

CHAPTER 1070

Video Service Provider Right-of-Way Management

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1070.01 PURPOSES.

- (a) Under the Uniform Video Services Local Franchise Act, Video Service Providers may obtain a franchise to provide Video Services in the City using a standardized, uniform form of franchise agreement established by the Michigan Public Service Commission (MPSC). This form includes the right to use the Public Right-of-Way to provide such service but does not contain right-of-way management and related provisions.
- (b) Telecommunications providers who obtain such a standardized, uniform form of franchise agreement will usually have a City permit issued pursuant to the Metro Act allowing them to construct and maintain their telecommunications facilities in the Public Right-of-Way. Such Metro Act permits set forth the terms and conditions for such right-of-way usage. Standard forms for such permits were agreed to in a collaborative process between municipalities and providers that was initiated by the MPSC, and such standard forms have since been approved by the legislature and the MPSC.
- (c) Because telecommunications providers typically provide Video Services over combined video and telecommunications facilities, such Metro Act Permits generally provide adequate public right-of-way protections for the City and the public when such providers are providing Video Services.
- (d) Other Video Service Providers, in particular new providers or existing cable companies, may not have a Metro Act Permit issued by the City.
- (e) The Uniform Video Services Local Franchise Act and the standardized, uniform franchise agreement require Video Service Providers to comply with all valid and enforceable local regulations regarding the use and occupation of the Public Right-of-Way in the delivery of Video Services. This includes the police powers of the franchising entity, and makes such right-of-way usage subject to the laws of the State of Michigan and the police powers of the franchising entity.
- (f) The Uniform Video Services Local Franchise Act and the standardized, uniform franchise agreement state that franchising entities shall provide Video Service Providers with open, comparable, nondiscriminatory and competitively neutral access to the Public Right-of-Way, and may not discriminate against a Video Service Provider for the authorization or placement of a Video Service or communications network in the Public Right-of-Way.
- (g) The Michigan Constitution reserves reasonable control of their highways, streets, alleys and public places to local units of government.
- (h) The purpose of this ordinance is to promote and protect the public health, safety and welfare and exercise reasonable control over the Public Right-of-Way by regulating the

use and occupation of such rights-of-way by Video Service Providers who have a standardized, uniform franchise but who lack a Metro Act Permit from the City. This ordinance does so by setting forth terms and conditions for such usage and occupation of the public's rights of way from the forms of Metro Act permit approved by the MPSC and approved by the legislature in Section 6(1) of the Metro Act, thus providing open, comparable, nondiscriminatory, and competitively neutral access to the Public Right-of-Way and not discriminating against a Video Service Provider for the authorization or placement of a Video Service or communications network in Public Right-of-Way.

(Ord. 795. Passed 6-2-08.)

1070.02 CONSISTENT INTERPRETATION.

This ordinance shall be interpreted and applied so as to be consistent with the Metro Act and corresponding provisions of the forms of Metro Act permit approved by the MPSC, including applicable MPSC, Metro Authority and court decisions and determinations relating to same.

(Ord. 795. Passed 6-2-08.)

1070.03 DEFINITIONS.

The following definitions apply to this ordinance, including 1070.01 and 1070.02 above.

- (1) "Act" means the Uniform Video Services Local Franchise Act, being Act 480 of the Public Acts of 2006, MCL 484.3301 and following, as amended from time to time.
- (2) "City" or "The City" means the City of Traverse City.
- (3) "Claims" shall have the meaning set forth in Section 7.1.
- (4) "Facilities" means the lines, equipment and other facilities of a Permittee which use or occupy the Public Right-of-Way in the delivery of Video Services in the City.
- (5) "Franchise Agreement" means the franchise agreement entered into or possessed by a Video Service Provider with the City as required by Section 3(1) of the Act, if it is the standardized, uniform form of franchise agreement established by the MPSC.
- (6) "Manager" means the City Manager or his or her designee.
- (7) "Metro Act" means the Metropolitan Extension Telecommunications Rights-of-Way Oversight Act, being Act No. 48 of the Public Acts of 2002, MCL 484.3101 and following.
- (8) "Metro Act Permit" means a permit issued to use the Public Right-of-Way issued by the City under Chapter 1050 after a provider's application for same.
- (9) "Metro Authority" shall have the same meaning as "Authority" in the Metro Act.
- (10) "MPSC" means the Michigan Public Service Commission, and shall have the same meaning as the term "Commission" in the Act and the Metro Act.
- (11) "Permittee" means a Video Service Provider with a currently valid Franchise Agreement but without a currently valid Metro Act Permit.
 - i. Upon applying to the City for and then obtaining a Metro Act Permit from the City, a Video Service Provider is not a Permittee and is no longer required to comply with this ordinance. A Video Service Provider is also not a Permittee and is not required to comply with this ordinance if it and the City enter into a voluntary franchise agreement as described in 1070.11(b).
- (12) "Person" means an individual, corporation, association, partnership, governmental entity, or any other legal entity.
- (13) "Public Right-of-Way" shall have the same meaning as in the Act.

(14) "Street Construction" and "Street Resurfacing" shall have the meanings set forth in 1070.09(h).

(15) "Video Service" shall have the same meaning as in the Act.

(16) "Video Service Provider" shall have the same meaning as in the Act.

(Ord. 795. Passed 6-2-08.)

1070.04 APPLICABILITY TO PERMITTEES.

Compliance, Insurance Exceptions. All Permittees shall comply with this ordinance, except that a Permittee need not comply with the insurance provisions of 1070.08(a) through 1070.08(f) below if it is maintaining the insurance required by Section II.J (pertaining to incumbent video providers continuing certain insurance provided under their preceding franchise) of its Franchise Agreement to certain insurance.

(Ord. 795. Passed 6-2-08.)

1070.05 CONTACTS, MAPS AND PLANS.

(a) Permittee Contacts. Permittee shall provide the Manager with the names, addresses and the like for engineering and construction related information for Permittee and its Facilities as follows:

(1) The address, e-mail address, phone number and contact person (title or name) at Permittee's local office (in or near the City).

(2) If Permittee's engineering drawings, as-built plans and related records for the Facilities will not be located at the preceding local office, the location address, phone number and contact person (title or department) for them.

(3) The name, title, address, e-mail address and telephone numbers of Permittee's engineering contact person(s) with responsibility for the design, plans and construction of the Facilities.

(4) The address, phone number and contact person (title or department) at Permittee's home office/regional office with responsibility for engineering and construction related aspects of the Facilities.

(5) Permittee shall at all times provide Manager with the phone number at which a live representative of Permittee (not voice mail) can be reached 24 hours a day, seven (7) days a week, in the event of a public emergency.

(6) Permittee shall notify the City in writing pursuant to the notice provisions of the Franchise Agreement of any changes in the preceding information.

(b) Route Maps. Within ninety (90) days after the substantial completion of construction of new Facilities in the City, Permittee shall submit route maps showing the location of the Facilities to the City, in the same manner and subject to the same provisions as apply to telecommunications providers under Section 6(7) and 6(8) of the Metro Act, MCL 484.3106(7) and (8).

(c) As-Built Records. Permittee, without expense to the City, shall, upon forty-eight (48) hours' notice, give the City access to all "as-built" maps, records, plans and specifications showing the Facilities or portions thereof in the Public Right-of-Way unless there exists an emergency situation requiring earlier view. Upon request by the City, Permittee shall inform the City as soon as reasonably possible of any changes from previously supplied maps, records, or plans and shall markup maps provided by the City so as to show the location of the Facilities.

(Ord. 795. Passed 6-2-08.)

1070.06 USE OF PUBLIC RIGHT-OF-WAY.

[RESERVED]

- (a) Overlashing. Permittee shall not allow the wires or any other facilities of a third party to be overlashed to Permittee's Facilities without the City's prior written consent. The City's right to withhold written consent is subject to the authority of the MPSC under Section 361 of the Michigan Telecommunications Act, MCL § 484.2361.
- (b) No Burden on Public Right-of-Way. Permittee, its contractors, subcontractors, and the Facilities shall not unduly burden or interfere with the present or future use of any of the Public Right-of-Way. Permittee's aerial cables and wires shall be suspended so as to not endanger or injure persons or property in or about the Public Right-of-Way. If the City reasonably determines that any portion of the Facilities constitutes an undue burden or interference, due to changed circumstances, Permittee, at its sole expense, shall modify the Facilities or take such other actions as the City may determine is in the public interest to remove or alleviate the burden, and Permittee shall do so within a reasonable time period. The City shall attempt to require all occupants of a pole or conduit whose facilities are a burden to remove or alleviate the burden concurrently.
- (c) No Priority. This ordinance does not establish any priority of use of the Public Right-of-Way by Permittee over any present or future permittees or parties having agreements with the City or franchises for such use. In the event of any dispute as to the priority of use of the Public Right-of-Way, the first priority shall be to the public generally, the second priority to the City, the third priority to the State of Michigan and its political subdivisions in the performance of their various functions, and thereafter as between other permit, agreement or franchise holders, as determined (except as otherwise provided by law) by the City in the exercise of its powers, including the police power and other powers reserved to and conferred on it by the State of Michigan.
- (d) Restoration of Property. Permittee, its contractors and subcontractors shall immediately (subject to seasonal work restrictions) restore, at Permittee's sole expense, in a manner approved by the City, any portion of the Public Right-of-Way that is in any way disturbed, damaged, or injured by the construction, installation, operation, maintenance or removal of the Facilities to a reasonably equivalent (or, at Permittee's option, better) condition as that which existed prior to the disturbance. In the event that Permittee, its contractors or subcontractors fail to make such repair within a reasonable time, the City may make the repair and Permittee shall pay the costs the City incurred for such repair.
- (e) Marking. Permittee shall mark its Facilities installed after the effective date of this ordinance as follows: Aerial portions of the Facilities shall be marked with a marker on Permittee's lines on alternate poles which shall state Permittee's name and provide a toll-free number to call for assistance. Direct buried underground portions of the Facilities shall have:
 - (1) a conducting wire placed in the ground at least several inches above Permittee's cable (if such cable is nonconductive); and
 - (2) at least several inches above that, a continuous colored tape with a statement to the effect that there is buried cable beneath; and

- (3) stakes or other appropriate above ground markers with Permittee's name and a toll-free number indicating that there is buried cable below.

Bored underground portions of the Facilities shall have a conducting wire at the same depth as the cable and shall not be required to provide the continuous colored tape. Portions of the Facilities located in conduit, including conduit of others used by Permittee, shall be marked at its entrance into and exit from each manhole and handhole with Permittee's name and a toll-free telephone number.

- (f) Tree Trimming. Permittee may trim trees upon and overhanging the Public Right-of-Way so as to prevent the branches of such trees from coming into contact with the Facilities, consistent with any standards adopted by the City. Permittee shall dispose of all trimmed materials. Permittee shall minimize the trimming of trees to that essential to maintain the integrity of the Facilities. Except in emergencies, all trimming of trees in the Public Right-of-Way shall have the advance approval of Manager.
- (g) Installation and Maintenance. The construction and installation of the Facilities shall be performed pursuant to plans approved by the City. The open cut of any Public Right-of-Way shall be coordinated with the Manager. Permittee shall install and maintain the Facilities in a reasonably safe condition. If the existing poles in the Public Right-of-Way are overburdened or unavailable for Permittee's use, or the facilities of all users of the poles are required to go underground then Permittee shall, at its expense, place such portion of its Facilities underground, unless the City approves an alternate location. Permittee may perform maintenance on the Facilities without prior approval of the City, provided that Permittee shall obtain any and all permits required by the City in the event that any maintenance will disturb or block vehicular traffic or are otherwise required by the City.
- (h) Pavement Cut Coordination. Permittee shall coordinate its construction and all other work in the Public Right-of-Way with the City's program for street construction and rebuilding (collectively "Street Construction") and its program for street repaving and resurfacing (except seal coating and patching) (collectively, "Street Resurfacing"). The goals of such coordination shall be to encourage Permittee to conduct all work in the Public Right-of-Way in conjunction with or immediately prior to any Street Construction or Street Resurfacing planned by the City.
- (i) Compliance with Laws. Permittee shall comply with all valid and enforceable federal and state statutes and regulations; and all valid and enforceable local regulations regarding the use and occupation of the Public Right-of-Way, including the police powers of the City; regarding the construction, installation, and maintenance of its Facilities, now in force or which hereafter may be promulgated. Before any installation is commenced, Permittee shall secure all necessary permits, licenses and approvals from the City or other governmental entity as may be required by law, including, without limitation, all utility line permits and highway permits. The City shall not unreasonably delay or deny issuance of any such permits, licenses or approvals. Permittee shall comply in all respects with applicable codes and industry standards, including but not limited to the National Electrical Safety Code (latest edition adopted by MPSC) and the National Electric Code (latest edition). Permittee shall comply with all zoning and land use ordinances and historic preservation ordinances as may exist or may hereafter be amended. This section

does not constitute a waiver of Permittee's right to challenge laws, statutes, ordinances, rules or regulations now in force or established in the future.

- (j) Street Vacation. If the City vacates or consents to the vacation of Public Right-of-Way within its jurisdiction, and such vacation necessitates the removal and relocation of Permittee's Facilities in the vacated Public Right-of-Way, Permittee shall consent to the vacation and remove its Facilities at its sole cost and expense when ordered to do so by the City or a court of competent jurisdiction. Permittee shall relocate its Facilities to such alternate route as the City and Permittee mutually agree, applying reasonable engineering standards.
 - (k) Relocation. If the City requests Permittee to relocate, protect, support, disconnect, or remove its Facilities because of street or utility work, or other public projects, Permittee shall relocate, protect, support, disconnect, or remove its Facilities, at its sole cost and expense, including where necessary to such alternate route as the City and Permittee mutually agree, applying reasonable engineering standards. The work shall be completed within a reasonable time period.
 - (l) Public Emergency. The City shall have the right to sever, disrupt, dig-up or otherwise destroy Facilities of Permittee if such action is necessary because of a public emergency. If reasonable to do so under the circumstances, the City shall attempt to provide notice to Permittee. Public emergency shall be any condition which poses an immediate threat to life, health, or property caused by any natural or man-made disaster, including, but not limited to, storms, floods, fire, accidents, explosions, water main breaks, hazardous material spills, etc. Permittee shall be responsible for repair at its sole cost and expense of any of its Facilities damaged pursuant to any such action taken by the City.
 - (m) Miss Dig. If eligible to join, Permittee shall subscribe to and be a member of "MISS DIG," the association of utilities formed pursuant to Act 53 of the Public Acts of 1974, as amended, MCL § 460.701 et seq., and shall conduct its business in conformance with the statutory provisions and regulations promulgated thereunder.
 - (n) Underground Relocation. If Permittee has its Facilities on poles of Traverse City Light & Power, Cherryland Electric, Consumers Energy, Detroit Edison or another electric or telecommunications provider, or their successors and assigns, and such electric or telecommunications provider relocates its system underground, then permittee shall relocate its Facilities underground in the same location at Permittee's sole cost and expenses.
 - (o) Identification. All personnel of Permittee and its contractors or subcontractors who have as part of their normal duties contact with the general public shall wear on their clothing a clearly visible identification card bearing Permittee's name, their name and photograph. Permittee shall account for all identification cards at all times. Every service vehicle of Permittee and its contractors or subcontractors shall be clearly identified as such to the public, such as by a magnetic sign with Permittee's name and telephone number.
- (Ord. 795. Passed 6-2-08.)

1070.07 INDEMNIFICATION.

- (a) Indemnity. Permittee shall defend, indemnify, protect, and hold harmless the City, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions from any and all claims, losses, liabilities, causes of action, demands, judgments, decrees, proceedings, and expenses of any nature (collectively "Claims")

(including, without limitation, attorneys' fees) arising out of or resulting from the acts or omissions of Permittee, its officers, agents, employees, contractors, successors, or assigns, but only to the extent such acts or omissions are related to Permittee's use of or installation of Facilities in the Public Right-of-Way and only to the extent of the fault or responsibility of Permittee, its officers, agents, employees, contractors, successors and assigns.

- (b) Notice, Cooperation. The City shall notify Permittee promptly in writing of any such Claims and the method and means proposed by the City for defending or satisfying any such Claims. The City shall cooperate with Permittee in every reasonable way to facilitate the defense of any such Claims. The City shall consult with Permittee respecting the defense and satisfaction of such Claims, including the selection and direction of legal counsel.
- (c) Settlement. The City shall not settle any Claim subject to indemnification under the preceding two sections without the advance written consent of Permittee, which consent shall not be unreasonably withheld. Permittee shall have the right to defend or settle, at its own expense, any Claim against The City for which Permittee is responsible hereunder.

(Ord. 795. Passed 6-2-08.)

1070.08 INSURANCE.

- (a) Coverage Required. Prior to beginning any construction in or installation of Permittee's Facilities in the Public Right-of-Way, Permittee shall obtain insurance as set forth below and file certificates evidencing same with the City. Such insurance shall be maintained in full force and effect until the end of the term of the Franchise Agreement. In the alternative, Permittee may satisfy this requirement through a program of self-insurance, acceptable to the City, by providing reasonable evidence of its financial resources to the City. The City's acceptance of such self-insurance shall not be unreasonably withheld.
- (1) Commercial general liability insurance, including Completed Operations Liability, Independent Contractors Liability, Contractual Liability coverage, railroad protective coverage and coverage for property damage from perils of explosion, collapse or damage to underground utilities, commonly known as XCU coverage, in an amount not less than Five Million Dollars (\$5,000,000).
 - (2) Liability insurance for sudden and accidental environmental contamination with minimum limits of Five Hundred Thousand Dollars (\$500,000) and providing coverage for claims discovered within three (3) years after the term of the policy. Pursuant to the 2006 MPSC decision in Case U-14720, Permittee need not comply with the preceding sentence until such time after the effective date of this ordinance that it decides to place any new or existing Facilities underground within the Public Right-of-Way in the City.
 - (3) Automobile liability insurance in an amount not less than One Million Dollars (\$1,000,000).
 - (4) Workers' compensation and employer's liability insurance with statutory limits, and any applicable Federal insurance of a similar nature.
 - (5) The coverage amounts set forth above may be met by a combination of underlying (primary) and umbrella policies so long as in combination the limits equal or exceed those stated. If more than one insurance policy is purchased to

provide the coverage amounts set forth above, then all policies providing coverage limits excess to the primary policy shall provide drop down coverage to the first dollar of coverage and other contractual obligations of the primary policy, should the primary policy carrier not be able to perform any of its contractual obligations or not be collectible for any of its coverages for any reason during the term of the Franchise Agreement, or (when longer) for as long as coverage could have been available pursuant to the terms and conditions of the primary policy.

- (b) Additional Insured. The City shall be named as an additional insured on all policies (other than worker's compensation and employer's liability). All insurance policies shall provide that they shall not be canceled, modified or not renewed unless the insurance carrier provides thirty (30) days prior written notice to the City. Permittee shall annually provide the City with a certificate of insurance evidencing such coverage. All insurance policies (other than environmental contamination, workers' compensation and employer's liability insurance) shall be written on an occurrence basis and not on a claims made basis.
- (c) Qualified Insurers. All insurance shall be issued by insurance carriers licensed to do business by the State of Michigan or by surplus line carriers on the Michigan Insurance Commission approved list of companies qualified to do business in Michigan. All insurance and surplus line carriers shall be rated A+ or better by A.M. Best Company.
- (d) Deductibles. If the insurance policies required by this ordinance are written with retainages or deductibles in excess of \$50,000, they shall be approved by Manager in advance in writing. Permittee shall indemnify and save harmless the City from and against the payment of any deductible and from the payment of any premium on any insurance policy required to be furnished hereunder.\
- (e) Contractors. Permittee's contractors and subcontractors working in the Public Right-of-Way shall carry in full force and effect commercial general liability, environmental contamination liability, automobile liability and workers' compensation and employer liability insurance which complies with all terms of this Section 1070.08. In the alternative, Permittee, at its expense, may provide such coverages for any or all its contractors or subcontractors (such as by adding them to Permittee's policies).
- (f) Insurance Primary. Permittee's insurance coverage shall be primary insurance with respect to the City, its officers, agents, employees, elected and appointed officials, departments, boards, and commissions (collectively "them"). Any insurance or self-insurance maintained by any of them shall be in excess of Permittee's insurance and shall not contribute to it (where "insurance or self-insurance maintained by any of them" includes any contract or agreement providing any type of indemnification or defense obligation provided to, or for the benefit of them, from any source, and includes any self-insurance program or policy, or self-insured retention or deductible by, for or on behalf of them).

(Ord. 795. Passed 6-2-08.)

1070.09 PERFORMANCE BOND OR LETTER OF CREDIT.

Municipal Requirement. The City may require Permittee to post a bond (or letter of credit), in the amount provided in Section 15(3) of the Metro Act, as amended [MCL § 484.3115(3)].

(Ord. 795. Passed 6-2-08.)

1070.10 REMOVAL.

- (a) Removal; Underground. As soon as practicable after the term of the Franchise Agreement expires, Permittee or its successors and assigns shall remove any underground cable or other portions of Permittee's Facilities from the Public Right-of-Way which has been installed in such a manner that it can be removed without trenching or other opening of the Public Right-of-Way. Permittee shall not remove any underground cable or other portions of the Facilities which requires trenching or other opening of the Public Right-of-Way except with the prior written approval of Manager. All removals shall be at Permittee's sole cost and expense. For purposes of this subsection, "cable" means any wire, coaxial cable, fiber optic cable, feed wire or pull wire.
- (b) Removal; Above Ground. As soon as practicable after the expiration of the term of a Franchise Agreement, Permittee, or its successor or assigns at its sole cost and expense, shall, unless waived in writing by Manager, remove from the Public Right-of-Way all above ground elements of its Facilities, including but not limited to poles, pedestal-mounted terminal boxes, and lines attached to or suspended from poles.
- (c) Schedule. The schedule and timing of removal shall be subject to approval by Manager. Unless extended by Manager, removal shall be completed not later than twelve (12) months following the expiration of the term of the Franchise Agreement. Portions of Permittee's Facilities in the Public Right-of-Way that are not removed within such time period shall be deemed abandoned and, at the option of the City exercised by written notice to Permittee at the address provided for in the Franchise Agreement, title to the portions described in such notice shall vest in the City.

(Ord. 795. Passed 6-2-08.)

1070.11 OTHER ITEMS.

- (a) Duties. Permittees shall faithfully perform all duties required by this ordinance.
- (b) Different Terms. The Act allows local units of government and Video Service Providers to enter into voluntary franchise agreements that include terms and conditions which are different from those required under the Act or which are different from those in the standardized, uniform form of franchise agreement established by the MPSC. The Metro Act allows municipalities and providers to mutually agree to Metro Act Permit terms differing from those in the standard forms of Metro Act permit approved by the MPSC. Current or prospective Permittees who desire terms different from those in this ordinance, as applied to them, should request such a voluntary franchise agreement or a mutually agreed to Metro Act Permit from the City.
- (c) Interpretation and Severability. The provisions of this ordinance shall be liberally construed to protect and preserve the peace, health, safety and welfare of the public, and should any provision or section of this ordinance be held unconstitutional, invalid, overbroad or otherwise unenforceable, such determination/holding shall not be construed as affecting the validity of any of the remaining conditions of this ordinance. If any provision in this ordinance is found to be partially overbroad, unenforceable, or invalid, Permittee and the City may nevertheless enforce such provision to the extent permitted under applicable law.
- (d) Violations. A Permittee who violates any provision of this ordinance is responsible for a municipal civil infraction, and shall be subject to sanctions as established in Ordinance

VIDEO SERVICE PROVIDER RIGHT-OF-WAY MANAGEMENT

202.99(c). Nothing in this Section shall be construed to limit the remedies available to the City in the event of a violation by a Permittee of this ordinance.

- (e) Authorized Officials. The Manager, which includes his or her designee, is hereby designated as the authorized official of the City to issue municipal civil infraction citations or municipal civil infraction violation notices on a form approved by the City Attorney for violations of this ordinance, as provided by the City's ordinances.

(Ord. 795. Passed 6-2-08.)

1070.12 REPEALER.

All ordinances, resolutions or rules, parts of ordinances, resolutions or rules inconsistent with the provisions hereof are hereby repealed.

(Ord. 795. Passed 6-2-08.)