocation, change or alteration is needed because of construction, repair, maintenance, or installation of public improvements or other operations of the city within the right-of-way or is otherwise in the public interest. In the event that the removal, relocation, change or alteration is needed to accommodate private development or other private use of the right-of-way, the developer or other private party requiring the action shall be responsible for the cost of removal, relocation, change or alteration. The utility operator shall be under no obligation to remove, relocate, change or alter its facilities to benefit a private party unless and until the private party pays a deposit for costs to the utility operator. The city shall specify in the written notice the amount of time for removal, relocation, change or alteration. In the event of emergency, the utility operator shall take action as needed to resolve the emergency, and the city may use any form of communication to direct the utility operator to take actions in an emergency to protect the public safety, health and welfare. (Ord. 06-11)

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15.06.270 Plan for Discontinuance or Removal

Whenever a utility operator plans to discontinue any utility facility, the utility operator shall submit a plan for discontinuance to the city. The plan may provide for removal of discontinued facilities or for abandonment in place. The city engineer shall review the plan and issue an order to the utility operator specifying which facilities are to be removed and which may be abandoned in place. The order shall establish a schedule for removal. The utility operator shall remain responsible for all facilities until they are removed. (Ord. 06-11)

15.06.280 Removal of Abandoned Facilities

Unless otherwise agreed to in writing by the city engineer, within 30 days following written notice from the city, a utility operator and any other person that owns, controls, or maintains any unauthorized utility system or facility within a right-of-way shall, at its own expense, remove the system or facility and restore the right-of-way. A utility system or facility that the city engineer has approved to be abandoned in place is not an unauthorized utility facility. A utility system or facility is unauthorized under the following circumstances:

A. The utility system or facility is outside the scope of authority granted by an existing franchise. This includes systems or facilities that were never franchised and systems or facilities that were once franchised but for which the franchise has expired or been terminated, unless the utility operator pays the right-of-way usage fee and complies with the provisions of this chapter. This does not include any facility for which the city engineer has authorized abandonment in place.

B. The system or facility has been abandoned and the city engineer has not authorized abandonment in place. A system or facility is abandoned if it is not in use and is not planned for further use. A system or facility will be presumed abandoned if it is not used for a period of one year. A utility operator may overcome this presumption by presenting plans for future use of the system or facility, or demonstrating that the utility operator is capable of using the system or facility in the future.

C. The facility is improperly constructed or installed or is in a location not permitted by the franchise or this chapter. (Ord. 06-11)

15.06.290 Removal by City

If the utility operator fails to remove any facility when required to do so under this chapter, the city may remove the facility and the utility operator shall be responsible for paying the full cost of the removal and any administrative costs incurred by the city in removing the facility and obtaining reimbursement. (Ord. 06-11)

15.06.300 Appeals

Unless another procedure is set forth in this chapter, any decision by the city engineer or city manager pursuant to this chapter may be appealed to the City Council by submitting to the city recorder, within 15 days after notice of the decision, a written statement setting forth the bases for appeal of the decision. The City Council's decision shall be subject to judicial review under the writ of review process. (Ord. 06-11)

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Article IV. Termination/Cures

15.06.310 Revocation or Termination of a Franchise or Authority to Use Rights-of-Way

The City Council may terminate a franchise or revoke other authority to use the rights-of-way for any of the following reasons:

- A. Violation of this chapter.
- B. Violation of a franchise agreement.
- C. Misrepresentation in a franchise application, including a renewal application.
- D. Abandonment of facilities without approval to abandon in place.
- E. Failure to pay taxes, compensation, fees or costs due the city after final determination of the taxes, compensation, fees or costs.
- F. Failure to restore rights-of-way after construction as required by this chapter or Chapter 15.04.
- G. Failure to comply with technical, safety and engineering standards related to work in the rights-of-way. (Ord. 06-11)

15.06.320 Standards for Revocation or Termination

In determining whether termination, revocation or some other sanction is appropriate, the following factors shall be considered:

- A. The egregiousness of the misconduct;
- B. The harm that resulted;
- C. Whether the violation was intentional;

D. The utility operator's history of compliance;

E. The utility operator's cooperation in discovering, admitting and/or curing the violation. (Ord. 06-11)

15.06.330 Notice and Cure

The city shall give the utility operator written notice of any apparent violations before terminating a franchise or revoking authority to use the rights-of-way. The notice shall include a short and concise statement of the nature and general facts of the violation or noncompliance and provide a reasonable time (no less than 20 and no more than 40 days) for the utility operator to demonstrate that the utility operator has remained in compliance, that the utility operator has cured or is in the process of curing any violation or noncompliance, or that it would be in the public interest to impose a penalty or sanction less than termination or revocation. If the utility operator is in the process of curing a violation or noncompliance, the utility operator must demonstrate that it acted promptly and continues to actively work on compliance. If the utility operator does not respond or if the city manager determines that the utility operator's response is inadequate, the city manager shall refer the matter to the City Council, which shall provide a duly noticed public hearing and determine whether the franchise or other authority to use the rights-of-way shall be terminated or revoked. (Ord. 06-11)

15.06.340 Penalties

Failure to comply with a provision of this chapter shall be a Class 1 civil infraction. (Ord. 06-11)

15.06.350 Other Remedies

Nothing in this chapter shall be construed as limiting any judicial or other remedies the city

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may have for enforcement of this chapter. (Ord. 06-11)

Article V. Severability and Application to Existing Agreements

15.06.360 Severability and Preemption

A. The provisions of this chapter shall be interpreted to be consistent with applicable federal and state law, and shall be interpreted, to the extent possible, to cover only matters not preempted by federal or state law.

B. If any provision of this chapter is for any reason declared or held to be invalid or unenforceable by any court of competent jurisdiction or superseded by state or federal legislation, rules, regulations or decision, the remainder of this chapter shall not be affected and all remaining portions shall be valid and enforceable to the fullest extent permitted by law. In the event any provision is preempted by federal or state law, the provision shall be preempted only to the extent required by law and any portion not preempted shall survive. If any federal or state law resulting in preemption is later repealed, rescinded or amended to end the preemption, the preempted provision shall return to full force and effect without further action by the city.

C. The provisions of this chapter shall not be applied or construed to unlawfully abridge contractual or property rights of a utility operator to occupy private property or the area of a utility easement. (Ord. 06-11)

15.06.370 Application to Existing Agreements

This chapter shall be applied to all persons and activities, including existing franchisees, except that it shall not affect contract rights of existing franchisees. This chapter shall fully apply

to existing franchisees on termination of existing franchises. (Ord 06-11; Ord. 00-35) ■