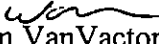


W. 5.b.

AGENDA MEMORANDUM

Date: November 3, 2004

WP ca/vv/04013/T

TO: Lane County Board of Commissioners
DEPARTMENT: Lane County Administration
PRESENTED BY:  William VanVactor, County Administrator

AGENDA ITEM TITLE: DISCUSSION/Possible Lane County Telecommunications Tax?

I. MOTION

No motion proposed. Based upon discussion, the Board may direct additional staff work.

II. ISSUE

The Lane County general fund has a structural deficit and, absent a significant reduction in services or an infusion of revenue, the County faces recurring deficits. One revenue option that has proven to be successful locally is a telecommunications tax. Several years ago, the City of Eugene enacted a telecommunications tax in addition to its franchise fees for use of the right-of-way. Different telecommunications entities challenged the tax in court. At this point, all litigation is now complete, and the City of Eugene's 2% tax on telecommunications companies has been judicially sustained. The City of Springfield is considering a similar but broader utility tax. Also, at the regional managers meetings, several of the city managers in Lane County expressed an interest in bringing a telecommunications tax proposal before their councils. L-COG staff indicated they were interested in assisting cities in this regard.

III. DISCUSSION

A. Background

Attached please find a primer on telecommunication and utility taxes prepared by the City of Eugene. Also included is a copy of the City of Eugene's judicially-validated ordinance that imposes the tax. Finally, there is a copy of the City of Springfield's ordinance which has been prepared, but is in draft form, and has not yet been presented to the council for consideration.

At the regional managers meeting on July 20, 2004, several cities indicated a keen interest in bringing forward a similar tax for their city councils to consider. In fact, there was even a suggestion that perhaps this tax could be modeled like the

transient room tax where Lane County adopts a uniform tax, and then distributes the revenues pursuant to an agreed-upon formula. Under this collaborative approach, each city council would need to adopt a resolution asking Lane County to impose that tax.

The City of Eugene's 2% telecommunications tax is anticipated to raise \$2,800,000 in FY 04-05. Of that amount, \$800,000 due from Qwest ILEC (incumbent local exchange carrier) is being deferred, pending litigation involving the City of Portland. Eugene's city staff does not believe the litigation will impact Qwest's obligation to pay the \$800,000. There is no pending court challenge to Eugene's ordinance.

Under Oregon law, county governments are prohibited from levying a right-of-way fee, so the focus of this agenda item is solely on levying tax on utility providers such as telecommunication companies.

The purpose of this agenda item is to explore the Board's interest in pursuing this revenue option.

B. Analysis

While this item was reviewed by the Finance and Audit Committee, it comes to the Board of Commissioners with no specific recommendation. As your budget officer, my belief is that Lane County faces years of budget deficits. That said, it is important that the Board is aware of every option available to address this situation. A telecommunications tax could certainly help preserve vital public services which will otherwise need to be reduced or eliminated. This sort of tax is relatively broad-based, and marginally based on ability to pay since the use or non-use of this service by a person or business determines the amount of tax they pay. Depending upon exemption levels, such a tax could be even more progressive. While adoption of the Eugene tax went smoothly, a recent article in the paper indicates that Qwest may seek repeal of that tax, and is likely to seek preemption on enactment of these sort of taxes in the 2005 legislature.

C. Recommendation

Due to Lane County government's severe fiscal constraint, the County Administrator recommends that the Board of Commissioners direct staff to draft an ordinance with alternative rate options, exemption options, and corresponding revenue estimates, and bring it before the Board for further consideration. I would further recommend that you consider a revenue sharing option with the cities only if the city councilors of a majority of Lane County cities adopt resolutions asking you to do so.

D. Timing

If Lane County pursues the City of Eugene approach and models its ordinance after the Eugene version, the ordinance can be ready for adoption rapidly. If a different approach is taken, more research and additional time would be required. County Counsel could come back with a proposed ordinance sometime in early December if it closely follows Eugene's judicially validated model, and sometime after the first of the year if the Board wants to explore new options that have not been judicially validated.

IV. ATTACHMENTS

Primer on Telecommunications Tax
City of Eugene Ordinance
City of Springfield Draft Ordinance
Corporative analysis of telecommunication ordinances

A Primer on Telecommunications or Utility Taxes

The Issue: Telecommunications providers are businesses common in all cities. Traditional telecommunications services are usually subject to a franchise granted by the City. There are increasing efforts by telecommunications providers to reduce or escape franchise obligations. There are an increasing number of telecommunications services that are not subject to traditional franchises. The city of Eugene has adopted a telecommunications tax that supplements or replaces traditional franchises, and licenses non-traditional telecommunications services.

History: Traditional franchises for telecommunications providers rested on the use of the city right-of-way. Telecommunications providers that use infrastructure to bring service to subscribers (the telephone companies and the cable company) were required to obtain a franchise from the city. The franchise required the provider to pay a franchise fee to the city. Typically for telephone companies the franchise fee was capped at seven percent of gross revenues from exchange services. For cable companies the maximum franchise fee is five percent of gross revenues on cable services. Wireless providers are not subject to a franchise fee.

In 1997 Eugene went through an extensive process of looking at its options for regulation and taxation of telecommunications providers. One important issue for the city was the increasing number of services provided by franchise holders that claimed the services were not subject to the franchise system. This meant that the City was losing revenue and was not able to keep track of how its right-of-way was being used. A second important factor was the telecommunication providers appearing and competing with traditional franchised telecommunications providers but who were not subject to the franchise regulations. Since 1997 Eugene's system has been challenged in court on numerous grounds, and has survived the challenges. Also since that time, telecommunications providers have waged a systematic attack on franchises and franchise fees. Thus far the attacks have not been successful, but the attacks continue.

Eugene system. Eugene adopted a two tiered system of registration and taxation of telephone, cable TV, and wireless phone and radio service providers..

Two Percent Business Tax. All entities carrying out telecommunications activities in the city are required to register with the City and pay a tax equal to two percent of the gross revenues of activities within the city. The first registration is also subject to a registration charge designed to recover the cost of developing the City ordinance.

Seven Percent Right of Way Use Charge. Telecommunications providers using the City right of way are also required to register their use of the right of way, and if that involves the installation of wires, cables or other infrastructure other than antennas, the users are subject to a seven percent fee, based on gross revenues. There is an exception which lowers the seven percent fee to the maximum allowed by state or federal law. There is an exception which continues the charges under any existing franchises until the end of the franchise. Telecommunications providers that buy and resell services are allowed to deduct the cost of the resale before calculating revenues.

Because cable systems and telecommunications carriers (telephone dial tone providers) are covered by federal and state laws limiting right of way charges, these companies will not be subject to the full seven percent fee. For the telephone company this means that they will not pay any fee for revenue from the local directory, or for revenue from data services such as DSL. The phone company is subject to the full seven percent fee on dial-tone revenue. For the cable company there are federal laws that limit franchise fees for the use of the right-of-way to five percent. Whether the cable company must pay a right of way fee on services such as cable modems is the subject of litigation at the federal level. At present the cable companies are not paying fees or taxes on this revenue.

Springfield option. The city of Springfield is currently considering an alternative system that would remove the connection between right of way use and non-permit fees. Instead, the proposed Springfield utility tax would impose a five percent business license tax on any utility doing business in Springfield. This would include electric utilities (except municipal utilities), natural gas companies, and telecommunications providers. All utilities would be required to pay an application fee and an annual five percent tax on gross revenues. There is a minimum tax amount and exemptions for businesses protected by state or federal laws setting limits.

Adopting and Administering a Telecommunications Tax

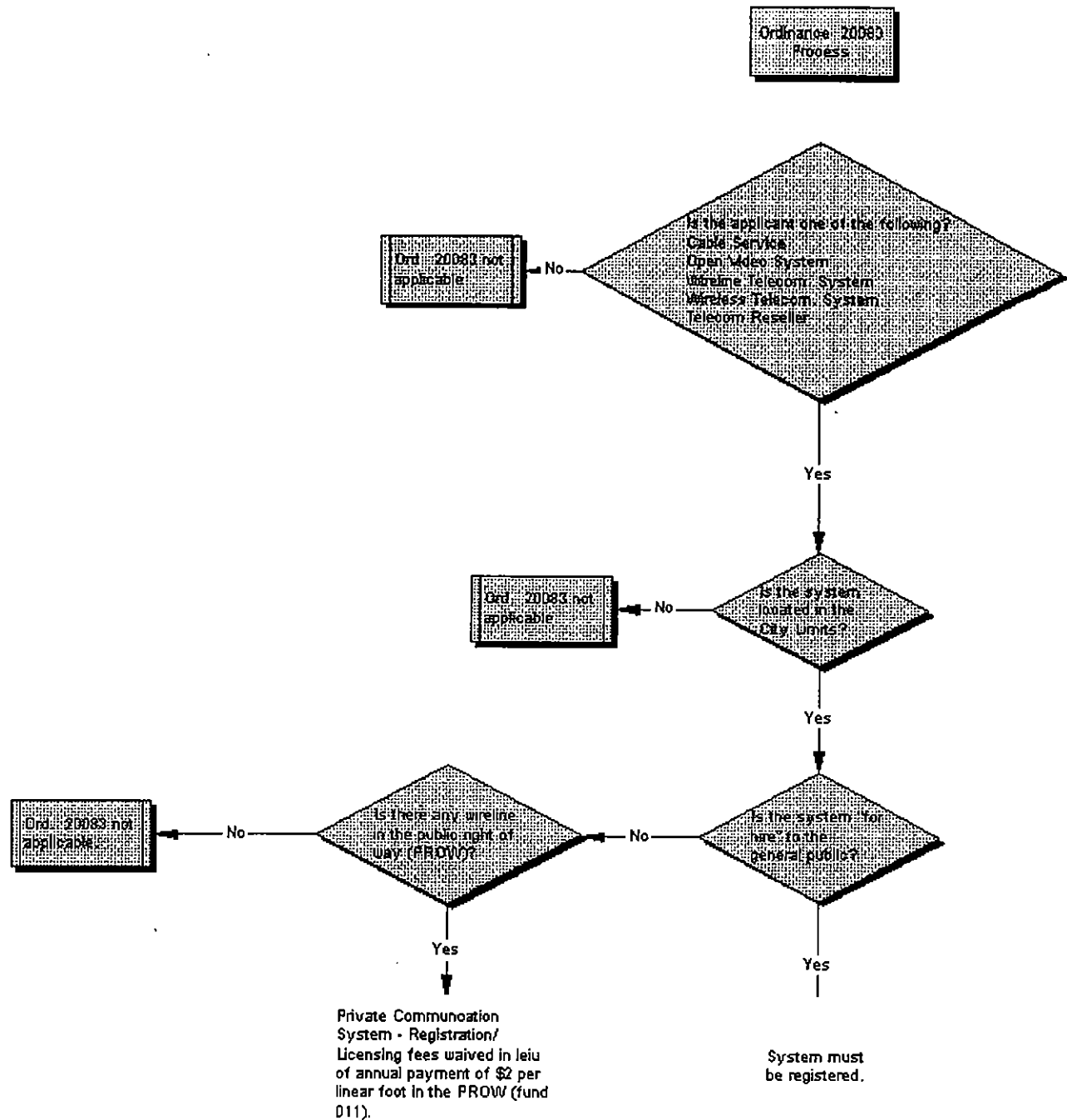
Eugene's Telecommunications Ordinance can be accessed from <http://www.ci.eugene.or.us/telecom>
Springfield's proposed Utility Tax Ordinance can be accessed from <http://www.ci.springfield.or.us/Pubworks/TechSvcs/utility%20tax.htm> . A flow chart of Eugene's administrative process is attached.

Eugene established administrative rules governing the registration and license fees. The administration of the Eugene system involves the efforts of the Eugene Franchise Administrator. When the system was originally established, all telecommunications providers operating in the city were sent notice of the existence of the ordinance and the need to register. Information on who was doing business in the city was obtained from the Eugene Public Works Department, from advertisements and from numerous personal and telephone inquiries. When the Eugene law was challenged by several large providers, many providers delayed registration pending the outcome of the challenge. When the litigation was completed, Eugene sent out reminders and contacted the providers again, informing them of the Ordinance requirements.

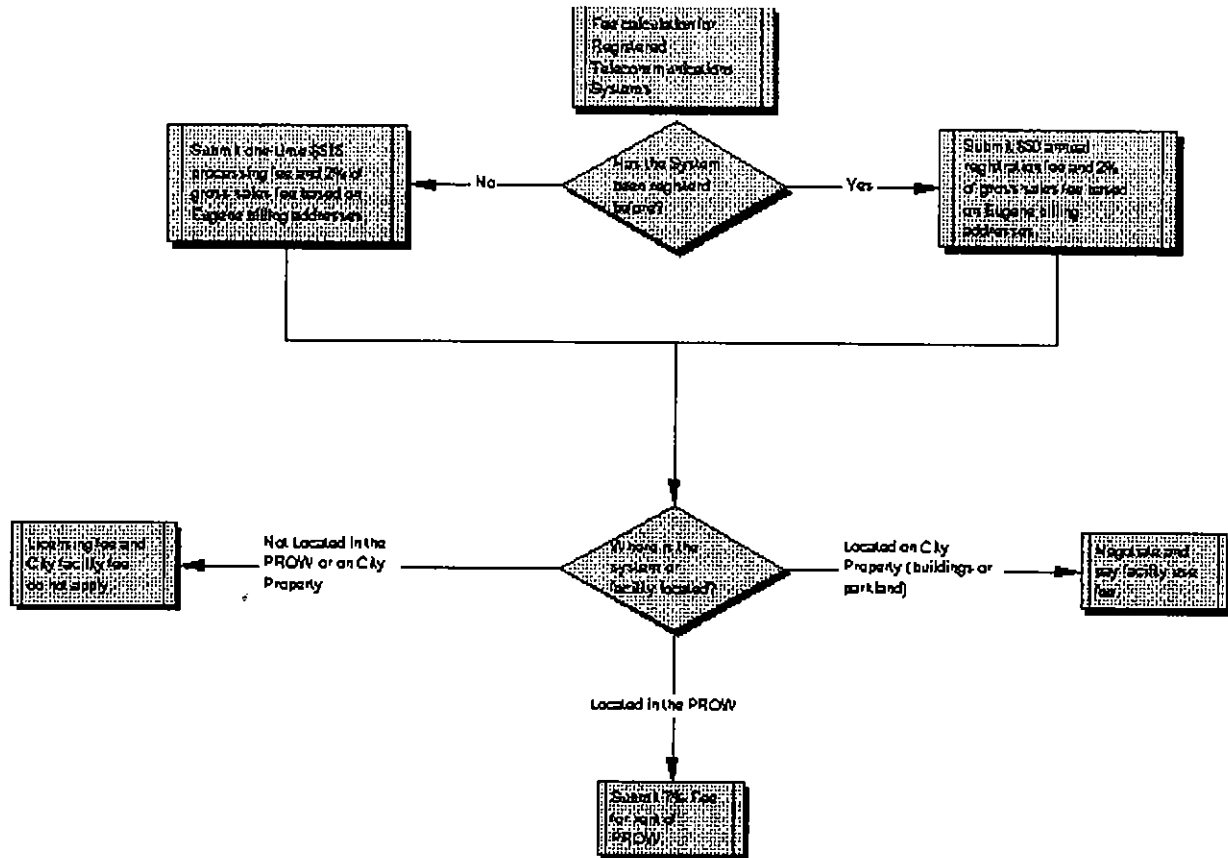
Eugene's Franchise Administrator has since then spent a great deal of time implementing the Ordinance and regulations. Different providers responded differently, but nearly all the discussions involved individual, multiple contacts with each telecom provider. Once the system was in place, the need for monitoring was reduced, but Eugene's Franchise Administrator still spends time each quarter dealing with new providers and some existing providers with questions or issues.

The taxes are collected on a quarterly basis. Eugene's Ordinance specified that the revenues from the two percent tax were to be kept separate from the general fund, for development of special telecommunications related projects.

Telecommunications Registration Process



Fee Calculation



Special Note 1: Pass through, long haul telecommunications carriers with no Eugene customers remain under the franchise authority of the City Charter, not Ordinance 20083. Please call Pam Berrian (541) 682-5590 about franchise procedures and rights of way use fees.

Special Note 2: Fees and taxes are standardized by type of carrier operating with owned or leased wireline or wireless facilities in the Eugene city limits and explained in an introductory orientation upon registration. For example: ILECs are influenced by ORS 220.515; Wireless carrier tax methodology is governed by the MTSA (federal Mobile Telecom Sourcing Act, adopted for use by the City council); the 7% PROW fee is waived for wireless providers using the public rights of way via co-location on existing poles; Wireline Long Distance fee and tax methodology is influenced by the defining decision of *Goldberg v. Sweet* (Eugene originating and terminating calls billed to a Eugene customer); Resellers are eligible for deductions and exemptions from their Eugene earned revenue before fees and taxes are applied, and so on.

Special Note #3: A one-time Cost of Plan fee is due and payable one year after a carrier receives Eugene earned revenue, usually one year after registration. There are four payment tiers depending upon revenue earned. This fee is allocated to the General Fund as are PROW use fees. The 2% tax is allocated to a dedicated fund to support "new City telecommunications projects of community benefit".

Source: <http://www.ci.eugene.or.us/telecom/Ordinances/TeleFlowchart.htm>

MEETING: Regional City/County Managers' Group

DATE: Tuesday, July 20, 2004

TIME: 12:00 noon

LOCATION: Eugene Airport
Upper Deck—see signage
Wings Restaurant
Eugene, Oregon

HOST: Ric Ingham, City of Veneta—935-2191

CONTACT: George Kloeppel, LCOG—682-4395

MEETING AGENDA

1. **Introductions, Issues of Common Concern, General Information**
2. **A Regional Airport**

Ric Ingham, our host for this meeting, identified the Eugene Airport as the venue. (Perhaps Dennis and Ric can debate as to whether Veneta's City Hall is closer to the Airport than that of Eugene) As one of the many things that tie our jurisdictions together, the Airport seems a suitable topic for some exploration by the Regional Managers Group. Airport Manager, Robert Noble, will provide some background and his vision for the future of this regional facility.

3. Walkable Communities

With the support of a foundation grant, LCOG facilitated four interactive Walkable Community Workshops in mid-May. These were presented by the National Center for Bicycling and Walking. Under this item, a brief report will be made regarding the workshops.

4 LCOG Board's Planning Session

On July 22, the LCOG Board of Directors will conduct a "planning session," intended to identify the policy-level topics that should receive special attention (at least at the discussion- if not the research-level) during the current fiscal year. It is important to note that the agency's work program of projects and services was adopted by the Board last month. The planning session will allow the Board members to focus on what *they* want to explore in the public policy arena. In general terms, the Board wants to delve into topics that are regional in character—involving more than one jurisdiction and more than one type of public agency. COG management staff will facilitate the discussion on the 22nd, but "priming the pump" will be an important ingredient. All members of the Board have been encouraged to consider the three topics or tasks that are the highest priority within their own jurisdictions and to bring those topics to the table at the planning session. The chief administrators can be a great help in that regard. The relationships between the elected official (COG Board member) and their managers differ from one jurisdiction to another. But, if asked, the managers could provide invaluable suggestions to their COG representatives. This is more of a "heads-up" than a topic for discussion by the Regional Managers Group. But it seemed appropriate for inclusion on this agenda, nevertheless. It might well be that the outcomes of the Board's planning session will be informative and useful for the managers, and LCOG will provide a follow-up report to this group.

5 Engineering Services RFQ

A proposal has been made that LCOG facilitate a "request for qualifications" (RFQ) and, perhaps, a formal solicitation (RFP) for professional engineering services. The intent would be for member jurisdictions to have access to civil engineering services for transportation or utility work without having to "start at square one" with the procurement process. Such a program would **not** circumvent the principles of fair, open and competitive contracting; all

applicable requirements would be fully met. However, a city, for example, might be able to access needed services by purchase order. More detail on this concept will be available at the meeting.

6. **Telecommunications Utility Tax**

Discussed briefly at the last meeting, the telecommunication utility tax (*a la* the City of Eugene) is the subject of the attached background paper. This item is for discussion.

7. **Other Issues**

ORDINANCE NO. 20083

AN ORDINANCE CONCERNING TELECOMMUNICATIONS; ADDING SECTIONS 3.400, 3.405, 3.410, 3.415, 3.420, 3.425, AND 3.430 TO THE EUGENE CODE, 1971; AMENDING SECTIONS 3.005, 7.290, 7.295, 7.297, 7.299, 7.300, AND 7.302 OF THAT CODE; AND DECLARING AN EMERGENCY.

THE CITY OF EUGENE DOES ORDAIN AS FOLLOWS:

Section 1. Section 3.005 of the Eugene Code, 1971 is amended by adding the following caption and definitions in alphabetical order in the Licensed Businesses section therein:

Telecommunications:

Cable service:

- (a) The one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and
- (b) Subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

Cable System. 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 which includes video programming and which is provided to multiple subscribers within a community. A reference to a cable system includes pedestals, equipment enclosures (such as equipment cabinets), amplifiers, power guards, nodes, cables, fiber optics and other equipment necessary to operate the cable system. As used herein, cable system does not include:

- (a) A facility that serves only to retransmit the television signals of one or more television broadcast stations;
- (b) A facility that serves subscribers without using any public right-of-way or public utility easements;
- (c) A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II (Common Carriers) of the Communications Act of 1934, as amended, except that such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers;
- (d) Any facilities of any electric utility used solely for operating its electric utility systems; or
- (e) An open video system that is certified by the FCC.

Communications facility. Refers to a telecommunications facility, cable system, or open video system.

License. Refers to the authorization granted by the city to an operator of a communications facility, giving the operator the non-exclusive right to provide, through facilities maintained or operated upon, across, beneath, or over any public right-of-way in the city, a specified service within a license area. Any such authorization, in whatever form granted, shall not exempt the licensee from the need to obtain any other permit, registration or authorization required by this code, including but not limited to:

- (a) The registration required by section 3.405 of this code;
- (b) Any permit, agreement or authorization required in connection with operations in the public right-of-way or on other public property including, without limitation, permits and agreements for placing devices on or in poles, conduits or other structures, whether owned by the city or a private entity, or for excavating or performing other work in or along public rights-of-way.

FCC. The Federal Communications Commission or its designee.

Gross Revenues. Any and all revenue, of any kind, nature or form, without deduction for expense.

Open Video System, or "OVS". A facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service, which includes video programming, which is provided to multiple subscribers within a community, and which the Federal Communications Commission or its successor has certified as compliant with Part 76 of the Rules of the Federal Communications Commission, 47 C.F.R., Part 76, as amended from time-to-time.

Operator. A person who provides telecommunications services. When used with reference to a system, refers to a person:

- (a) Who provides, or intends to provide, service over a communications facility and directly or through one or more affiliates owns a significant interest in such facility; or
- (b) Who otherwise controls or is responsible for, through any arrangement, the management and operation of such a facility.

A person that leases a telecommunications facility or a specific portion of a telecommunications facility to provide telecommunications services shall be treated as an operator for purposes of this code.

Person. Includes any individual, corporation, partnership, association, joint stock company, trust, limited liability company, or any other legal entity.

Private communications system. A facility placed in whole or in part in the public right of way for the provision of communications solely in connection with a private communications system owner's business, but not encompassing the provision of telecommunications services for hire to others or in any respect the provision of telecommunications services.

Registration. The provision of information to the city by an operator or other person engaged in telecommunications activities, pertaining to telecommunications activity within the city. The information shall be submitted on a form provided by the city and in such additional documents as the city may require, and shall be accompanied by an application fee in an amount set by the city manager pursuant to section 2.020 of this code.

Reseller. Any person that provides telecommunications service using a telecommunications facility for which service a separate charge is made, where that person does not own, lease, control or manage the telecommunications facility used to provide the service.

Telecommunication activities. Telecommunication activities include telecommunication services, cable service, OVS services, and private communication system services.

Telecommunications facility. A facility that is used to provide one or more telecommunications services. The term telecommunications facility includes radio transmitting towers, other supporting structures, and associated facilities, including fiber, used to transmit telecommunications signals. An open video system is not a telecommunications facility to the extent that it provides only video services; a cable system is not a telecommunications facility to the extent that it provides only cable service.

Telecommunications services. The transmission for hire, of information in electromagnetic frequency, electronic or optical form, including, but not limited to, voice, video, or data, whether or not the transmission medium is owned by the provider itself, and whether or not the transmission medium is wireline or wireless.

Telecommunications service includes all forms of telephone services and voice, data and video transport, but does not include: (1) cable service; (2) OVS service; (3) private communications system services; (4) over-the-air radio or television broadcasting to the public-at-large from facilities licensed by the Federal Communications Commission or any successor thereto; and (5) direct-to-home satellite service within the meaning of Section 602 of the Telecommunications Act of 1996.

Section 2. The following caption, and Sections 3.400, 3.405, 3.410, 3.415, 3.420, 3.425, and 3.430 are added to the Eugene Code, 1971, to provide:

Telecommunications

3.400 Telecommunications - General. The provisions of sections 3.400 to 3.430 of this code and the rules adopted by the city manager pursuant to section 2.019 of this code are intended to authorize and regulate telecommunication activities in the city to the extent permitted under laws of the United States and the State of Oregon. Except as these sections specifically provide to the contrary, the procedures and requirements of sections 3.015 to 3.075 of this code apply to the activities authorized by sections 3.400 to 3.430.

3.405 Telecommunications Activities - Registration Required.

(1) No person may, without first registering with the city and then paying the fee required by section 3.415(1), engage in any telecommunications activity through a communications facility located in the city.

(2) Registration under this section shall be submitted pursuant to section 3.020, on a form provided by the city. The registration shall be accompanied by any additional documents required therein or in rules issued by the city manager pursuant to section 2.019 of this code.

3.410 Telecommunications - License Required.

(1) No operator may, without first applying for and receiving a license from the city, construct, place or locate any facility in, upon, beneath, over or across any public right-of-way or on other public property to:

- (a) Construct a cable system or provide cable service;
- (b) Construct a telecommunications facility or provide telecommunications service;
- (c) Construct an open video system or provide services via an open video system; or
- (d) Construct or operate a private communications system.

(2) An application for a license under this section shall be submitted pursuant to section 3.020, on a form provided by the city. The application shall be accompanied by any additional documents required by the application or in rules issued by the city manager pursuant to section 2.019 of this code.

(3) The fact that a particular communications facility may be used for multiple purposes does not obviate the need to obtain a license for other purposes. By way of illustration and not limitation, a cable operator of a cable system must obtain a license to construct, install or locate a cable system to provide cable services, and, should it intend to provide telecommunications services over the same facilities, must also obtain a separate license.

(4) So long as it registers with the city as required by section 3.405 and pays the registration and license fees required by section 3.415, a reseller may use another person's facilities to engage in telecommunications activities in the right-of-way without obtaining a license, providing the reseller does not, either itself or through an affiliate, own or lease, control or manage any facilities in the right-of-way and is not involved in construction or repair of facilities in the right-of-way. For purposes of calculating the registration and license fees to be paid by a reseller, the amount of compensation paid by the reseller to the owner or manager of facilities in the right-of-way for the services it resells shall be deducted from the reseller's gross revenues before applying the percentage rates described in section 3.415(1) and (2).

(5) So long as it registers with the city as required by section 3.405 and pays the annual registration fee required by section 3.415(1) as well as other applicable fees, an operator is not required to obtain a license under this section or pay an annual license fee under section 3.415(2) if the operator's only use of the public right-of-way is to place wireless transmitting or receiving facilities above the ground on existing poles or similar structures in the right-of-way and the operator does not install or use lines, wires or cables.

(6) An operator holding an outstanding permit or franchise from the city for a communications facility to provide specified services, or for a private communications system, may continue to operate under its existing permit or franchise to the conclusion of its present term (but not for any renewal or extension thereof) with respect to those activities expressly authorized by the permit or franchise. Any such permittee or franchisee may elect to apply for a superseding license under sections 3.400 to 3.430 of this code, and must apply for a license under those sections if intending to provide services other than, or in addition to, the services authorized under its existing permit or franchise. All such permittees and franchisees shall register and pay registration fees as required by sections 3.405 and 3.415(1) and be subject to the provisions of sections 3.400 to 3.430 and 7.290 to 7.309 to the full extent permitted by law. Any permits or licenses that are revocable shall be automatically revoked as of July 1, 1997, and the permittee or licensee required to obtain a new license pursuant to the provisions of sections 3.400 to 3.430.

(7) A license granted pursuant to this section shall not convey equitable or legal title in the rights-of-way.

(8) The license may not be assigned or transferred without the prior written consent of the city.

(9) Neither the issuance of a license hereunder nor any provisions contained therein shall constitute a waiver or bar to the exercise of any governmental right or power, police power, or regulatory power of the city as may exist at the time the license is issued or thereafter obtained.

3.415 Telecommunications - Annual Registration and License Fees.

(1) Annual Registration Fee. Each person required to register under section 3.405 of this code, except an operator of a private communications system, shall pay to the city an annual registration fee in the amount of 2% of the licensee's gross revenues derived from its telecommunication activities within the city. In addition, the first annual registration fee paid by a registrant shall include an additional charge, in an amount set by the city manager pursuant to section 2.020 of this code, that is calculated to recover all of the city's costs incurred in processing the registration, as well as a share of the city's costs in preparation of the city's telecommunications plan, this ordinance, and the implementing rules.

(2) Annual License Fee. As compensation for use of right-of-way, each operator required to obtain a license pursuant to section 3.410 of this code shall pay, in addition to the registration fee described in subsection (1) of this section, a fee in the amount of 7% of the licensee's gross revenues derived from telecommunications activities within the city, to compensate the City for the use of the rights-of-way.

(3) Private Communications System. In lieu of the fees required by subsections (1) and (2), a private communications system licensee shall pay to the city a fee based on a per foot rate to be established pursuant to section 2.020 of this code in an amount not less than the amount needed to ensure no degradation of the right-of-way.

(4) Effect of Federal and State Law. To the extent that federal or state law, or an existing franchise agreement, limits the amount of fees which the City may impose on, or the compensation it may require from, an operator, nothing in this section shall require the payment of any greater amount, unless and until the federal or state limits are raised, or the franchise agreement expires or is otherwise terminated.

(5) Other Fees. Payment of fees required by this section shall be in addition to both application fees required by this chapter, and any other fees required pursuant to chapters 7, 8 or 9 of this code.

(6) In Lieu of Fee Payment.

(a) In lieu of part or all of the annual registration and license fees, the city may accept in-kind services which the city manager determines have a value to the city equal to or greater than the registration and license fees, or the portion of those fees in lieu of which the city will accept services. If the city manager agrees to the in-kind payment, the registration or license shall reflect this agreement.

(b) Prior to the city manager agreeing to such an arrangement, the operator shall provide to city, at the operator's expense, an analysis prepared by an independent entity, which demonstrates that the value of the in-kind service is equal to or greater than the license fee (or portion of fee) to be waived. In addition, the city manager shall give at least 20 days notice to the city council of the proposed arrangement. If any two city councilors give the manager written objections to the proposed arrangement within the 20 day period, the manager shall not agree to the proposal unless the council votes to approve the proposal.

(c) If an operator fails to provide all or a portion of the in-kind service reflected in the registration or license, the operator shall be liable to the city for the full amount of the annual registration and license fees pursuant to subsections (1) and (2) of this section for the year or years in which the in-kind service or a portion thereof is not provided. In addition, the city manager may terminate the arrangement for in-kind services and amend the registration or license accordingly.

(7) Payment of Annual Registration and License Fees.

(a) Unless otherwise specified, the annual registration and license fees shall be paid to the City quarterly, and not later than forty-five (45) days after the end of each calendar quarter.

(b) Each payment shall be accompanied by a statement showing the manner in which the fee was calculated, and shall be personally delivered or mailed to the city on or before the due date. If mailed, the postmark shall be considered the date of delivery.

(c) For good cause, the city may extend for not to exceed one month, the time for making payment and filing the statement. Any person or operator to whom an extension is granted shall pay interest at the rate of 1.5% per month on the amount of fee due, without proration for a fraction of a month. If the statement is not filed and the fee and interest due is not paid by the end of the extension period, then the interest shall become part of the fee for computation of penalties prescribed in subsection (4) of this section.

(d) No acceptance by the city of any payment hereunder shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such payment be construed as a release of any claim the city may have for additional sums payable.

(e) The payments hereunder are not a payment in lieu of any tax, fee or other assessment except as specifically provided in this section, or as required by applicable law.

(f) Within ninety (90) days following the end of the calendar year, each person or operator which paid a fee hereunder shall submit a statement, certified as true by an independent auditor or the chief financial officer of such person or operator, setting forth its gross revenues, by category, and describing what revenues were included and excluded in calculating the fee or fees, and any adjustments made to gross revenues.

(g) The city may, from time to time, and upon reasonable advance written notice, inspect, copy and audit any and all books and records of a registrant or licensee reasonably necessary to the determination of whether fees have been accurately computed and paid.

(h) Notwithstanding the foregoing, in the event a registrant or licensee that is obligated to pay a fee ceases to provide service for any reason (including as a result of a transfer), such registrant or licensee shall make a final payment of any amounts owed to the city within ninety (90) calendar days of the date its operations in the city cease, and shall provide a statement of gross revenues for the calendar year through the date operations ceased which statement shall contain the information and certification required by this section.

(8) Penalties and Interest.

(a) Any registrant or licensee who has not been granted an extension of time for remittance of a fee due and who fails to remit any fee imposed under subsection (2) of

this section prior to delinquency shall pay a penalty of ten percent (10%) of the amount of the fee due in addition to the amount of the fee.

(b) Any registrant or licensee who has not been granted an extension of time for remittance of a fee due, and who fails to pay any delinquent remittance on or before a period of 30 days following the date on which the remittance first becomes delinquent shall pay a second delinquency penalty of fifteen percent (15%) of the amount of the fee due plus the amount of the fee and the ten percent (10%) penalty first imposed.

(c) If the city determines that the nonpayment of any remittance due under this section is due to fraud or intent to evade the provisions hereof, a penalty of twenty-five percent (25%) of the amount of the fee shall be added thereto in addition to the penalties stated in subparagraphs (b) and (c) of this subsection.

(d) In addition to the penalties imposed, any registrant or licensee who fails to remit any fee imposed by this section shall pay interest at the rate of 1.5% per month or fractions thereof, without proration for portions of a month, on the amount of the fee due, exclusive of penalties, from the date on which the remittance first becomes delinquent, until paid.

(e) Every penalty imposed, and such interest as accrues under the provisions of this section, shall be merged with, and become a part of, the fee required to be paid.

(f) Any person required to pay a penalty under this section may appeal to the city manager as provided in section 2.021 of this code.

3.420 Telecommunications - Inspection and Conditions Relating to Licensee's Facilities.

(1) Every licensee's communications facility shall be subject to the right of periodic inspection and testing by the city to determine compliance with the provisions of this code, a franchise or license agreement, or other applicable laws that the city has some responsibility to enforce. The city shall have the right, upon request, to be notified and be present when the licensee's communications facility is tested by the operator. Each operator must respond to requests for information regarding its existing system and plans for the system as the city may from time to time issue, including requests for information regarding its plans for construction, operation and repair and the purposes for which the facility is being constructed, operated or repaired. The city engineer may require such information including GIS format or other drawings, surveys and plans as deemed necessary to determine whether the proposed work conforms to the requirements of this code.

(2) Each operator of a communications facility that places facilities underground shall be a member of the regional notification center for subsurface installations (Underground Services Alert) and shall field mark the locations of its underground communications facilities upon request. The operator shall locate its facilities for the city at no charge.

(3) The work to be performed by an operator shall be publicized as the city may from time to time direct.

(4) Each licensee shall provide the city a plan for any initial system construction, or for any substantial rebuild, upgrade or extension of its facility, which shall show its timetable for construction of each phase of the project, and the areas of the city that will be affected.

(5) A communications facility operator shall not deny service, deny access, or otherwise discriminate against subscribers, programmers, suppliers, vendors, or residents of the city on the basis of race, color, creed, national origin, sex, age, conditions of physical handicap, religion, ethnic background, marital status, or sexual orientation.

(6) A communications facility operator shall not discriminate among persons or the city or take any retaliatory action against a person or the city because of that entity's exercise of any right it may have under federal, state, or local law, nor may the operator require a person or the city to waive such rights as a condition of taking service.

3.425 Telecommunications - Removal of Facilities; Termination of Use of Right-of- Way.

(1) Every licensee that ceases to operate a communications facility located within the city shall, upon written request of the city made within two years of the cessation of operation of such facility, promptly remove the facility, or any part thereof, and restore the property and right-of-way to the condition prior to installation. If the licensee neglects, refuses, or fails to remove the facility or part thereof, or to restore the property, the city may remove or restore it at the expense of the licensee. The obligation to remove shall survive the termination of the license. The city may require a licensee, prior to installation of a facility, to post a bond in an amount sufficient to cover the cost of removal of the facility and restoration of the property and right-of-way.

(2) If a licensee violates any provision of sections 3.400, 3.405, 3.410, 3.415, 3.420 or administrative rules adopted pursuant to section 3.430 and fails to remedy the violation within ten days of receiving notice of the violation, the city manager may terminate the licensee's use of the right-of-way.

3.430 Telecommunications - Administrative Rules. The city manager shall adopt administrative rules pursuant to section 2.019 of this code, in order to implement the provisions of sections 3.400 - 3.430. Such rules may include, but are not limited to:

(a) The information required to be provided in an application for registration and for a license, including a description of the services to be provided and the location and design of the proposed facility;

- (b) Criteria for determining whether the applicant for a license is financially, technically, and legally qualified to successfully complete any proposed facility to be installed in, on, under or over the public right-of-way;
- (c) Contents of a licensee's plans for construction, rebuilding, upgrade or extension of facilities, including the period of time such plans must cover;
- (d) Licensee and registrant reporting requirements;
- (e) Terms and renewals of registrations and licenses.
- (f) Transfer of licenses.

The rules may differentiate between telecommunications facilities and telecommunications service providers, open video systems, cable television systems, and private communications facilities.

Section 3. Sections 7.290, 7.295, 7.297, 7.299, 7.300, and 7.302 of the Eugene Code, 1971, are amended to provide:

7.290 Construction and Use of Public Way - Permit Required; Standard Specifications.

(1) As used in this section, "work affecting the public way" includes, but is not limited to: installation or construction of any structure, pipe, pole, conduit, culvert, facility, including a communications facility, as defined by section 3.005 of this code, or other wire line utilities in or on a public way; construction, reconstruction, grading, oiling, repair, opening or excavation of a public way for any purpose; but does not include the construction of public improvements performed under a contract executed by the city manager or work performed by city employees under the city manager's direction.

(2) No person, municipal utility, or operator of a communications system shall do work affecting a public way without first obtaining a permit from the city engineer. A license issued pursuant to section 3.410 of this code shall not constitute authorization to perform work affecting a public way; all such work shall require a permit pursuant to this section.

(3) Work affecting a public way shall be performed in accordance with this code, the standard specifications and design standards adopted pursuant to section 7.085, administrative rules issued by the city manager pursuant to section 2.019 of this code, sound engineering and design practices and such other reasonable conditions required by the city engineer to protect the public health, safety and welfare, including proof that the contractor performing the work is licensed and bonded.

(4) If an applicant for a permit or the contractor performing the work for the applicant:

(a) Is delinquent in performing the obligations required by sections 7.290 to 7.308 on permits previously issued, the city engineer may refuse to issue a new permit for other work affecting a public way until the delinquency is corrected; and

(b) Has been delinquent in performing the obligations required by sections 7.290 to 7.308 more than two times in the previous 24 months, the city engineer may require a bond or other reasonable security, which may be a cash deposit, be posted with the city against which the city may collect its cost of enforcing this code and the conditions of any permit issued thereunder against the permittee.

7.295 Public Way Construction and Use - Permit Application.

(1) Unless otherwise permitted in section 7.305, application for a permit to perform work affecting a public way shall be made to the city engineer on forms provided by him/her. The city engineer may waive the requirement to complete the application form and pay the permit fees and restoration deposit when the amount of work to be done in the public way does not warrant the cost of processing the application.

(2) No permit which authorizes the cutting of street surfaces shall be issued for installation of any utility or facility for a period of five years from the time the street is constructed or resurfaced, unless otherwise approved by the city engineer pursuant to rules adopted and section 7.302(5) of this code.

(3) If the city engineer determines that it is proper that the proposed work be done, the application shall be approved. After approval, and upon receipt of the required fee, deposit, and proof of license and bond required by section 7.290(3), the city engineer shall issue a revocable permit.

(4) If the city engineer denies a permit, or revokes a permit because of a failure to comply with the provisions of this chapter or because another public purpose is to be accomplished which is inconsistent with the permittee's use of the public way, the applicant or permittee shall have the right of appeal to the city manager as provided in section 2.021 of this code.

(5) Permits issued pursuant to this section do not authorize vehicle parking in the public way. If the proposed construction necessitates parking vehicles in the public way, the applicant must make an application for a parking space rental permit in accordance with and subject to section 5.350.

7.297 Permit - Insurance Requirement; Safety.

(1) No permit shall be issued under section 7.295 unless an applicant agrees to save the city, its officers, employees and agents harmless from any and all costs, damages and liabilities which may accrue or be claimed to accrue by reason of any work performed under said permit and provides proof of the license and bond required under section 7.290. The acceptance of a permit under 7.290 shall constitute such an agreement by the applicant whether the same is expressed or not.

(2) A permittee shall preserve and protect from injury other permittees' facilities in the public way, the public using the public way and any adjoining property, and take other necessary measures to protect life and property including but not limited to buildings, walls, fences, trees or utilities that may be subject to damage from the permitted excavation. A permittee shall be responsible for all damage to public or private property resulting from its failure to properly protect people and property and to carry out the work.

7.299 Public Way Construction and Use - Permit Revocation. Failure to comply with any condition of the permit issued under section 7.295 and related code or administrative rule requirements, or failure to make a safe and timely restoration of the public way shall be cause for revocation of the permit.

7.300 Public Way Construction and Use - Permit Fees.

(1) The fee for a permit required by section 7.290 shall be set by the city manager pursuant to section 2.020 of this code in an amount sufficient to fully recover all of the City's costs related to processing the application for the permit and inspecting the work during and after completion of the work.

(2) Except when the permittee is a municipal utility, a franchisee, or a licensee otherwise obligated to compensate the city for on-going use of the public way, in addition to the fee required in subsection 7.300(1), a fee for leaving any structure, pipe, conduit, culvert or facility in the public way may be set by the city manager pursuant to section 2.020 of this code to provide a reasonable return to the public for the permitted on-going use of the public way.

7.302 Public Way Construction and Use - Location of Facilities.

(1) All underground pipes and conduits in the public way shall be laid a minimum depth of 30 inches below the city-established street grade or alley grade and 30 inches below ground level in utility easements, unless otherwise approved by the city manager or designee. If it becomes necessary for the proper or necessary public use of any public way that any structure, pipe, conduit, culvert or facility heretofore installed or constructed be removed or relocated or that any use made thereof by a municipal utility, franchisee, licensee, or permittee be discontinued, the city engineer shall give written notice to the owner of the street tree, pipe, conduit, culvert or other facility to remove the same within a reasonable time. If the owner fails to comply with such notice, the city may remove or relocate the same and charge the costs of removal or relocation to the owner.

(2) A permit issued under sections 7.290 and 7.295 shall require that all utilities and communications facilities be located underground in the manner provided in subsection (1) of this section if the permit is associated with new residential or new commercial development.

(3) A permit issued under section 7.295 may require the permittee to locate the facility or utility jointly with other providers and to reserve public space in privately opened trenches to ensure adequate conduit capacity for city operational and infrastructure needs.

(4) A permit issued under section 7.295 may require the permittee to install capacity in excess of the permittee's or other providers' needs, as determined by the city. The permittee may negotiate with other licensed providers, which are co-locating with the permittee, for sharing the use and costs associated with the joint use in open trenches.

(5) A licensee or owner of above-ground wires, cables or lines located in a right-of-way that is subject to a capacity-enhancing improvement project shall install conduit crossings at the time of the improvement project.

(6) The administrative rules issued by the city manager hereunder shall include, but not be limited to:

(a) Requirements for prior notice to other licensed providers before performing work, and establishment of criteria to address the frequency that street openings will be permitted;

(b) Location criteria and regulations for installation of above-ground facilities, such as junction boxes, controllers, distribution centers, etc. within the general right of way, including the ability to require under-grounding.

(c) Standards for when and under what conditions existing above-ground utilities and telecommunications facilities shall be placed underground;

(d) Standards for conduit size, location and capacity to be installed by providers, which may be different for different areas of the city, class of street, location, and other factors;

(e) Standards that ensure initial providers in an area provide extra capacity for later providers and a procedure that enables the initial provider to recover a portion of its costs incurred, is not discriminatory, does not prevent competition in service delivery, or become a barrier to other providers;

(f) Criteria for providing exceptions to the requirement that later providers utilize the extra capacity of initial providers;

(g) The format for the manner in which data on the construction and location of services is provided to the city;

(h) Procedures that ensure providers belong to the local utility notification service and can document their ability to provide locating service for their facilities;

(i) Requirements for public notice;

(j) Traffic control plans; and

(k) Requirements for indemnity, performance bonds and project completion bonds.

Section 4. Notwithstanding the effective date of this Ordinance, or any provisions adopted herein requiring the imposition of annual license and/or registration fees, the City Manager may provide in the administrative order establishing the fees an effective date of July 1, 1997 for imposition of the fees.

Section 5. The City Recorder, at the request of, or with the concurrence of the City Attorney, is authorized to administratively correct any reference errors contained herein or in other provisions of the Eugene Code, 1971, to the provisions added, amended or repealed herein.

Section 6. The findings attached as Exhibit 1 hereto are hereby adopted in support of this Ordinance.

Section 7. That the matters contained herein concern the public health, welfare and safety and therefore, an emergency is hereby declared to exist, and this Ordinance shall become effective immediately upon its passage by the City Council and approval by the Mayor, retention by the Mayor for more than ten days, or readoption over a mayoral veto by two-thirds of all members of the City Council.

Passed by the City Council this Approved by the Mayor this

DRAFT

ORDINANCE NO. _____

AN ORDINANCE AMENDING THE SPRINGFIELD MUNICIPAL CODE TO PROVIDE FOR LICENSING OF UTILITIES, IMPOSING A PRIVILEGE TAX UPON UTILITIES USING THE PUBLIC WAYS OR TAKING ADVANTAGE OF FACILITIES WHICH USE THE PUBLIC WAYS, AMENDING SECTIONS 4.600 THROUGH 4.716, ADDING SECTIONS 4.800 THROUGH 4.805, AND SETTING AN EFFECTIVE DATE

THE COMMON COUNCIL OF THE CITY OF SPRINGFIELD ORDAINS AS FOLLOWS:

Section 1. Findings.

- A. The Springfield City Charter grants to the City all powers that the constitutions, statutes and common law of the United States and of the State of Oregon now or hereafter expressly or impliedly grant or allow.
- B. Among the powers granted to the City is the power to impose privilege taxes.
- C. Numerous utilities make use, and desire to make use, of the public ways of the City for the purpose of providing to citizens of the City and others services, including, without limitation, electricity, heat, natural gas, water, conveyance of sewage and storm drainage, telephone, cable television, and other information and telecommunications services.
- D. Utilities also seek to provide services which require, for their effective delivery, connection to, interaction with, or other use of facilities placed in the public ways by others.
- E. The City desires to facilitate making available to citizens such services by permitting use of the public ways for such purposes, so long as such use does not unduly burden or interfere with the principal purpose of the public ways, that is to facilitate the free movement of persons and goods in commerce.
- F. The City holds these public ways in trust for all of its citizens, and has a fiduciary responsibility to assure that any use of such public ways, other than for the movement of persons and goods in commerce, is not permitted or authorized unless there is recovered fair and reasonable compensation for the use of such public ways.
- G. The State of Oregon has established limits on the amount of compensation that the City is authorize to receive for allowing certain uses of the public ways. In particular ORS 221.515 limits the amount of compensation the City may receive from certain defined telecommunications carriers, and Section 221.450 limits the amount of compensation the City may receive from certain other utilities if not franchised.
- H. The Council finds and determines that the amounts specified in these provisions of statute constitute fair and reasonable compensation for the use of the public ways in the City.

Section 2. Sections 4.600 through 4.716 of the Springfield Municipal Code, as amended, are further amended to read as follows:

UTILITY LICENSE

4.600 **Definitions.** Terms used in this Chapter shall have the following meanings:

(1) **Affiliate:** A person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another person.

(2) **Cable Acts:** The Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, as amended by The Telecommunications Act of 1996 and as hereafter amended.

(3) **Cable operator:** An entity providing or offering to provide "cable service" within the City as that term is defined in the Cable Acts.

(4) **Cable service:** Shall have the same meaning as defined in the Cable Acts.

(5) **Excess capacity:** The volume or capacity in any existing or future duct, conduit, maintenance hole, handhole or other utility facility within the public way that is or will be available for use for additional telecommunications facilities, including that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Public Utility Commission, to allow its use by a telecommunications carrier for a pole attachment.

(6) **FCC or Federal Communications Commission:** The Federal administrative agency, or lawful successor, authorized to regulate and oversee telecommunications carriers, services and providers on a national level.

(7) **Licensee:** Any entity granted a license hereunder.

(8) **Overhead facilities:** Utility poles, utility facilities and telecommunications facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

(9) **Person:** Any individual or entity engaging in activities regulated by this Chapter.

(10) **Public street:** Any highway, street, alley or other public right-of-way dedicated for motor vehicle travel under the jurisdiction and control of the City.

(11) **Public Utility easement:** Any easement granted to the City, acquired, established, dedicated or devoted for access for public utility facilities for construction, operations, and maintenance purposes.

(12) **Public way:** Includes all public streets owned by the City and public utility easements granted to the City, as those terms are defined herein, but only to the extent of the City's right, title, interest or authority to grant permission to occupy and use such streets and easements.

(13) **Telecommunications carrier:** Includes every person that directly or indirectly owns, controls, operates or manages plant, equipment or property within the City, used or to be used for the purpose of offering telecommunications service.

(14) **Telecommunications facilities or system:** The plant, equipment and property including, but not limited to, cables, wires, conduits, ducts, pedestals, antennae, electronics and

other appurtenances used or to be used to transmit, receive, distribute, provide or offer telecommunications service.

(15) Telecommunications provider: Includes every person who provides telecommunications service over telecommunications facilities.

(16) Telecommunications service: The providing or offering for rent, sale or lease, or in exchange for other value received, of the transmittal of voice, data, image, graphic and video programming or any other information between or among points by wire, cable, fiber optics, laser, microwave, radio, satellite or similar facilities, with or without benefit of any closed transmission medium.

(17) Underground facilities: Utility and telecommunications facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead facilities.

(18) Usable space: The total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the Public Utility Commission.

(19) Utility: any public utility as defined in ORS 757.005(1), any telecommunications utility as defined in ORS 759.005(1), and telecommunications carrier, telecommunications provider or other entity providing telecommunications services.

(20) Utility facilities: The plant, equipment and property including, but not limited to, the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within the public ways of the City and used or to be used for the purpose of providing utility services. The term shall include all such things owned by the utility and all such things as the utility shall have a property interest in, including things held by the utility or on its behalf under a lease, rental agreement or indefeasible right of use for a term of years.

(21) Utility services: All services provided by a utility to customers located within the city limits of the City of Springfield or provided to customers wherever located using facilities physically located within the city limits of the City of Springfield.

4.602 Utility License. A utility license shall be required of any utility who desires to provide service to persons in the City or to persons or areas outside the City using facilities located in the City. No utility shall provide services within the City nor shall such utility provide services outside the City using facilities located within the City unless licensed as provided herein. Any violation of the provisions of this article shall be a misdemeanor punishable in accordance with Chapter V of this Code. Carriers who utilize facilities of another licensed carrier for the distribution of their services shall be required to have a separate license. The purpose of licensing under this Article is to:

(1) provide the City with accurate and current information concerning the utilities who offer utility services within the City, or that own or operate utility facilities within the City;

(2) assist the City in enforcement of this Chapter;

(3) assist the City in the collection and enforcement of any municipal taxes, franchise fees, license, permit or other fees or charges that may be due the City;

(4) assist the City in monitoring compliance with local, and, to the extent authorized by law, with State and Federal laws.

4.604 License Application. Any utility that is required to have a utility license shall file an application, using the form provided for such purpose, with the Public Works Department which shall include the following information:

- (1) The identity of the license applicant, including all affiliates of the applicant.
- (2) A description of the utility services that are or will be offered or provided by licensee
- (3) Preliminary engineering plans, specifications and a map of the facilities located in or to be located within the public ways in the City, all in sufficient detail to identify:
 - (a) the location and route requested for applicant's proposed facilities.
 - (b) the location of all existing overhead and underground public utility, telecommunication, cable, water, sewer drainage and other facilities in the public way which may be affected along the proposed route.
 - (c) the location(s), if any, for interconnection with the facilities of other utilities.
- (4) If the applicant is proposing to install overhead facilities within the public ways, evidence that useable space is available for locating its facilities on existing utility poles along the proposed route, or a duly executed pole attachment agreement with an owner of existing poles.
- (5) A preliminary construction schedule and completion date.
- (6) Information to establish that the applicant has obtained or has applied for all other governmental approvals and permits to construct and operate the facilities and to offer or provide the services. Such approvals include, without limitation, any land use decisions. In the event any other required government approval is not obtained any license granted hereunder shall be subject to modification to reflect the absence of such approval.
- (7) Identification of any adverse circumstances affecting the use of the public way, and a description of efforts to mitigate such circumstances.
- (8) All fees, deposits or charges required pursuant to this Chapter.
- (9) Such other and further information as may be required by the Public Works Director.

4.606 Determination by the City. Within 120 days after receiving a complete application under Section 4.604 hereof, the Public Works Director shall apply the following standards, as applicable, and, if the application conforms with the requirements of law, issue the license :

- (1) Compliance with requirements of applicable State and federal laws and regulations.
- (2) The capacity of the public ways to accommodate the applicant's proposed facilities.
- (3) The capacity of the public ways to accommodate additional utility facilities if the license is granted.
- (4) The absence or minimization of damage or disruption of public or private facilities, improvements, service, travel or landscaping if the license is granted.
- (5) The minimization of the cost and disruption occasioned by construction within the public ways.

(6) Measures taken to address any adverse effect on public health, safety and welfare if the license is granted.

(7) The availability of alternate routes and/or locations for the proposed facilities.

(8) Such other factors as may demonstrate that the grant to use the public ways will serve the community interest.

If the application is denied, the denial shall be in writing and state the reasons for denial.

4.608 Utility License. (1) The license granted hereunder shall authorize and permit the licensee, subject to the provisions of the Springfield Municipal Code, and other applicable provisions of state or federal law, to operate the utility and provide the utility services covered by the license. The license shall authorize the licensee to place facilities in, and occupy, the public ways of the City for so long as the licensee shall comply with the provisions of this code, and continue to hold any and all licences and permits required by state or federal law for the provision of such services as covered by this license; provided, however that all work, construction, placement or operation of such facilities shall be in compliance with the provisions of this code, including the Standard Construction Specification. Nothing in such license shall authorize the licensee to use the facilities or property of another, including agencies such as the Springfield Utility Board, which use, if any shall be subject to agreement with the owner of such facility or property and any applicable provisions of law. Nothing in such license shall operate or be construed as an approval of such business or a regulation of the practices of such business.

(2) The City reserves the right, in every event, without limitation, to:

(a) construct, install, maintain and operate any public improvement, work or facility in, on, over or under the public ways;

(b) perform or authorize or direct the performance of any work that the City may find desirable or convenient in, on, over or under any public way; or

(c) vacate, alter, or close any public way; provided, however, that no vacation shall obligate a utility to remove or abandon any facility located within such public way; or

(d) require, in the public interest, the removal or relocation, temporarily or permanently, of facilities maintained by the utility in the public ways of the City. The Utility shall remove and relocate such facilities within 120 days after receiving notice in writing to do so from the City. Such removal or relocation shall be without cost or expense to the city, provided, however, that when such removal or relocation is required for the convenience or benefit of any private person, or non-governmental agency or instrumentality, utility shall be entitled to reimbursement for the reasonable cost thereof from such person, agency or instrumentality, to the extent permitted by law.

(3) Whenever the City shall perform or cause or permit to be performed, any work in the public way or the vicinity of the public way where such work may disturb or interfere with utility's facilities, the City shall, or shall require its permittee, to notify, in writing, utility sufficiently in advance of such contemplated work to enable utility to take such measures, including removal or relocation of such facilities, as may be deemed necessary to protect such facilities, at its own expense.

4.610 Nonexclusive Grant. No license granted under this Article shall confer any exclusive right, privilege, license or franchise to occupy or use the public ways of the City for delivery of utility services or any other purposes.

4.612 Rights Granted. No license granted under this Article shall convey any right, title or interest in the public ways, but shall be deemed a license only to use and occupy the public ways for the limited purposes and term stated in the grant. Further, no license shall be construed as any warranty of title.

4.614 Term of Grant. Unless otherwise specified in a license agreement, a telecommunications license granted hereunder shall be in effect for a term of five (5) years, provided, however, that no agreement shall grant a license for any term in excess of ten (10) years.

4.616 Coordination of Activities. All holders of a License shall be obliged to coordinate their activities affecting the public ways and shall be obliged to participate in coordination meetings to be held by the City not less than annually for the purpose of facilitating such cooperation and coordination.

4.618 Amendment of Grant. A new license application and grant shall be required of any utility that desires to extend additional or different services in the City which are not included in a license previously granted under this Chapter.

4.620 Renewal Applications. A licensee that desires to renew its license under this Article shall, not more than 180 days nor less than 90 days before expiration of the current license, file an application with the City for renewal of its license which shall include the information required pursuant to Section 4.604 of this Article.

4.626 Renewal Determinations. Within 90 days after receiving a complete application under Section 4.622 hereof, the Public Works Director shall issue a written determination applying the following standards, as applicable, and, if the application conforms with the requirements of law, grant the application:

- (1) Demonstrated legal qualifications, financial and technical ability of the applicant.
- (2) Compliance with requirements of applicable State and federal laws and regulations.
- (3) The continuing capacity of the public ways to accommodate the applicant's existing facilities
- (4) The applicant's compliance with the requirements of this Chapter and any Public Way Use Agreement.
- (5) Such other factors as may demonstrate that the continued grant will serve the community interest.

If the renewal application is denied, the written determination shall include the reasons for non-renewal.

4.628 Obligation to Cure As a Condition of Renewal. No license shall be renewed until any existing violations or defaults in the licensee's performance of the requirements of this Chapter,

have been cured, or a plan detailing the corrective action to be taken by the licensee has been approved by the City.

UTILITY LICENSE - FEES AND COMPENSATION

4.700 Purpose. It is the purpose of this Article to provide for the payment and recovery of all direct and indirect costs and expenses of the City related to the enforcement and administration of this Chapter

4.702 Application and Review Fee.

(1) Any applicant for a license, including a renewal or amendment of an existing license, pursuant to Article 1 of this Chapter shall pay a fee fixed by resolution of the Council.

(2) The application and review fee shall be deposited with the City as part of the application filed pursuant to Article 1 of this Chapter.

(3) An applicant whose license or franchise application has been withdrawn, abandoned or denied within sixty (60) days of its application and review fee written request, shall be refunded the balance of its deposit under this section, less:

- (i) the non-refundable portion of the application and review fee, as fixed by resolution of the Council, or
- (ii) All ascertainable costs and expenses incurred by the City in connection with the application, whichever is greater.

4.704 Other City Costs. In addition to the application and review fee, all license or franchise grantees shall, within thirty (30) days after written demand therefor, reimburse the City for all direct and indirect costs and expenses incurred by the City in connection with any issuance, modification, amendment, renewal or transfer of the license or franchise or any license or franchise agreement to the extent permitted by law.

4.708 Compensation for City Property. If the right is granted, by lease, license, franchise or other manner, to use and occupy City property other than the public ways for the installation of facilities, the compensation to be paid shall be fixed by the City and shall be separate and distinct from any fees and taxes imposed herein.

4.710 Annual Fees., each license grantee shall pay an annual license fee to the City in an amount fixed by Council resolution as reimbursement for the City's costs in connection with reviewing, inspecting and supervising the use and occupancy of the public ways in behalf of the public and existing or future users.

4.712 Regulatory Fees and Compensation Not a Tax. The regulatory fees and costs provided for in this Article, and any compensation charged and paid for City property provided for in Section 4.708, are separate from, and additional to, any and all federal, state, local and City taxes as may be levied, imposed or due from a utility, its customers or subscribers, or on account of the lease, sale, delivery or transmission of utility services.

4.714 Penalties and Interest for Late Payment. If any fee provided for herein shall not be timely paid, a penalty in the amount of 10 percent of such fee shall be assessed and due as of the date the underlying fee was due. Interest on fees and penalties shall accrue at the rate of 1.5 percent per month, commencing with the fifteenth day after the fee or penalty shall be due

Section 3. Following Section 4.714 of the Springfield Municipal Code, as amended by Section 2 of this ordinance, there are added the following sections, to be sections 4.801 through 4.806:

UTILITY TAX

4. 801 Utility Tax Imposed. There is hereby imposed a tax in the amount of five percent of gross revenue upon the privilege of conducting a utility business and providing utility services required to be licensed under Section 4.602, upon any utility required to be licensed, as defined herein, in consideration of the authority of such utility to conduct such business.

4. 802 Minimum Tax. In no event shall the tax due for any calendar year be less than the greater of either:

- (1) The product of the number of linear feet of public ways occupied by the facilities of the taxpayer and \$3.00, or
- (2) The sum of \$1,000.

4. 803 Returns.

- (1) For purposes of calculating taxes dues under this section, every utility subject to tax shall pay such tax on the basis of a calendar year, and shall file, quarterly, before the 45th day following the end of a calendar quarter, a return certified by an officer of the utility showing the amount of tax due and accompanied by the amount due.
- (2) Such return shall show the amount of gross revenue of the utility within the City for the period covered by the payment computed on the basis set out in this section, and shall show any offsets, deductions or credits against the revenue or the amount of tax due. The compensation for the period covered by the statement shall be computed on the basis of the gross revenue so reported. If the utility fails to pay the entire amount of compensation due the City through error or otherwise, the difference due the City shall be paid by the utility within fifteen (15) days from discovery of the error or determination of the correct amount, with interest at the rate of 9 percent per annum, compounded monthly. Any overpayment to the City through error or otherwise shall be offset against the next payment due from the utility.
- (3) In the event a taxpayer files a return claiming the minimum tax provided by Section 4.801 shall be due, the taxpayer shall nonetheless file a return as provided in subdivision (2) hereof and shall, if claiming under Section 4.801(1), file a

report duly certified by an engineer, licensed to practice within the State of Oregon, setting forth the calculation of the number of linear feet of public way occupied by the taxpayer.

- (4) The City may audit any return filed by the utility, and require the utility to submit such information as shall reasonably be required to establish the accuracy of any payment of tax or return documenting the amount of tax due. In the event such audit shall disclose a discrepancy in favor of the City in excess of five percent of the amount paid, there is hereby imposed a penalty in the amount of 10 percent of the difference between the amount paid and the amount found, upon audit, to be due.
 - (5) Acceptance by the City of any payment due under this section shall not be deemed to be a waiver by the City of any rights to conduct such audit, nor shall the acceptance by the City of any such payments preclude the City from later establishing that a larger amount was actually due, or from collecting any balance due to the City.
4. 804 **Gross Revenue.** For purposes of this article, gross revenue shall mean all revenues of whatsoever kind and nature derived by the utility and, any affiliates, subsidiaries or parent of the utility on account of goods or services delivered within the City of Springfield. Gross revenue shall include any and all subsidies, discounts, rebates or other considerations or forbearances by the utility associated with the delivery of such goods and services within the City of Springfield. In determining gross revenues for the calculation of taxes, the city shall consider mobile telecommunications services to occur within the city if they are used by a customer whose place of primary use is within the city. As used in this section, "place of primary use" means the residential street address or the primary business street address of the customer. The city shall apply this provision consistently with the Mobile Telecommunications Sourcing Act, 4 USC 116 to 126.
4. 805 **Exemptions and Credits.** If any licensed utility is a party to a franchise, public way use agreement, or other contract with the City which requires the payment of a fee for the use of the public ways of the City, the full amount of any payments made under such agreement during the filing year shall be credited against any tax due hereunder.
- (1) If a taxpayer asserts that any other provisions of local, state or federal law imposes a limit upon the revenue subject to taxation that can be imposed in connection with the use of public ways, such taxpayer shall file a return which:
 - (a) itemizes the gross revenue subject to taxation under this article;
 - (b) itemizes the portion of such revenue that is subject to the limitation claimed to exist under other provisions of local, state or federal law.
 - (2) The tax liability of a taxpayer claiming a limitation on revenue subject to taxation shall be the sum of:
 - (a) the tax due hereunder on that portion of the taxpayers revenue not subject to the limitation; and
 - (b) on the portion of revenue subject to a limitation, the lesser of:
 - (i) The tax due under this article; or

- (ii) The tax due under the other provision of local, state or federal law.
- (3) Any licensed utility shall be allowed, as a credit against taxes due hereunder, the reasonable value of any and all services rendered to or goods provided to the City without fee, if any, during the preceding calendar year.

4. 806 **Penalties and Interest.**

- (1) If any tax payment due hereunder shall not be timely made, there is imposed a penalty in the amount of 10 percent of the amount due.
- (2) Interest on any payment not timely made, and upon all penalties imposed, shall accrue at the annual rate of nine (9) percent, compounded daily, for each day beyond the due date, until the date paid.

Section 4. Severability. Should any court of competent jurisdiction determine that a section or part of a section of this ordinance is invalid, such invalidity shall not impair the effect or validity of the remaining sections or parts of sections.

Section 5. Effective Date. This ordinance shall become effective on September 30, 2004.

ADOPTED by the Common Council of the City of Springfield this ____ day of _____, 2004, by a vote of ____ for and ____ against.

APPROVED by the Mayor of the City of Springfield this ____ day of _____, 2004.

Mayor

ATTEST:

Amy Sowa, being first duly sworn, deposes and says that Sidney W. Leiken, to me personally known and known by me to be the person described in the foregoing instrument did sign this ordinance with his hand in my presence this ____ day of _____, 2004.

CITY RECORDER

COMPARATIVE ANALYSIS OF TELECOMMUNICATION ORDINANCES

	Revenue Source	Coverage	Includes Traditional Franchise Provisions For Use of ROW	Legally Tested	Advantages	Disadvantages	Risk Assessment
Corvallis	7% franchise fee on use of ROW by telecom utilities	Only telecom utilities; separate franchise required for cable	Yes	Yes; although Ninth Circuit is considering Qwest's appeal of ROW useage fee. (<i>Qwest v. City of Portland</i>) ¹	Clearly allowed by federal and state statutes	• Totally dependent upon ability to charge for ROW use; • Not able to gain revenue from telecom providers who do not use the ROW.	Low—The <i>Qwest</i> case represents the largest potential liability.
Eugene	2% annual tax on revenues from business in the city; 7% ROW user fee on local phone service revenues	Telecom providers regardless of whether they use ROW	Yes	Yes although <i>Qwest</i> case is pending.	• Highest revenue capture of all models; • Spreads revenue between two sources; • Survived legal challenge	• Has forced major telecom players to focus their efforts on limiting or reducing the spread of this model; • Higher admin costs	Moderate—Telecom providers who lost their challenge to ordinance now are lobbying the legislature.
Springfield	5% utility tax	Public utilities, telecom utilities and telecom carriers and providers	No, these issues are addressed under license and franchise	No	• Right-of-way use not required; • Admin efficiencies and consistent treatment in ROW regulation; • Greater revenue from cable companies.	• All revenue eggs are in one basket	Moderate—Broadens eugene's tax model to all utilities, not just telecommunications; increases tax amount to 5%. May still face legislative reversal
Salem	"Hybrid" proposed, no clear details; annual tax with franchise fees credited	Presumably telecom carriers and utilities	?	Yes (in theory); Council waiting for outcome of <i>Qwest</i> case before taking action.	• Risk spread between two legal and revenue theories; • Not likely to overly offend major telecom players	• May be perceived as an extension of a dangerous precedent (ala Eugene) by telecom players	Low—Revenue based upon two different theories and does not represent an increase in financial burden on telecoms.
MACC	Model ord provides for maximum of 7% for telecom carriers. Also, a nominal registration fee not associated with use of ROW.	Telecoms who have facilities within the jurisdiction. Does not address cable service.	Yes	Yes although <i>Qwest</i> case is pending.	• Fee does not exceed statutory authority.	• Revenue is limited to revenues from companies that use the right-of-way	Low—All revenue eggs in one basket with the <i>Qwest</i> case represents the largest potential liability.
Milwaukie	5% Franchise fee for cable providers; 7% fee on telecom utilities/carriers	Telecom carriers and utilities who utilize the ROW	Yes	Yes although <i>Qwest</i> case is pending.	• Explicitly authorized by current federal and state statute	• Cable operators subject to traditional franchise agreement; • Unfavorable decision in <i>Qwest</i> case would leave them with no revenue source.	Low—All revenue eggs in one basket with <i>Qwest</i> case pending.

¹In the *Qwest v. City of Portland* case, *Qwest* is challenging the ability of cities to charge a fixed fee for use of the right-of-way. It is arguing that the fee must be "cost-based" and therefore the fee would be revenue neutral. The Court of Appeals ruled that challenges to "cost-based fees" are precluded by the state court rulings in *Qwest v. Eugene* and *AT&T v. Eugene*. This should end the discussion for all the providers who were involved in the Eugene decisions. It may not bar other providers, but weakens their case. The other major issue in the Portland case, whether sec 253(a) [which prohibits barriers to entry] applies was not decided.

³Sunset of Ron Wyden's internet taxing bill in two years may result in restrictions on taxation of internet-related facilities within rights-of-way (i.e. cable modems).