

## **NOTICE**

This City of Kettering Code section is not the official version and is provided only for the convenience of the public. The only official version of the City of Kettering Code is available through the office of the Clerk of Council, located in the City of Kettering Government Center, 3600 Shroyer Road, Kettering, Ohio 45429.

This version may, occasionally, differ from the official version and should be relied upon for general information purposes only. Any errors or omissions should be reported to the Clerk of Council. In no event shall City of Kettering be held liable for damages of any nature, direct or indirect, arising from the use of this service or reliance on this unofficial document.

## **CODIFIED ORDINANCES OF KETTERING**

### **PART NINE – STREETS, UTILITIES AND PUBLIC SERVICES CODE**

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#### **TITLE ONE – STREET AND SIDEWALK AREAS.**

- Chapter 901. Rights of Way Administration.
- Chapter 903. Sidewalks, Curbs and Driveway Aprons.
- Chapter 905. Street Names and Numbering.
- Chapter 909. Use of City Right of Way. (License)

#### **TITLE THREE – UTILITIES.**

- Chapter 921. Utilities Generally.
- Chapter 923. Water.
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- Chapter 947. Street Lights

## CODIFIED ORDINANCES OF KETTERING

### PART NINE – STREETS, UTILITIES AND PUBLIC SERVICES CODE

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#### TITLE ONE – STREET AND SIDEWALK AREAS

- Chap. 901. Rights of Way Administration. (Ord. 3823. Passed 12/28/99)  
 Chap. 903. Sidewalks, Curbs and Driveway Aprons.  
 Chap. 905. Street Names and Numbering.  
 Chap. 909. Use of City Right of Way.

#### CHAPTER 901 Rights of Way Administration

901.101	Declaration of Findings and Purpose, Scope, Definitions	901.113	Termination of Certificate of Registration
901.102	Rights of Way Administration	901.114	Unauthorized Use of Public Rights of Way
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#### CROSS REFERENCES

Director of Public Service in charge – see CHTR. Art. VI, 8  
 Establishment and care of streets – see Ohio R.C. 715.19  
 Streets and public grounds – see Ohio R.C. 723.01 et seq.

CROSS REFERENCES (continued)

Damage from excavation near street – see Ohio R.C. 723.49  
Street grades – see ADM. 103.01  
Abandoned excavations – see GEN. OFF. 660.12  
Sidewalks – see S.U. & P.S. Ch. 903  
Street design – see P. & Z. Ch. 1111  
Street improvements – see P. & Z. Ch. 1113

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**SECTION 901.101- DECLARATION OF FINDINGS AND PURPOSE, SCOPE, DEFINITIONS**

901.101.1 FINDINGS AND PURPOSE.

1. The City of Kettering, Ohio (the "City") is vitally concerned with the use of all Rights of Way in the City as such Rights of Way are a valuable, and potentially limited, resource which must be utilized to promote the public health, safety, and welfare including the economic development of the City.

2. Changes in the public utilities and communication industries have increased the demand and need for access to Rights of Way and placement of facilities and structures therein.

3. It is necessary to comprehensively plan and manage access to, and structures and facilities in, the Rights of Way to promote efficiency, discourage duplication of facilities, lessen the public inconvenience of uncoordinated work in the Rights of Way, and promote the public health, safety, and welfare. Where it is in the best interest of the public health, safety, and welfare and the aesthetics of the City, the City shall take steps to encourage locating Facilities underground.

4. The City has authority under the Laws and Constitution of the State of Ohio, including but not limited to Article 18, Sections 3, 4, and 7, to regulate public and private entities which use the Rights of Way.

901.101.2 SCOPE. The provisions of this Chapter shall apply to all users of the Rights of Way as provided herein except as provided in Chapter 909. To the extent that any provision in this Chapter 901 conflicts with Chapter 909, the provisions of this Chapter 901 shall control.

901.101.3 DEFINITIONS. For the purposes of Chapter 901, the following terms, phrases, words, and their derivations shall have the meanings as set forth herein. When not inconsistent with the context, words in the present tense include the future tense, words in the plural number include the singular number, and words in the singular

number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning. References hereafter to "Sections" are, unless otherwise specified, references to Sections in this Chapter. Defined terms remain defined terms whether or not capitalized.

1. *Applicant* means any Person who seeks to obtain or renew a Certificate of Registration or Permit.

2. *Application* means the process and format by which an Applicant submits a request to obtain a Certificate of Registration or Permit.

3. *Certificate of Registration* means the document that may be issued to a Provider and its unique System that allows Permitting of the Provider and its unique System.

4. *City* means the City of Kettering, Ohio.

5. *City Council* means the governing body of the City.

6. *City Manager* means the administrative head of the municipal government known as the City of Kettering, Ohio.

7. *Codified Ordinances* means the Codified Ordinances of the City of Kettering, Ohio.

8. *Construct* means, but shall not be limited to, to dig, bore, tunnel, trench, excavate, obstruct, install wires, install conduit, install pipes, install transmission lines, install poles, install signs, or install Facilities, other than landscaping or ornamental plantings, in, on, above, within, over, below, under, or through any part of the Rights of Way. Construct shall also include the act of opening and/or cutting into the surface of any paved or improved surface that is any part of the Rights of Way.

9. *Construction* means, but shall not be limited to, the act or process of digging, boring, tunneling, trenching, excavating, obstructing, installing wires, installing conduit, installing pipes, installing transmission lines, installing poles, installing signs, or installing Facilities, other than landscaping or ornamental plantings in, on, above, within, over, below, under, or through any part of the Rights of Way. Construction shall also include the act of opening and/or cutting into the surface of any paved or improved surface that is part of the Rights of Way.

10. *Construction Bond* means a bond posted with the City to ensure proper and complete Construction, replacement and/or repair of a Facility and/or the effected Rights of Way pursuant to a Permit.

11. *Construction Cost* means the cost of installation, materials, engineering costs, and other incidental expenses and fees required for the Construction, repair, or replacement of real and/or personal property or Facilities effected by Construction in the Rights of Way.

12. *Construction Permit* means the Permit as specified in § 901.117 et seq. of the Codified Ordinances which must be obtained before a Person may Construct in, locate in, occupy, maintain, move, or remove Facilities from, in, or on a Rights of Way excluding work performed pursuant to a Minor Maintenance Permit.

13. *Construction and Major Maintenance Plan* means a written plan including maps of the expected location, design, other related equipment and Facilities of a Provider which describes in full the Construction intended to be accomplished by the Provider in the Rights of Way over the next calendar year.

14. *County* means any County providing sewer and water service within the City but excludes contractors, agents, or other Persons acting on behalf of said County.

15. *Credible* means worthy of being believed.

16. *Department of Public Service* means the Department of Public Service of the City.

17. *Director of Public Service* means the Director of the Department of Public Service, or his or her designee.

18. *Emergency* means a condition that poses a clear and immediate danger to life, health or safety of a Person, or of a significant loss of real or personal property.

19. *Facilities* means any tangible thing located in any Rights of Way within the City; but shall not include boulevard plantings, ornamental plantings, or gardens planted or maintained in the Rights of Way between a Person's property and the street edge of pavement.

20. *FCC* means the Federal Communications Commission, or any successor thereto.

21. *Full* means unable to accommodate any additional Facilities: (i.) in light of applicable standards and using current engineering practices as determined by the Director of Public Service; or (ii.) without negatively impacting the public health, safety, and welfare; or (iii.) without violating any applicable Laws, Rules, or Regulations.

22. *In*, when used in conjunction with Rights of Way, means in, on, above, within, over below, under or through a Rights of Way.

23. *Inspector* means any Person authorized by the Director of Public Service to carry out inspections related to the provisions of this Chapter.

24. *Law(s)* means any local, state, or federal legislative, judicial or administrative order, certificate, decision, statute, constitution, ordinance, resolution, regulation, rule, tariff, or other requirement in effect either at the time of execution of this Chapter or at any time during the location of, and/or while a Provider's Facilities are located in the public Rights of Way.

25. *Minor Maintenance Permit* means a permit as specified in Section 901.119 et seq. which must be obtained before a Person can perform minor maintenance, as set forth in Section 901.119 et seq., in or on the Rights of Way.

26. *Ohio Manual of Uniform Traffic Control Devices* means the uniform system of traffic control devices promulgated by the Ohio Department of Transportation pursuant to O.R.C. § 4511.09.

27. *O.R.C.* means the Revised Code of the State of Ohio.

28. *Ohio Utility Protection Service* means the utility protection service as defined in O.R.C. §§ 153.64 and 3781.26 or their statutory successor.

29. *Open Video Service* means any video programming services provided by a Person through use of Rights of Way, which Provider is certified by the FCC to operate an Open Video System pursuant to Sections 651 et seq. of the Telecommunications Act of 1996 (codified at 47 U.S.C. Title VI, Part V), regardless of the Facilities used.

30. *Permit* means both a Construction Permit and a Minor Maintenance Permit unless otherwise specified.

31. *Permit Cost* means all direct, incidental, and indirect costs borne by the City for Permit issuance, Permit oversight and any pavement degradation resulting from Construction activity.

32. *Permit Fee* means money paid to the City for a Permit to Construct and or do Minor Maintenance in the Rights of Way.

33. *Permittee* means any Person to whom a Construction Permit and or a Minor Maintenance Permit has been granted by the City and not revoked.

34. *Person* means any natural or corporate person, business association, or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity.

35. *Provider* means a Person who owns or operates a System and has a valid Certificate of Registration. The City, County, RTA and cable television operators operating pursuant to a valid cable franchise shall also be considered Providers.

36. *PUCO* means the Public Utilities Commission of Ohio as defined in O.R.C. § 4901.02.

37. *Registration Maintenance Fee* means the money paid to the City to maintain a Registration Certificate and compensate the City for costs associated with Rights of Way management and administration.

38. *Removal Bond* means a bond posted to ensure the availability of sufficient funds to properly remove a Provider's Facilities upon abandonment, disuse, or discontinuance of a Provider's use or occupation of the Rights of Way.

39. *Restoration* means the process and the resultant effects by which a Rights of Way is returned to a condition as good as or better than its condition immediately prior to Construction. Restoration shall occur in accordance with the Rules and Regulations established by the Director of Public Service and as amended from time to time.

40. *Revocable Street Privileges Permit* means the Permit for special licenses and privileges that must be obtained from the City Manager pursuant to Codified Ordinance Chapter 909 et seq.

41. *Right(s) of Way* means the surface and space in, on, above, within, over, below, under or through any real property in which the City has an interest in Law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, conduit or any other place, area, or real property owned by or



under the legal or equitable control of the City that, consistent with the purposes for which it was dedicated, may be used for the purposes of constructing, operating, repairing or replacing a System. Rights of Way shall not include buildings, parks, or other public property or easements that have not been dedicated to compatible uses, except to the extent the use or occupation of such property is specifically granted in a Permit or approved by Law.

42. *Right(s) of Way Cost* means all direct, incidental and indirect costs borne by the City for the management, administration and regulation of the Rights of Way and this Chapter.

43. *RTA* means the Miami Valley Regional Transit Authority for purposes of public transportation.

44. *Rule(s) and Regulation(s)* means any rule and or regulation adopted by the Director of Public Service.

45. *Service(s)* means the offering of any Service for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.

46. *Supplementary Application* means any application made to Construct on or in more of the Rights of Way than previously allowed, or to extend a Permit that had already been issued.

47. *Surety Fund* means a formal pledge made to secure against loss, damage, or default.

48. *System* means any System of conduit, ducts, cables, pipes, wires, lines, towers, antennae wave guides, optic fiber, microwave, or laser beams, and any associated converters, equipment, or Facilities or Utilities designed and constructed for the purpose of producing, receiving, amplifying, delivering or distributing Service within the City.

49. *System Representative* means the specifically identified agent/employee of a Provider who is authorized to direct field activities of that Provider and serve as official notice agent for System related information. Any such System Representative shall be required to be available at all times to receive notice of and immediately direct response to System related emergencies or situations.

50. *Transfer* means the disposal by the Provider, directly or indirectly, by gift, assignment, voluntary sale, merger, consolidation, or otherwise, of fifty-one percent (51%) or more at one time of the ownership or

controlling interest in the System, or cumulatively fifty-one percent (51%), or more, over the term of a Certificate of Registration of such interests to a corporation, partnership, limited partnership, trust, or association, or person or group of persons acting in concert.

51. *Trenchless Technology* means, but shall not be limited to, the use of directional boring, horizontal drilling, microtunneling and other techniques in the Construction of underground portions of Facilities which result in the least amount of disruption and damage to Rights of Way as possible.

52. *Underground Facilities* means all lines, cables, conduits, pipes, posts, tanks, vaults, wires and any other Facilities which are located wholly or partially underneath Rights of Way.

53. *Unused Facilities* means Facilities located in the Rights of Way which have remained unused for a period of twelve (12) months and for which the Provider is unable to: (i.) provide the City with a Credible plan detailing the procedure by which the Provider intends to begin actively using such Facilities within the next twelve (12) months; or (ii.) that it has a potential purchaser or user of the Facilities who will be actively using the Facilities within the next twelve (12) months; or (iii.) that the availability of such Facilities is required by the Provider to adequately and efficiently operate its System.

54. *Utility(ies)* means any water, sewer, gas, drainage, sprinkler, or culvert pipe and any electric power, telecommunication, signal, communication, or cable television conduit, fiber, wire, trackless trolley wires, cable, or operator thereof.

55. *Working Day* means any Monday, Tuesday, Wednesday, Thursday, or Friday excluding legal holidays observed by the City. *Business Day* shall have the same meaning as Working Day.

## **SECTION 901.102 - RIGHTS OF WAY ADMINISTRATION**

901.102.1 ADMINISTRATION. The City Manager shall be the principal City official responsible for the administration of this Chapter except as otherwise provided herein. The City Manager may delegate any or all of the duties hereunder to the Director of Public Service or other designee.

901.102.2 RIGHTS OF WAY OCCUPANCY. Each Person who occupies, uses, or seeks to occupy or use the Rights of Way to operate a System located in the Rights of Way, or who has or seeks to have, a System located in any Rights of Way, shall apply for and obtain a Certificate of Registration pursuant to this Chapter. Any Person owning, operating or maintaining a System without a Certificate of Registration,

including Persons operating under a Permit, license or franchise issued by the City prior to the effective date of this Chapter, shall apply for and obtain a Certificate of Registration from the City within ninety (90) days of May 1, 2000 unless exempted by Section 901.102.4. Applications will consist of providing the application information set forth in Section 901.106 et seq. and as reasonably required by the Director of Public Service.

901.102.3 NO CONSTRUCTION WITHOUT CERTIFICATE OF REGISTRATION. Following the effective date of this Chapter, no Person shall Construct or perform any work on or in, or use any System or any part thereof located on or in, any Rights of Way without first obtaining a Certificate of Registration. For the purposes of this Section only, a Person with a System in place at the time of the effective date of this Chapter shall not be considered immediately in violation of this Section, but shall have up to six (6) months from the effective date of this Chapter to obtain a Certificate of Registration. Whoever violates this section is guilty of a misdemeanor of the second degree.

901.102.4 EXCEPTIONS. The following entities are not obligated to obtain a Certificate of Registration: the City; the County; cable television operators for the limited purpose of providing only cable television service and operating pursuant to a valid cable television franchise; resellers of Services that do not own any System or Facilities in the Rights of Way; Miami Valley Regional Transit Authority (RTA) for purposes of public transportation.

901.102.5 SYSTEMS IN PLACE WITHOUT A CERTIFICATE OF REGISTRATION. Beginning one year after the effective date of this Chapter, any System or part of a System found in a Rights of Way for which a Certificate of Registration has not been obtained shall be deemed to be a nuisance and an unauthorized use of the Rights of Way. The City may exercise any remedies or rights it has, including, but not limited to abating the nuisance; taking possession of the Facilities and/or non-complying portion of such System; and/or prosecuting the violator.

901.102.6 FUTURE USES. In allowing Facilities to be placed in the Rights of Way, the City is not liable for any damages caused thereby to any Provider's Facilities that are already in place. No Provider is entitled to rely on the provisions of this Chapter as creating a special duty to any Provider.

## **SECTION 901.103 - DISCONTINUANCE OF OPERATIONS, ABANDONED AND UNUSED FACILITIES**

901.103.1 A Provider who has discontinued or is discontinuing operation of any System in the City shall:

1. provide information satisfactory to the City that the Provider's obligations for its System in the Rights of Way under this chapter and any other chapters in the Codified Ordinances or other Laws have been lawfully assumed by another Applicant and/or Provider; or
2. submit a written proposal to re-use its Facilities in a manner that promotes the City's goals of providing innovative and economic solutions to efficiently and economically utilize a potentially limited Rights of Way capacity. Said proposal must be approved by the Director of Public Service; or
3. submit a written proposal for abandonment of Facilities in place indicating why good engineering practice would support this type of solution. Said proposal must be approved by the Director of Public Service; or
4. completely remove its entire System within a reasonable amount of time and in a manner acceptable to the City; or
5. submit to the City, in good faith and within a reasonable amount of time, and in accordance with O.R.C. Sections 4905.20 and 4905.21, a proposal for transferring ownership of its Facilities to the City. If a Provider proceeds under this clause, the City may, at its option:
  - a. purchase the Facilities; or
  - b. unless a valid Removal Bond has already been provided pursuant to 901.121.2, require the Provider to post a bond in an amount sufficient to reimburse the City for its reasonably anticipated costs to be incurred in removing the Facilities.

901.103.2 Facilities of a Provider who fails to comply with this Section and which remain Unused Facilities shall be deemed to be abandoned. Abandoned Facilities are deemed to be a nuisance. The City may exercise any remedies or rights it has at Law or in equity, including, but not limited to: abating the nuisance; or taking possession of the Facilities and restoring them to a useable condition subject to the finding of the PUCO pursuant to the requirements of O.R.C. Sections 4905.20 and 4905.21; or requiring removal of the Facilities by the Provider or by the Provider's surety. If the City determines to require a Provider to remove Unused Facilities in any Rights of Way, the City shall use reasonable efforts to direct that this removal occur in conjunction with other scheduled excavation of the Rights of Way. If the City abates the nuisance it may take all action necessary to recover its costs to abate said nuisance, including but not limited to, those methods set forth in O.R.C. Section 715.261.

**SECTION 901.104 - NATURE OF ISSUANCE**

A Certificate of Registration shall not convey equitable or legal title in the Rights of Way. A Certificate of Registration is only the nonexclusive, limited right to occupy Rights of Way in the City for the limited purposes and for the limited period stated in the Certificate of Registration and in accordance with Codified Ordinances Chapter 901 and any associated Permit. For those Providers with a valid gas or electric franchise, the provisions of a Certificate of Registration shall be deemed as regulatory in nature and shall not be interpreted to limit the right to occupy the Rights of Way which may have been granted by such franchise. The rights to occupy the Right of Way itself may not be subdivided or subleased; provided, however, that two or more Providers may collocate Facilities in the same area of the Rights of Way so long as each such Provider complies with the provisions of this Chapter. Collocating Providers may file a joint application for a Construction Permit. A Certificate of Registration does not excuse a Provider from obtaining appropriate access or pole attachment agreements before collocating its Facilities on Facilities of others, including the City's Facilities. A Certificate of Registration does not prevent a Provider from leasing space in or on the Provider's System, so long as the sharing of Facilities does not cause a violation of Law, including the provisions of this Chapter. A Certificate of Registration does not excuse a Provider from complying with any provisions of this Chapter and other applicable Law.

**SECTION 901.105 - OTHER APPROVALS, PERMITS AND AGREEMENTS**

In addition to a Certificate of Registration, Providers shall obtain any and all regulatory approvals, permits, authorizations, or licenses necessary for the offering or provision of such Services from the appropriate federal, state and local authorities and upon the City's reasonable request, shall provide copies of such documents to the City. Further, a Certificate of Registration issued pursuant to this Chapter shall not entitle a Provider to use, alter, convert to, or interfere with, the Facilities, easements, poles, conduits, lines, pipelines, wires, fiber, cable, or any other real or personal property of any kind whatsoever under the management or control of the City.

**SECTION 901.106 - CERTIFICATE OF REGISTRATION APPLICATIONS**

901.106.1 CERTIFICATE OF REGISTRATION APPLICATIONS. To obtain a Certificate of Registration or to obtain a renewal of a Certificate of Registration issued pursuant to this Chapter, an Application must be filed with the City on the form adopted by the Department of Public Service which is hereby incorporated by reference. All Applications shall be accompanied by a Five Hundred Dollar (\$500.00) Application fee which will pay for internal processing and administrative costs associated with the Application process.

901.106.2 APPLICATION INFORMATION. The Applicant shall keep all of the information required in this Section current at all times, provided that Applicant or

Provider shall notify the City of any changes to the information required by § 901.106.2.2 within fifteen (15) days following the date on which the Applicant or Provider has knowledge of any such change and shall notify the City of any changes to other information required by § 901.106.2 within thirty (30) days following the date on which the Applicant or Provider has knowledge of such change. The information provided to the City at the time of Application shall include, but not be limited to:

1. Each Applicant's name, legal status (i.e. partnership, corporation, etc.), street address, and telephone and facsimile numbers.
2. The name, street address, and telephone and facsimile numbers of a System Representative. The System Representative shall be available at all times. Current information regarding how to contact the System Representative in an Emergency shall be provided at the time of Application and shall be updated as necessary to assure accurate contact information is available to the City at all times.
3. A certificate of insurance provided to meet the requirements of this Section shall:
  - a. Verify that an insurance policy has been issued to the Applicant by an insurance company licensed to do business in the State of Ohio;
  - b. Verify that the Applicant is insured on an occurrence basis against claims for personal injury, including death, as well as claims for property damage arising out of the: use and occupancy of the Rights of Way by the Applicant, its officers, agents, employees and contractors; and placement and use of Facilities in the Rights of Way by the Applicant, its officers, agents, employees and contractors, including, but not limited to, protection against liability arising from any and all operations, damage of Underground Facilities, explosion, environmental release, and collapse of property;
  - c. Name the City, its elected officials, officers, employees, agents and volunteers as additional insureds as to whom the comprehensive general liability and completed operation and products liability insurance required herein are in force and applicable and for whom defense will be provided as to all such coverages;
  - d. Require that the City be notified thirty (30) days in advance of cancellation of, or coverage changes in, the policy. The liability insurance policies required by this Section shall contain the following endorsement: "It is hereby understood and agreed that this

policy may not be diminished in value, be canceled, nor the intention not to renew be stated, until thirty (30) days after receipt by the City, by registered mail, return receipt requested, of a written notice addressed to the City Manager or her/his designee of such intent to cancel, diminish, or not to renew." Within thirty (30) days after receipt by the City of said notice, and in no event later than five (5) days prior to said cancellation, the Provider (or Applicant) shall obtain and provide to the City Manager a certificate of insurance evidencing appropriate replacement insurance policies.

4. Satisfy the requirements for comprehensive liability coverage, automobile liability coverage and umbrella coverage as follows:

a. Comprehensive general liability insurance: Comprehensive general liability insurance to cover liability, bodily injury, and property damage must be maintained. Coverage must be written on an occurrence basis, with the following minimum limits of liability and provisions, or their equivalent:

- i. Bodily injury  
Each occurrence: One Million Dollars (\$ 1,000,000)  
Annual aggregate: Three Million Dollars (\$3,000,000)
- ii. Property damage  
Each occurrence: One Million Dollars (\$1,000,000)  
Annual aggregate: Three Million Dollars (\$3,000,000)
- iii. Personal Injury  
Annual aggregate: Three Million Dollars (\$3,000,000)

b. Completed operations and products liability shall be maintained for six (6) months after the termination of or expiration of a Certificate of Registration.

c. Property damage liability insurance shall include coverage for the following hazards: E - explosion, C - collapse, U - underground.

5. Comprehensive auto liability insurance: Comprehensive auto liability insurance to cover owned, hired, and non-owned vehicles must be maintained. Applicant may maintain comprehensive auto liability insurance as part of Applicant's comprehensive general liability insurance, however, said insurance is subject to approval by the City Manager or her or his designee. Coverage

must be written on an occurrence basis, with the following limits of liability and provisions, or their equivalent:

- a. Bodily injury  
Each occurrence: One Million Dollars (\$1,000,000)  
Annual aggregate: Three Million Dollars (\$3,000,000)
- b. Property damage  
Each occurrence: One Million Dollars (\$ 1,000,000)  
Annual aggregate: Three Million Dollars (\$3,000,000)

6. Additional insurance: The City reserves the right in unusual or unique circumstances to require any other insurance coverage it deems reasonably necessary after review of any proposal submitted by Applicant.

7. Self-insurance: Those Applicants maintaining at all times a book value in excess of Twenty Million Dollars (\$20,000,000) may submit a statement requesting to self-insure. If approval to self-insure is granted, Applicant shall assure the City that such self-insurance shall provide the City with no less than would have been afforded to the City by a third party insurer providing Applicant with the types and amounts of coverage detailed in this Section. This statement shall include:

- a. Audited financial statements for the previous year; and,
- b. A description of the Applicant's self-insurance program.
- c. A Listing of any and all actions against or claims made against Applicant for amounts over One Million Dollars (\$1,000,000) or proof of available excess umbrella liability coverage to satisfy all total current claim amounts above Twenty Million Dollars (\$20,000,000).

8. City's examination of, or failure to request or demand, any evidence of insurance in accordance with this Chapter, shall not constitute a waiver of any requirement of this Section and the existence of any insurance shall not limit Applicant's obligations under this Chapter.

9. Documentation that Applicant or Provider maintains standard workers' compensation insurance as required by Law. Similarly, Provider shall require any subcontractor to provide workers' compensation insurance in amounts required by Law for all of the subcontractor's employees.

10. If the Person is a corporation, a copy of the certificate of incorporation (or its legal equivalent), as recorded and certified to by the



secretary of state (or legal equivalent) in the state or country in which incorporated.

11. A copy of the Person's certificate of authority (or other acceptable evidence of authority to operate) from the PUCO and/or the FCC and any other approvals, permits, or agreements as set out in Section 901.105.

12. Upon request of the City, a narrative (or if applicable PUCO/FCC application information) describing applicant's proposed activities in the City including Credible information detailing Applicant's financial, managerial, and technical ability to fulfill Applicant's obligations under this chapter and carry on Applicant's proposed activities.

**901.106.3 CRITERIA FOR ISSUANCE OF A CERTIFICATE OF REGISTRATION.** In deciding whether to issue a Certificate of Registration, the City shall consider:

1. Whether the issuing of the Certificate of Registration will contribute to the health, safety, and welfare of the City and its citizens.

2. Whether issuing of the Certificate of Registration will be consistent with this Chapter.

3. Whether Applicant has submitted a complete Application and has secured all certificates and other authorizations required by Law in order to Construct and operate a System in the manner proposed by the Applicant;

4. Whether the Applicant is delinquent on any taxes or other obligations owed to the City or Montgomery County or State of Ohio;

5. Whether the Applicant has the requisite financial, managerial, and technical ability to fulfill all its obligations under this Ordinance and the issuance of a Certificate of Registration; and

6. Any other applicable Law.

## **SECTION 901.107 - REPORTING REQUIREMENTS**

**901.107.1 REPORTING OBLIGATIONS OF PROVIDERS.** At the time of initial Application and by January 1st of each following year, each Provider shall file a Construction and Major Maintenance Plan with the Department of Public Service. Such Construction and Major Maintenance Plan shall be provided for all geographical areas requested by the Director of Public Service, up to and including the entire geographical area of City. It shall be submitted using a format(s) mutually agreeable to the Provider

and the City and shall contain the information determined by the Director of Public Service to be necessary to facilitate the coordination and reduction in the frequency of Construction in the Rights of Way. The Construction and Major Maintenance Plan shall include, using the Provider's best efforts, but not be limited to, all currently scheduled and/or anticipated Construction or Major Maintenance projects for the next calendar year; if none are scheduled or anticipated then the Plan should so state.

901.107.2 MAPPING DATA.

1. Upon Application for a Certificate of Registration, or within ninety (90) days after initial application, a Provider shall provide the City with information regarding the location of its Facilities in the Rights of Way in the most advanced mapping format and in as much detail as currently available to the Provider. Following that initial provision of information and upon the reasonable request of the Director of Public Service, which request shall not occur more than once annually, every Provider shall provide to the City, in the most advanced mapping format and in as much detail as currently available to the Provider, all location information for all Facilities which it owns or over which it has control and which are located in any Rights of Way. All such information as described above shall be provided for the geographical area (up to and including the entire geographic area of the City) as requested by the Director of Public Service, with the specificity then currently available to the Provider, and in a format(s) mutually acceptable to the Provider and the City.

2. The Director of Public Service shall in the future adopt specifications and further define the mapping data requirement(s) under this Section. In each instance a Provider shall be served with a copy of the specifications by regular U.S. Mail to the company representative identified in 901.106.2.2 and in accordance with Section 901.123.4; provided, however, that failure to actually receive such notice shall not in any way affect the validity or enforceability of said specifications.

**SECTION 901.108 - COMPENSATION FOR CERTIFICATE OF REGISTRATION**

901.108.1 COMPENSATION. As compensation for the City's costs to administer this Chapter and the Rights of Way and for each Certificate of Registration issued pursuant to this Chapter, every Provider or any Person operating a System shall pay to the City Registration Maintenance Fees determined as follows:

1. Providers utilizing equal to or greater than twenty (20) miles of Right-of-Way within the City shall pay a fee of Two Thousand Dollars per year.
2. Providers utilizing less than twenty (20) miles of Right of Way within the City shall pay a fee of One Thousand Dollars per year.

3. Cable companies to the extent they are providing only cable television services and are operating under non-exclusive franchises for the provision of cable television services and compensating the City under other mechanisms shall not be required to contribute to the recovery of Rights of Way Costs as defined by this Chapter with the exception of Permit costs.

901.108.2 TIMING. Registration Maintenance Fees shall be paid in advance by January 1st of each calendar year. Registration Maintenance Fees shall be paid in full for the first year of the Registration as a condition of the Certificate of Registration becoming effective. Fees may be prorated from the effective date of the Certificate of Registration to the end of the calendar year if less than one (1) full year. Payment of any and all Registration Maintenance Fees shall be waived until January 1, 2001.

901.108.3 TAXES AND ASSESSMENTS. To the extent taxes or other assessments are imposed by taxing authorities on the use of City property as a result of a Provider's use or occupation of the Rights of Way, the Provider shall be responsible for payment of such taxes. Such payments shall be in addition to any other fees payable pursuant to this Chapter and shall not be considered an offset to, or in lieu of, the fees and charges listed in this Chapter. The Registration Maintenance Fee is not in lieu of any tax, fee, or other assessment except as specifically provided in this Chapter, or as required by applicable Law. By way of example, and not limitation, Permit Fees and fees to obtain space on City-owned poles are not waived and remain applicable.

901.108.4 INTEREST ON LATE PAYMENTS. In the event that any Registration Maintenance Fee is not paid to the City by January 31, a monthly late charge of one percent (1 %) of the unpaid balance shall be paid by the Provider for each month or any portion thereof for which payment is not made.

901.108.5 NO ACCORD AND SATISFACTION. No acceptance by the City of any Registration Maintenance Fee shall be construed as an accord that the amount paid is in fact the correct amount, nor shall such acceptance of such Registration Maintenance Fee payment be construed as a release of any claim the City may have for additional sums payable.

901.108.6 COSTS OF PUBLICATION. A Provider shall assume publication costs of up to One Hundred Dollars (\$100.00) associated with its Certificate of Registration that may be required by Law.

## **SECTION 901.109 - OVERSIGHT AND REGULATION**

901.109.1 REPORTS. Upon reasonable request of the Director of Public Service, a Provider shall provide the City with a list of any and all material communications, public reports, petitions, or other filings, either received from or submitted to any

municipal, county, state or federal agency or official (and any response thereto submitted by or received by a Provider), and any other information or report reasonably related to a Provider's obligations under this Chapter which in any way materially effects the operation of the System or a Provider's representations and warranties set forth herein, but not including tax returns or other filings which are confidential. Upon request, a Provider shall promptly, but in no case later than fifteen (15) business days following the request, deliver to the City a complete copy of any item on said list. Upon the request of the City, a Provider shall promptly submit to the City any information or report reasonably related to a Provider's obligations under this Chapter, its business and operations with respect to the System or its operation, in such form and containing such information as the City shall specify. Such information or report shall be accurate and complete and supplied within fifteen (15) days.

901.109.2 CONFIDENTIALITY. All information submitted to the City that is considered trade secret and/or proprietary information must be clearly marked as such when submitted. The City shall exercise all reasonable protection so as not to publicly disclose to any third party proprietary information unless required by Law.

901.109.3 PROVIDER'S EXPENSE. All reports and records required under this Chapter shall be furnished at the sole expense of a Provider, except as otherwise provided in this Chapter.

901.109.4 RIGHT OF INSPECTION AND AUDIT. The City's designated representatives shall have the right to inspect, examine, or audit during normal business hours and upon reasonable notice to a Provider under the circumstances, all documents, records, or other information which pertain to a Provider and its operation of a System or its obligation under this ordinance. All such documents shall be made available within the City or in such other place that the City may agree upon in writing in order to facilitate said inspection, examination, or audit provided, however, that if such documents are located outside of the City, then a Provider shall pay the reasonable expenses incurred by the City's designated representatives in traveling to such location. Provider shall also reimburse the City for at least fifty percent (50%) of the total cost incurred by the City for utilizing a third party to assist with or conduct an investigation or audit.

## **SECTION 901.110 – REGISTRATION TERM**

The term of each Certificate of Registration granted or any renewal thereof under this Chapter shall be for five (5) years.

## **SECTION 901.111 - INDEMNITY**

Each Certificate of Registration issued under this Chapter shall be under the conditions and contain provisions whereby Providers agree to defend, indemnify and hold City and its agents,

officers, elected officials, employees, volunteers, and contractors harmless from and against all damages, costs, losses, or expenses: (i) for the repair, replacement, or restoration of City's property, equipment, materials, structures and Facilities which are damaged, destroyed, or found to be defective as a result of such Provider's acts or omissions; and (ii) from and against any and all claims, demands, suits, causes of action, and judgments for: (a) damage to or loss of the property of any Person (including, but not limited to such Provider, its agents, officers, employees and subcontractors, City's agents, officers, elected officials, employees, volunteers, contractors and third parties); and/or (b) death, bodily injury, illness, disease, worker's compensation, loss of Services, or loss of income or wages to any Person (including but not limited to the agents, officers and employees of such Provider, Provider's subcontractors, the City, and third parties), arising out of, incident to, concerning or resulting from the act or omissions of such Provider, its agents, employees, and/or subcontractors, in the performance of activities pursuant to such Certificate of Registration, no matter how, or to whom, such loss may occur. In any event, all persons using or occupying the Rights of Way agree to defend, indemnify, and hold the City harmless as set forth above as a condition of their use or occupancy of the Rights of Way. Excepting negligent acts or omissions that are willful and wanton or intentional torts and for which immunity is not provided by the O.R.C. for such acts, omissions, or intentional torts. This exception shall not extend to acts, omissions, or intentional torts occurring as a result of or in response to an Emergency.

#### **SECTION 901.112 - LIQUIDATED DAMAGES**

In addition to any other penalties set forth in this Chapter, and the remedy of specific performance which may be enforced in a court of competent jurisdiction, the Director of Public Service may assess an additional penalty of civil forfeiture for failure to comply with any provision of this Chapter. Said penalty shall be a monetary sum, payable to the City, in the amount of Five Hundred Dollars (\$500.00) per twenty-four (24) hour day of violation and any subsequent portion of a day less than twenty four (24) hours in length. Prior to assessing said penalty, the Director of Public Service shall provide written notice to the Provider detailing the failure to comply with a specific provision of this Chapter. Said notice shall indicate that said penalty shall be assessed in fifteen (15) calendar days after service of the notice if compliance is not achieved. If a Provider desires to challenge said penalty, Provider shall request a hearing before the City Manager within ten (10) days of service of the notice. Said hearing shall be held within thirty (30) days of the Provider's request. If Provider requests such hearing before the City Manager, said penalty shall be temporarily suspended. However, if, after the hearing, the City Manager determines that Provider failed to comply with the specific provision of this Chapter referenced in the notice, said penalty shall be assessed starting fifteen (15) calendar days after service of the notice referenced in this Section and continuing for each day thereafter until compliance is achieved. The determination of the City Manager shall be final.

#### **SECTION 901.113 - TERMINATION OF CERTIFICATE OF REGISTRATION**

901.113.1 The Director of Public Service shall give written notice of default to a Provider if it is determined that a Provider has:

1. Violated any material provision or requirement of the issuance or acceptance of a Certificate of Registration or any Law of the City, state, or federal government; or
2. Attempted to evade any provision or requirement of the issuance of a Certificate of Registration or the acceptance of it; or
3. Practiced any fraud or deceit upon the City; or
4. Made a material misrepresentation of fact in its Application for a Certificate of Registration.

901.113.2 If a Provider fails to cure a default within thirty (30) calendar days after such notice is served by the City then such default shall be a material breach and City may exercise any remedies or rights it has at Law or in equity to terminate the Certificate of Registration. If the Director of Public Service decides there is cause or reason to terminate, the following procedure shall be followed:

1. City shall serve a Provider with a written notice of the reason or cause for proposed termination and shall allow a Provider a minimum of ten (10) calendar days to cure its breach.
2. If the Provider fails to cure within ten (10) calendar days, the Director of Public Service may declare the Certificate of Registration terminated.
3. The Provider shall have ten (10) calendar days to appeal the termination to the City Manager. All such appeals shall be in writing. If the City Manager determines there was not a breach, then the City Manager shall overturn the decision of the Director of Public Service. Otherwise, the City Manager shall affirm the decision of the Director of Public Service to terminate. The determination of the City Manager shall be final.

#### **SECTION 901.114 - UNAUTHORIZED USE OF PUBLIC RIGHTS OF WAY**

901.114.1 No Person Shall use the Rights of Way to operate a System that has not been authorized by the City in accordance with the terms of this Chapter and been issued a Certificate of Registration.

901.114.2 No Provider shall place or have placed any Facilities in, on, above, within, over, below, under, or through the Rights of Way, unless allowed under this Chapter or having been issued a Certificate of Registration.

901.114.3 Each and every unauthorized use shall be deemed to be a violation and a distinct and separate offense. Each and every day any violation of this Chapter continues shall constitute a distinct and separate offense.

901.114.4 No Person shall fail to comply with the provisions of this Chapter. Each and every failure to comply shall be deemed a distinct and separate offense. Each and every day any violation of this Chapter continues shall constitute a distinct and separate offense.

901.114.5 Whoever violates any of the provisions of this Chapter shall be guilty of a second degree misdemeanor. Lack of intent shall not be a defense.

#### **SECTION 901.115 - PEG REQUIREMENTS FOR OPEN VIDEO SYSTEMS**

Any Provider that receives a certificate from the FCC to provide Open Video Services in the City shall notify the City of such certification. Any Provider that operates an Open Video System shall comply with all applicable Laws and FCC Rules and Regulations including those regarding support for public, educational, and governmental access ("PEG").

#### **SECTION 901.116 - TRANSFER OF OWNERSHIP AND RENEWAL**

901.116.1 TRANSFER APPROVAL REQUIRED. A Certificate of Registration shall not be assigned or transferred, either in whole or in part, without requesting, through the City Manager, the consent of the City. Any request for assignment or transfer shall include a completed copy of any application documents required by the PUCO or FCC for such an assignment or transfer. If the City should object to such assignment or transfer, it shall serve the Provider with notice of the objection within thirty (30) days following receipt of the Provider's request. If no objection is served upon the Provider within thirty (30) days of the City's receipt of the initial assignment or transfer request, the City shall be deemed to have consented to the requested assignment or transfer by operation of Law.

901.116.2 CERTIFICATE OF REGISTRATION AND ASSIGNEE/ TRANSFEREE SIGNATURE REQUIRED. In no event shall a transfer or assignment of ownership or control be ultimately acceptable to the City without transferee or assignee requesting and being issued a replacement Certificate of Registration with ninety (90) days of transfer or assignment.

901.116.3 RENEWAL OF CERTIFICATE OF REGISTRATION. A Provider shall request renewal of a Certificate of Registration in writing at least six (6) months prior to the expiration of its term but not more than twelve (12) months prior to expiration. A Provider shall furnish information as required under Section 901.06.

Unless otherwise extended by the City, the City shall act on the request before the expiration of the Certificate of Registration.

## **SECTION 901.117 – CONSTRUCTION PERMITS**

901.117.1 CONSTRUCTION PERMIT REQUIREMENT. Except as otherwise provided in the Codified Ordinances, no Person may Construct in any Rights of Way without first having obtained a Construction Permit as set forth in this Chapter. This requirement shall be in addition to any requirement set forth in Codified Ordinances Chapter 909 et seq.

1. A Construction Permit allows the Permittee to Construct in the specified portion of the Rights of Way as described in the Construction Permit while placing Facilities described therein, to the extent and for the duration specified therein. The Construction Permit allows the Permittee, if necessary, to obstruct travel in the Rights of Way, pursuant to City approved traffic control measures and as may be specified in the Permit.

2. Unless otherwise approved in writing by the Director of Public Service, a Construction Permit is valid for six (6) months from date of issuance for the area of Rights of Way specified in the Permit.

3. No Permittee may Construct in the Rights of Way beyond the date or dates specified in the Construction Permit unless such Permittee:

(a) makes a Supplementary Application for another Construction Permit before the expiration of the initial Construction Permit; and

(b) is granted a new Construction Permit or Construction Permit extension.

4. Original Construction Permits issued under this Chapter shall, when possible, be conspicuously displayed at all times at the indicated work site and be available for inspection by Inspectors and authorized City personnel. If the original Construction Permit is not conspicuously displayed at the indicated work site or the project involves work conducted simultaneously at multiple locations, then upon request, the Construction Permit must be produced within twelve (12) hours or the first earliest Business Hour, whichever is later. For purposes of this Chapter, Business Hour shall mean the hours between 8 a.m. and 5 p.m. during a Business Day.

901.117.2 CONSTRUCTION PERMIT APPLICATIONS. Application for a Construction Permit shall be made to the Director of the Department of Public Service.



In addition to any information required by the Director of Public Service, all Construction Permit Applications shall contain, and will only be considered complete upon compliance with the following provisions:

1. Credible evidence that the Applicant has been issued a Certificate of Registration or proof that the Applicant has written authority to apply for a Construction Permit on behalf of a party that has a then valid Certificate of Registration;

2. Submission of a completed Construction Permit Application in the form required by the Director of Public Service, including, but not limited to, all required attachments, and scaled, dated drawings showing the location and area of the proposed project, number and location of street cuts, and the location of all existing and proposed Facilities, accompanied by the certification of a registered professional engineer, or other trained technical personnel acceptable to the Director of Public Service, that the drawings, plans and specifications submitted with the Application comply with applicable technical codes, rules and regulations.

3. A City approved traffic control plan demonstrating the protective measures and devices that will be employed, consistent with the Ohio Manual of Uniform Traffic Control Devices, to prevent injury or damage to Persons or property and to minimize disruptions to efficient pedestrian and vehicular traffic.

4. If Applicant is proposing an above ground installation on existing poles within the Rights of Way, the applicant shall provide Credible information satisfactory to the City to sufficiently detail and identify:

a. the size and height of the existing poles; and

b. based on the facilities currently on the existing poles, the excess capacity currently available on such poles before installation of Applicant's Facilities; and

c. based on the facilities currently on the existing poles, the excess capacity for like or similar Facilities that will exist on such poles after installation of Applicant's Facilities; and

5. If the Applicant proposes to install new poles within the Rights of Way, the Applicant shall provide:

- a. Credible evidence satisfactory to the City that there is no excess capacity on existing poles or in existing underground systems; and
- b. Credible evidence that it is not financially and/or technically practicable for the Applicant to make an underground installation or locate its facilities on existing poles; and
- c. the location, size, height, color, and material of the proposed poles; and
- d. Credible evidence satisfactory to the City that the Applicant will adhere to all the applicable Laws concerning the installation of new poles.

6. If Applicant is proposing an underground installation in existing ducts or conduits within the Rights of Way, the Applicant shall provide Credible information satisfactory to the City to sufficiently detail and identify:

- a. based on the existing facilities, the excess capacity for like or similar facilities currently available in such ducts or conduits before installation of Applicant's Facilities; and
- b. based on existing facilities, the excess capacity for like or similar facilities that will exist in such ducts or conduits after installation of Applicant's Facilities.

7. If Applicant is proposing an underground installation within new ducts or conduits to be constructed within the Rights of Way, the Applicant must provide Credible information satisfactory to the City to sufficiently detail and identify:

- a. the location, depth, size, and quantity of proposed new ducts or conduits; and
- b. the excess capacity for like or similar equipment that will exist in such ducts or conduits after installation of Applicant's Facilities.

8. A preliminary Construction schedule and completion date.

9. Payment of all money due to the City for:

- a. Permit fees;

b. any loss, damage, or expense suffered by the City as a result of Applicant's prior Construction in the Rights of Way or any Emergency actions taken by the City; and

c. any Certificate of Registration issued to the Applicant/Person whose Facilities are being Constructed; and

d. any other money due to the City from the Applicant/Person whose Facilities are being Constructed.

10. When a Construction Permit is requested for purposes of installing additional Systems or any part of a System, the posting of a Construction Bond and Removal Bond, acceptable to the City and subject to Section 901.121 of this Chapter for the additional Systems or any part of a System is required.

#### 901.117.3 ISSUANCE OF CONSTRUCTION PERMIT; CONDITIONS.

1. If the Director of Public Service determines that the Applicant has satisfied the requirements of this Chapter and the Construction Permit process, the Director of Public Service shall issue a Construction Permit subject to the provisions of this Chapter.

2. The City may impose reasonable conditions upon the issuance of the Construction Permit and the performance of the Permittee thereunder in order to protect the public health, safety and welfare, to insure the structural integrity of the Rights of Way, to protect the property and safety of other users of the Rights of Way, and to minimize the disruption and inconvenience to the traveling public.

901.117.4 CONSTRUCTION PERMIT FEES. The Director of Public Service shall develop and maintain a schedule of Permit Fees based on fair and reasonable criteria. The Director of Public Service shall conduct a study of degradation to and reduction in the useful life of the Rights of Way resulting from Construction. After such study is completed and after providing notice to Providers with a valid Certificate of Registration, the Director of Public Service may include in the schedule of Permit Fees an amount sufficient to recover the degradation and reduction in the useful life of the Rights of Way that will result from the Construction to take place thereon. "Degradation and the reduction in the useful life" for the purpose of this Section means the accelerated depreciation of the Rights of Way caused by Construction in or disturbance of the Rights of Way, resulting in the need to reconstruct or repair such Rights of Way earlier than would be required if the Construction did not occur. No Construction Permit shall be issued without payment of Construction Permit Fees except to the City, County, or RTA which shall be exempt. Construction Permit Fees that were paid for a Permit that the City has revoked due to breach are not refundable.

901.117.5 JOINT APPLICATIONS. Applicants are encouraged to make joint Application for Construction Permits to work in the Rights of Way at the same place and time. Joint Applicants shall have the ability to divide amongst themselves, in proportions the parties find appropriate, any applicable Construction Permit Fees.

## **SECTION 901.118 - CONSTRUCTION, RELOCATION AND RESTORATION**

901.118.1 TECHNICAL INFORMATION REQUIRED. Prior to commencement of any initial Construction of Facilities in the Rights of Way, except for repair, maintenance or replacement with like Facilities only, a Construction Permittee shall provide technical information about the proposed route of Construction. The technical information required shall consist of, at minimum, completion of the following tasks:

1. Secure all available "as-built" plans, plats, and other location data indicating the existence and approximate location of all Facilities along the proposed Construction route.
2. Visibly survey and record the location and dimensions of any Facilities along the proposed Construction route, including, but not limited to, manholes, valve boxes, utility boxes, posts, and visible street cut repairs.
3. Determine and record the presence and precise location of all Underground Facilities the Applicant or Person on whose behalf the Permit was applied for owns or controls in the Rights of Way along the proposed System route. Upon request of the Director of Public Service, a Permittee shall also record and identify the general location of all other Facilities in the Rights of Way along the proposed System route. For the purposes of this Section, general location shall mean the alignment of other Facilities in the Rights of Way, but shall not necessarily mean the depth of other Facilities in the Rights of Way.
4. Plot and incorporate the data obtained from completion of the tasks described in this section on the Permittee's proposed System route maps, Construction plans, plan sheets, and computer aided drafting and design (CADD) files, or other data files in a mutually agreeable format compatible with that used by the City.
5. Where the proposed location of Facilities and the location of existing Underground Facilities appear to conflict with the plans as drafted, Construction Permittee has the option of either utilizing non-destructive digging methods, such as vacuum excavation, at the critical points identified to determine as precisely as possible, the horizontal, vertical and spatial position, composition, size and other specifications of the conflicting Underground Facilities, or re-designing the Construction plans to eliminate the apparent

conflict. A Construction Permittee shall not excavate more than a three (3) foot by three (3) foot square hole in the Rights of Way in order to make this determination to complete this task.

6. Plot, incorporate, and reconcile the data obtained by completion of the tasks described in subsection 901.118.1.5 with the updated System route maps, Construction plans and CADD files or other data files in a mutually agreeable format as described in subsection 901.118.1.4.

7. Based on the data collected upon completion of the tasks described in this Section, adjust the proposed System design.

901.118.2 COPY TO CITY. Upon completion of the tasks described in Section 901.118.1, the Construction Permittee shall plot and incorporate the data on the Construction Permittee's proposed System route maps, Construction plans, plan sheets, and CADD files, or other data files in a mutually agreeable format and deliver a copy to the Department of Public Service.

901.118.3 QUALIFIED FIRM. All technical information gathered pursuant to this Section shall be performed by a firm specializing in utility engineering that is approved by the City or such studies may be performed by the Construction Permittee, at the discretion of the Director of Public Service, and if the Construction Permittee is qualified to complete the project itself.

901.118.4 COST OF SUPPLYING TECHNICAL INFORMATION. The Construction Permittee shall bear the cost of compliance with Sections 901.118.1 through 901.118.3 of this Chapter.

901.118.5 CONSTRUCTION SCHEDULE. Unless otherwise provided for in this Chapter, or unless the Director of Public Service waives any of the requirements of this Section due to unique or unusual circumstances, a Construction Permittee shall be required to: submit a written Construction schedule to the City ten (10) Working Days before commencing any work in or about the Rights of Way and, shall further notify the City not less than two (2) Working Days in advance of any excavation in the Rights of Way. This Section shall apply to all situations with the exception of circumstances under Section 901.119 (Minor Maintenance Situations) and Section 901.120.4.1 (Emergency Situations).

901.118.6 LOCATION OF FACILITIES.

1. The placement of new Facilities and replacement of old Facilities, either above ground or underground, shall be completed in conformity with applicable Laws.

2. The City shall have the power to prohibit or limit the placement of new or additional Facilities within the Rights of Way if the Right of Way is Full. In making such decisions, the City shall strive to the extent possible to accommodate all existing and potential users of the Rights of Way, but shall be guided primarily by considerations of the public health, safety, and welfare, the condition of the Rights of Way, the time of year with respect to essential Utilities, the protection of existing Facilities in the Rights of Way, future City and County plans for public improvements, development projects which have been determined to be in the public interest, and the non-discriminatory and competitively neutral treatment of providers.

3. Should it be determined by the City that any existing poles in the Rights of Way are Full, then those poles may be replaced with bigger and/or taller poles in order to accommodate additional Facilities or Systems but only after written permission has been received from the Director of Public Service and the Construction Permittee has made reasonable attempts to reach an acceptable solution without replacement with bigger and/or taller poles. This paragraph shall not apply to replacement of any existing pole(s) with identically sized pole(s) which results from the destruction of or hazardous condition of the existing pole(s) as long as no new Facilities or additional Facilities are attached.

901.118.7 LEAST DISRUPTIVE TECHNOLOGY. All Construction or maintenance of Facilities shall be accomplished in the manner resulting in the least amount of damage and disruption of the Rights of Way. In addition, all cable, wire or fiber optic cable installed in the subsurface Rights of Way under this Chapter may be required to be installed in conduit, and if so required, no cable, wire or fiber optic cable may be installed under this Chapter using "direct bury" techniques.

901.118.8 RELOCATION OF FACILITIES.

1. A Provider shall promptly and at its own expense, permanently remove and relocate its Facilities in the Rights of Way whenever the City finds it necessary to request such removal and relocation. In instances where the City requests removal and/or relocation, the City shall waive all applicable Construction Permit Fees. Upon removal and/or relocation, the Provider shall restore the Rights of Way to the same or better condition it was in prior to said removal or relocation. If existing poles are required to be removed and/or relocated, then the existing poles will be replaced with poles of the same or similar size unless waived in writing by the Director of Public Service. The Director of Public Service may request relocation and/or removal in order to prevent unreasonable interference by the Provider's Facilities with:

- a. A public improvement undertaken or approved by the City or County;

b. When the public health, safety, and welfare requires it, or when necessary to prevent interference with the safety and convenience of ordinary travel over the Rights of Way.

2. Notwithstanding the foregoing, a Provider who has Facilities in the Right of Way subject to a vacation or narrowing that is not required for the purposes of the City, shall have a permanent easement in such vacated portion or excess portion in conformity with O.R.C. §723.04.01.

3. If, in the reasonable judgment of the City, a Provider fails to commence the removal process and/or relocation of its Facilities as designated by the City, within thirty (30) days after the City's removal order is served upon Provider, or if a Provider fails to substantially complete such removal, including all associated repair of the Rights of Way of the City, within twelve (12) months thereafter, then, to the extent not inconsistent with applicable Law, the City shall have the right to:

a. Declare that all rights, title and interest to the Facilities belong to the City with all rights of ownership, including, but not limited to, the right to connect and use the Facilities or to effect a transfer of all right, title and interest in the Facilities to another Person for operation; or

b. Authorize removal of the Facilities installed by the Provider in, on, over or under the Rights of Way of the City at Provider's cost and expense, by another Person, however the City shall have no liability for any damage caused by such action and the Provider shall be liable to the City for all reasonable costs incurred by the City in such action; and

c. To the extent consistent with applicable Law, any portion of the Provider's Facilities in, on, over or under the Rights of Way of the City designated by the City for removal and not timely removed by the Provider shall belong to and become the property of the City without payment to the Provider, and the Provider shall execute and deliver such documents, as the City shall request, in form and substance acceptable to the City, to evidence such ownership by the City.

901.118.9 PRE-EXCAVATION FACILITIES LOCATION. Before the start date of any Rights of Way excavation, each Provider who has Facilities located in the area to be excavated shall be responsible to mark the horizontal and make every reasonable attempt to mark the approximate vertical placement of all its Facilities. All Providers shall notify and work closely with the excavation contractor in an effort to establish the exact location of its Facilities and the best procedure for excavation.

901.118.10 RIGHTS OF WAY RESTORATION.

1. The work to be done under the Permit, and the Restoration of the Rights of Way as required herein, must be completed within the dates specified in the Permit. In addition to its own work, the Permittee must restore the general area of the work, and the surrounding areas, including trench backfill, paving and its foundations in accordance with any applicable Laws and the standards established by the Director of Public Service, and must inspect the area of the work and use reasonable care to maintain the same condition for twelve (12) months thereafter.

2. In approving an Application for a Permit, the City may choose either to have the Permittee restore the Rights of Way or the City may restore the Rights of Way itself.

3. If the City chooses to allow Permittee to restore the Rights of Way, Construction Permittee shall at the time of Application of a Construction Permit post a Construction Bond in an amount determined by the City to be sufficient to cover the cost of restoring the Rights of Way to its pre-excavation condition. If, twelve (12) months after completion of the Restoration of the Rights of Way, the City determines that the Rights of Way have been properly restored, the surety on the Construction Bond shall be released.

4. The Permittee shall perform the work according to the standards and with the materials specified by the City. The City shall have the authority to prescribe the manner and extent of the Restoration, and may do so in written procedures of general application or on a case-by-case basis. The City in exercising this authority shall be guided by the following standards and considerations: the number, size, depth and duration of the excavations, disruptions or damage to the Rights of Way; the traffic volume carried by the Rights of Way; the character of the neighborhood surrounding the Rights of Way; the pre-excavation condition of the Rights of Way; the remaining life-expectancy of the Rights of Way effected by the excavation; whether the relative cost of the method of Restoration to the Permittee is in reasonable balance with the prevention of an accelerated depreciation of the Rights of Way that would otherwise result from the excavation, disturbance or damage to the Rights of Way; and the likelihood that the particular method of Restoration would be effective in slowing the depreciation of the Rights of Way that would otherwise take place. Methods of Restoration shall be according to the Rules, Regulations, and standards established by the Director of Public Service or any other Laws.

5. By restoring the Rights of Way itself, the Permittee guarantees its work and shall maintain it for twelve (12) months following its completion. During this twelve (12) month period, it shall, upon notification from the Department of Public Service, correct all Restoration work to the extent necessary using the method required



by the Department of Public Service. Weather permitting, said work shall be completed within five (5) Business Days of the receipt of the notice from the Department of Public Service.

6. If the Permittee fails to restore the Rights of Way in the manner and to the condition required by the City, or fails to satisfactorily and timely complete all repairs required by the City, the City, at its option, may do such work. In that event, the Permittee shall pay to the City, within thirty (30) days of billing, the cost of restoring the Rights of Way and any other costs incurred by the City. Upon Failure to pay, the City may call upon any bond or letter of credit posted by Permittee and/or pursue any and all legal and equitable remedies.

#### 901.118.11 DAMAGE TO OTHER FACILITIES.

1. In the case of an Emergency and, if possible, after reasonable efforts to contact the Provider seeking a timely response, when the City performs work in the Rights of Way and finds it necessary to maintain, support, or move a Provider's Facilities to protect those Facilities, the costs associated therewith will be billed to that Provider and shall be paid within thirty (30) days from the date of billing. Upon failure to pay, the City may pursue all legal and equitable remedies in the event a Provider does not pay or the City may call upon any bond or letter of credit posted by Permittee and pursue any and all legal or equitable remedies.

2. Each Provider shall be responsible for the cost of repairing any Facilities in the Rights of Way which it or its Facilities damage. Each Provider shall be responsible for the cost of repairing any damage to the Facilities of another Provider caused during the City's response to an Emergency caused by that Provider's Facilities.

901.118.12 RIGHTS OF WAY VACATION. If the City vacates a Rights of Way which contains the Facilities of a Provider, such vacation shall be subject to the provisions of O.R.C. § 723.04.1. If the vacation requires the relocation of the Provider's Facilities and if the vacation proceedings are initiated by the Provider, the Provider will pay the relocation costs. If the vacation requires the relocation of the Provider's Facilities and if the vacation proceedings are initiated by the City for a public purpose, the Provider or Permittee must pay the relocation costs unless otherwise agreed to by the City, the Provider or Permittee.

901.118.13 INSTALLATION REQUIREMENTS. The excavation, backfilling, Restoration, and all other work performed in the Rights of Way shall be performed in conformance with all applicable Laws and the standards as promulgated by the Director of Public Service.

901.118.14 INSPECTION.

1. When the Construction under any Permit hereunder is completed, the Permittee shall notify the Department of Public Service.

2. The Permittee shall make the Construction site available to the Inspector and to all others as authorized by Law for inspection at all reasonable times during the execution and upon completion of the Construction.

3. At any time, including the time of inspection, the Inspector may order the immediate cessation of any work which poses a serious threat to the health, safety, or welfare of the public, violates any Law, or which violates the terms and conditions of the Permit and/or this Chapter.

4. The Inspector may issue an order to correct work which does not conform to the Permit and/or applicable standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the Permit. The order may be served on the Permittee as provided in Section 901.123.4. An order may be appealed to the Director of Public Service. The decision of the Director of Public service may be appealed to the City Manager whose decision shall be final. If not appealed, within ten (10) days after issuance of the order, the Provider shall present proof to the Director of Public Service that the violation has been corrected. If such proof has not been presented within the required time, the Director of Public Service may revoke the Permit pursuant to Section 901.120.3.

901.118.15 OTHER OBLIGATIONS. Obtaining a Construction Permit does not relieve Permittee of its duty to obtain all other necessary Permits, licenses, and authority and to pay all fees required by the City, or any other city, county, state, or federal Laws.

1. A Permittee shall comply with all requirements of Laws, including the requirements of the Ohio Utility Protection Service.

2. A Permittee shall perform all work in conformance with all applicable Laws and standards and is responsible for all work done in the Rights of Way pursuant to its Permit, regardless of who performs the work.

3. No Rights of Way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work, except in the case of an Emergency as outlined in Section 901.120.4.1.

4. A Permittee shall not so obstruct a Rights of Way that the natural free and clear passage of water through the gutters or other waterways shall be interfered with.

5. Private vehicles other than necessary Construction vehicles may not be parked within or adjacent to a Permit area. The loading or unloading of trucks adjacent to a Permit area is prohibited unless specifically authorized by the Permit.

901.118.16 UNDERGROUNDING REQUIRED. Any owner of property abutting upon a street or alley where Service Facilities are located underground and where the Service connection is at the property line, shall install or cause others to install underground any Service delivery infrastructure from the property line to the buildings or other structures on such property to which such Service is supplied.

## **SECTION 901.119 MINOR MAINTENANCE PERMITS**

901.119.1 MINOR MAINTENANCE PERMIT REQUIREMENT. No Person shall perform Minor Maintenance of Facilities in the Rights of Way without first having obtained a Minor Maintenance Permit as set forth in this Chapter. Minor Maintenance means: (i.) the routine repair or replacement of Facilities with like Facilities not involving Construction and not requiring traffic control for more than thirty (30) minutes at any one location; or (ii.) Construction on thoroughfares and arterials between the hours of 9:00AM and 3:00PM that does not impede traffic and does not involve a street, pavement, curb, or sidewalk cut without first contacting the Director of Public Service; or (iii.) Construction other than on thoroughfares and arterials that takes less than eight (8) contiguous hours to complete, does not impede traffic, and does not involve a pavement, street, curb, or sidewalk cut without first contacting the Director of Public Service.

1. A Minor Maintenance Permit allows the Minor Maintenance Permittee to perform all minor maintenance in any part of the Rights of Way as required.

2. A Minor Maintenance Permits is valid from the date of issuance until December 31 of the year in which the Minor Maintenance Permit was issued at which time the Minor Maintenance Permit shall expire.

3. A Minor Maintenance Permit must be displayed or upon request, the Minor Maintenance Permit must be produced within twelve (12) hours or the first earliest Business Hour, whichever is later. For purposes of this Chapter, Business Hour shall mean the hours between 8 a.m. and 5 p.m. during a Business Day.

4. A Minor Maintenance Permit by itself shall under no circumstances provide a Permittee with the authority to cut street, pavement,

curb, or sidewalk without first seeking and receiving approval from the Director of the Department of Public Service.

901.119.2 MINOR MAINTENANCE PERMIT APPLICATIONS. Application for a Minor Maintenance Permit shall be made to the Director of the Department of Public Service. In addition to any information required by the Director of Public Service, all Minor Maintenance Permit Applications shall contain, and will only be considered complete upon compliance with the following provisions:

1. Credible evidence that the Applicant has obtained a Certificate of Registration or proof that the Applicant has written authority to apply for a Minor Maintenance Permit on behalf of a party that has been issued a Certificate of Registration;
2. Submission of a completed Minor Maintenance Permit Application in the form required by the Director of Public Service.
3. A statement that the Applicant will employ protective measures and devices that, consistent with the Ohio Manual of Uniform Traffic Control Devices, will prevent injury or damage to Persons or property and to minimize disruptions to the efficient movement of pedestrian and vehicular traffic.

901.119.3 ISSUANCE OF MINOR MAINTENANCE PERMITS; CONDITIONS.

1. If the Director of Public Service determines that the Applicant has satisfied the requirements of this Chapter and the Minor Maintenance Permit process, the Director of Public Service shall issue a Minor Maintenance Permit subject to the provisions of this Chapter.

2. The City may impose reasonable conditions upon the issuance of the Minor Maintenance Permit and the performance of the Minor Maintenance Permittee thereunder in order to protect the public health, safety and welfare, to insure the structural integrity of the Rights of Way, to protect the property and safety of other users of the Rights of Way, and to minimize the disruption and inconvenience to the traveling public.

901.119.4 MINOR MAINTENANCE PERMIT FEES. The Director of Public Service may charge a fee for the issuance of the Minor Maintenance Permit. No Minor Maintenance Permit shall be issued without payment of Minor Maintenance Permit Fees except to the City, County, or RTA which shall be exempt. Minor Maintenance Permit Fees that were paid for a Minor Maintenance Permit that the City has revoked due to breach are not refundable. The Director of Public Service may revoke the Minor Maintenance Permit as any other Permit may be revoked under this Chapter.

**SECTION 901.120 - ENFORCEMENT OF PERMIT OBLIGATION**

901.120.1 MANDATORY DENIAL OF PERMIT. Except in the case of an Emergency, no Construction Permit or Minor Maintenance Permit will be granted:

1. To any Person who has not yet made an Application; or
2. To any Person or their agent who has outstanding debt owed to the City; or
3. To any Person or their agent as to whom there exists grounds for the revocation of a Permit; or
4. If, in the discretion of the Director of Public Service, the issuance of a Permit for the particular date and/or time would cause a conflict or interfere with an exhibition, celebration, festival, or any other event. The Director of Public Service, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the Rights of Way, and by considerations relating to the public health, safety, and welfare.

901.120.2 PERMISSIVE DENIAL. The Director of Public Service may deny a Permit in order to protect the public health, safety, and welfare, to prevent interference with the safety and convenience of ordinary travel over the Rights of Way, or when necessary to protect the Rights of Way and its users. The Director of Public Service, in his or her discretion, may consider one or more of the following factors: the extent to which Rights of Way space where the Permit is sought is available; the competing demands for the particular space in the Rights of Way; the availability of other locations in the Rights of Way or in other Rights of Way for the proposed Facilities; the applicability of this Chapter or other regulations of the Rights of Way that effect location of Facilities in the Rights of Way; the degree of compliance of the Provider with the terms and conditions of this Chapter and its requirements, and other applicable ordinances and regulations; the degree of disruption to surrounding communities and businesses that will result from the use of that part of the Rights of Way; the condition and age of the Rights of Way, and whether and when it is scheduled for total or partial re-construction; the balancing of the costs of disruption to the public and damage to the Rights of Way, against the benefits to that part of the public served by the expansion into additional parts of the Rights of Way; and whether such Applicant or their agent has failed within the past three (3) years to comply, or is presently not in full compliance, with the requirements of this Chapter or, if applicable, any other Chapters of the Codified Ordinances, or any other applicable Law.

901.120.3 DISCRETIONARY ISSUANCE. Notwithstanding the provisions of Section's 901.120.1.1 and 901.120.1.2, the Director of Public Service may issue a

Permit in any case where the Permit is necessary: (a) to prevent substantial economic hardship to a customer of the Permit applicant if established by Credible evidence satisfactory to the City; (b) to allow such customer to materially improve its Service; or (c) to allow a new economic development project. To be granted a Permit under this Section, the Permit Applicant must not have had knowledge of the hardship, the plans for improvement of Service, or the development project at the time it was required to submit its list of next year projects.

#### 901.120.4 WORK DONE WITHOUT A PERMIT.

1. Emergency Situations. Each Provider shall immediately notify the Director of Public Service of any event regarding its Facilities which it considers to be an Emergency. The Provider may proceed to take whatever actions are necessary in order to respond to the Emergency. Within two (2) business days, unless otherwise extended by the Director of Public Service, after the occurrence or discovery of the Emergency (whichever is later), the Provider shall apply for the necessary Permits, pay the fees associated therewith and fulfill all the requirements necessary to bring itself into compliance with this Chapter for any and all actions taken in response to the Emergency.

In the event that the City becomes aware of an Emergency regarding a Provider's Facilities, the City may attempt to contact the Provider or System Representative of each Provider effected, or potentially effected, by the Emergency. In any event, the City may take whatever action it deems necessary in order to respond to the Emergency, the cost of which shall be borne by the Provider whose Facilities caused the Emergency.

2. Non-Emergency Situations. Except in the case of an Emergency, any Provider who Constructs in, on, above, within, over, below or through a Right of Way without a valid Permit shall subsequently obtain a Permit, pay double the normal fee for said Permit, pay double all the other fees required by the Codified Ordinances, deposit with the City the fees necessary to correct any damage to the Rights of Way and comply with all of the requirements of this Chapter.

#### 901.120.5 REVOCAION OF PERMITS.

1. Permittees hold Permits issued pursuant to the Codified Ordinances as a privilege and not as a right. The City reserves the right, as provided herein, to revoke any Permit, without refunding any fees, in the event of a substantial breach of the terms and conditions of any Law or any provision or condition of the Permit. A substantial breach by Permittee shall include, but shall not be limited to, the following:

- a. The violation of any provision or condition of the Permit; or

- b. An evasion or attempt to evade any provision or condition of the Permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the City or its citizens; or
- c. Any material misrepresentation of fact in the Application for a Permit; or
- d. The Failure to obtain and/or maintain required Construction or Removal Bonds and/or insurance; or
- e. The failure to obtain and/or maintain, when required, a Certificate of Registration; or
- f. The failure to complete Construction in a timely manner; or
- g. The failure to correct any nonconformity as ordered pursuant to Section 901.118.15.

2. If the Director of Public Service determines that the Permittee has committed a substantial breach of a term or condition of any Law or any provision or condition of the Permit, the Director of Public Service shall serve a written demand upon the Permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the Permit. Upon, a substantial breach, as stated above, the Director of Public Service, may place additional or revised conditions on the Permit.

3. By the close of the next business day following receipt of notification of the breach, Permittee shall contact the Director of Public Service with a plan, acceptable to the Director of Public Service, for its correction. Permittee's failure to so contact the Director of Public Service, or the Permittee's failure to submit an acceptable plan, or Permittee's failure to reasonably implement the approved plan, shall be cause for immediate revocation of the Permit.

4. From time to time, the Director of Public Service may establish a list of standard conditions for the Permit. A substantial breach of any condition shall also constitute an unauthorized use of the public Rights of Way as defined in Section 901.114.

5. If a Permittee, commits a second substantial breach as outlined above, Permittee's Permit will automatically be revoked and not be allowed further Permits for one full year, except for Emergency repairs.

6. If a Permit is revoked, the Permittee shall also reimburse the City for the City's reasonable costs, including Restoration costs and the costs of collection and reasonable attorneys' fees incurred in connection with such revocation.

## **SECTION 901.121 - CONSTRUCTION AND REMOVAL BONDS**

901.121.1 CONSTRUCTION BOND. Prior to the commencement of any Construction, a Construction Permittee, excluding the County, City, or RTA shall deposit with the Director of Public Service an irrevocable, unconditional letter of credit and/or surety bond in an amount determined by the Director of Public Service to be appropriate, based upon fair and reasonable criteria. Unless a Construction default, problem, or deficiency involves an Emergency or endangers the safety of the general public, the Director of Public Service shall serve the Construction Permittee with notice detailing any Construction default, problem, or deficiency. If the Director of Public Service determines that correction or repair of the Construction default, problem or deficiency has not occurred or has not been substantially initiated within ten (10) calendar days after the date following service of notification and detailing the construction default, problem or deficiency, then the City may attach the letter of credit or surety bond. Upon attachment, written notice shall be served on the Construction Permittee by the Director of Public Service.

901.121.2 REMOVAL BOND. Upon issuance of a Certificate of Registration, and continuously thereafter until One Hundred Twenty (120) days after a Provider's Facilities have been removed from the Rights of Way, (unless the Director of Public Service notifies the Provider that a reasonably longer period shall apply), a Provider shall deposit with the Director of Public Service and maintain an irrevocable, unconditional letter of credit or a surety bond in an amount equal to or greater than Fifty Thousand Dollars (\$50,000.00). The Director of Public Service shall make all reasonable effort to allow Provider a period of five (5) Business Days after serving notification to correct or repair any default, problem or deficiency prior to Director of Public Service' attachment of letter of credit or surety bond regarding the removal of Facilities. Upon attachment, written notice shall be provided to the Provider by the Director of Public Service.

901.121.3 BLANKET BOND. In lieu of the Construction Bond required by Section 901.121.1 and the Removal Bond required by Section 901.121.2, Provider may deposit with the Director of Public Service an irrevocable, unconditional letter of credit and/or surety bond in the amount of Five Million Dollars (\$5,000,000.00). Unless a Construction default, problem or deficiency involves an Emergency or endangers the safety of the general public, the Director of Public Service shall make all reasonable effort to allow Permittee a period of five (5) Business Days after sending notification in writing to the last known business address to correct or repair any Construction default, problem or deficiency prior to Director of Public Service' attachment of letter of credit



or surety bond. Upon attachment, written notice shall be provided to the Provider by the Director of Public Service.

901.121.4 SELF BONDING. In lieu of the Construction Bond required by Section 901.121.1, the Removal Bond required by Section 901.121.2 and the Blanket Bond required by Section 901.121.3, those Providers maintaining at all times a book value in excess of Twenty Million Dollars (\$20,000,000) may submit a statement to the Director of Public Service requesting to self-bond. If approval to self-bond is granted, a Provider shall assure the City that such self-bonding shall provide the City with no less protection and security than would have been afforded to the City by a third party surety providing Provider with the types and amounts bonds detailed in the above named Sections. This statement shall include:

- a. Audited financial statements for the previous year; and,
- b. A description of the Applicant's self-bonding program; and,
- c. Other applicable and pertinent information as reasonably requested by the Director of Public Service.

901.121.5 PURPOSES. The bonds required by this Section, and any self bonding to the extent it has been permitted, shall serve as security for:

1. The faithful performance by the Permittee or Provider of all terms, conditions and obligations of this Chapter;
2. Any expenditure, damage, or loss incurred by the City occasioned by the Permittee or Provider's violation of this Chapter or its failure to comply with all Rules, Regulations, orders, Permits and other directives of the City issued pursuant to this Chapter;
3. The payment of all compensation due to the City, including Permit Fees;
4. The payment of premiums for the liability insurance required pursuant to this Chapter;
5. The removal of Facilities from the Rights of Way pursuant to this Chapter;
6. The payment to the City of any amounts for which the Permittee or Provider is liable that are not paid by it's insurance or other surety; and

7. The payment of any other amounts which become due to the City pursuant to this Chapter or other Law.

901.121.6 FORM. The bond documents required by this Section, and any replacement bond documents shall, contain the following endorsement: "It is hereby understood and agreed that this bond may not be canceled or not renewed by the surety nor the intention to cancel or not to renew be stated by the surety until ninety (90) days after completion of Construction of the Facilities and, notwithstanding the foregoing, shall in no case be canceled or not renewed by the surety without ninety (90) days advance written notice to the City of surety's intention to cancel or not renew this bond."

## **SECTION 901.122 - INDEMNIFICATION AND LIABILITY**

901.122.1 CITY DOES NOT ACCEPT LIABILITY. By reason of the acceptance of an Application or the grant of a Permit, the City does not assume any liability:

1. For injuries to Persons, damage to property, or loss of Service claims; or
2. For claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of Facilities.

901.122.2 INDEMNIFICATION. By applying for and being issued a Certificate of Registration with the City a Provider agrees, or by accepting a Permit a Permittee is required and agrees, to defend, indemnify, and hold harmless the City's agents, elected officials, officers, employees, volunteers and subcontractors from all costs, liabilities, claims, and suits for damages of any kind arising out of the Construction, presence, installation, maintenance, repair or operation of its Facilities, or out of any activity undertaken in or near a Rights of Way, whether any act or omission complained of is authorized, allowed, or prohibited by a Permit. Excepting negligent acts or omissions that are willful and wanton or intentional torts and for which immunity is not provided by the O.R.C. for such acts, omissions, or intentional torts. This exception shall not extend to acts, omissions, or intentional torts occurring as a result of or in response to an Emergency. A Provider or Permittee further agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the City's agents, elected officials, officers, employees, volunteers and subcontractors for any claim nor for any award arising out of the presence, installation, maintenance or operation of its Facilities, or any activity undertaken in or near a Rights of Way, whether the act or omission complained of is authorized, allowed or prohibited by a Permit. This Section is not, as to third parties, a waiver of any defense or immunity otherwise available to the Provider, Permittee, or to the City; and the Provider or Permittee, in defending any action on behalf of the City, if allowable by Law, shall

be entitled to assert in any action every defense or immunity that the City could assert in its own behalf. Any and all exercise of the above shall be consistent with, but not limited to, the following:

1. To the fullest extent permitted by Law, all Providers and Permittees shall, at their sole cost and expense, fully indemnify, defend and hold harmless the City, its agents, elected officials, officers, employees, volunteers and subcontractors from and against any and all lawsuits, claims (including without limitation worker's compensation claims against the City or others), causes of actions, actions, liability, and judgments for injury or damages including but not limited to expenses for reasonable legal fees and disbursements assumed by the City in connection therewith:

a. To persons or property, in any way arising out of or through the acts or omissions of Provider, its subcontractors, agents or employees attributable to the occupation by the Provider or Permittee of the Rights of Way, to which Permittee's or Provider's negligence shall in any way contribute, and regardless of whether the City's negligence or the negligence of any other party shall have contributed to such claim, cause of action, judgment, injury or damage.

b. Arising out of any claim for invasion of the right of privacy, for defamation of person, firm or corporation, or the violation or infringement of any copyright, trademark, trade name, service mark or patent or any other right of any person, firm and corporation by the Provider or Permittee, but excluding claims arising out of or related to City programming.

c. Arising out of Provider's or Permittee's failure to comply with the provisions of any Law applicable to Provider or Permittee in its business hereunder.

2. The foregoing indemnification is conditioned upon the City:

a. Giving Provider or Permittee reasonable notice of any claim or the commencement of any action, suit or proceeding for which indemnification is sought;

b. Affording the Provider or Permittee the opportunity to participate in any compromise, settlement, or other resolution or disposition of any claim or proceeding subject to indemnification; and

c. Cooperating in the defense of such claim and making available to the Provider or Permittee all pertinent information under the City's control.

3. The City shall have the right to employ separate counsel in any such action or proceeding and to participate in the investigation and defense thereof, and the Provider or Permittee shall pay all reasonable fees and expense of such separate counsel if employed.

### **SECTION 901.123 - GENERAL PROVISIONS**

901.123.1 NON-EXCLUSIVE REMEDY. The remedies provided in this Chapter are not exclusive or in lieu of other rights and remedies that the City may have. The City is hereby authorized at any time to seek legal and equitable relief for actual or threatened injury to the Rights of Way, including damages to the Rights of Way, whether caused by a violation of any of the provisions of this chapter or other provisions of applicable Law.

901.123.2 SEVERABILITY. If any section, subsection, sentence, clause, phrase, or portion of this Chapter is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and such holding shall not affect the validity of the remaining portions thereof. If a regulatory body or a court of competent jurisdiction should determine by a final, nonappealable order that any Permit, right or any portions of this Chapter are illegal or unenforceable, then any such Permit or right granted or deemed to exist hereunder shall be considered as a revocable Permit with a mutual right in either party to terminate without cause upon giving sixty (60) days written notice to the other. The requirements and conditions of such a revocable Permit shall be the same requirements and conditions as set forth in the Permit, right or registration, respectively, except for conditions relating to the term of the Permit and the right of termination. If a Permit or right shall be considered a revocable Permit as provided herein, the Permittee must acknowledge the authority of the City to issue such revocable Permit and the power to revoke it.

901.123.3 RESERVATION OF REGULATORY AND POLICE POWERS. The City by the granting of a Permit, or by issuing a Certificate of Registration under this Chapter, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights, which it has now or may be hereafter vested in the City under the Constitution and Laws of the United States, State of Ohio, and under the Charter of the City of Kettering to regulate the use of the Rights of Way. The Permittee by its acceptance of a Permit, or Provider by applying for and being issued a Certificate of Registration, agrees that all lawful powers and rights, regulatory power, or police power, or otherwise as are or the same may be from time to time vested in or reserved

to the City, shall be in full force and effect and subject to the exercise thereof by the City at any time. A Permittee or Provider is deemed to acknowledge that its rights are subject to the regulatory and police powers of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public and is deemed to agree to comply with all applicable general Laws enacted by the City pursuant to such powers.

901.123.4 METHOD OF SERVICE. Any notice or order of the Director of Public Service or City Manager shall be deemed to be properly served if a copy thereof is:

1. Delivered personally; or
2. Successfully transmitted via facsimile transmission to the last known fax number of the Person to be served; or
3. Left at the usual place of business of the Person to whom it is to be served upon and with someone who is 18 years of age or older; or
4. Sent by certified, preposted U.S. mail to the last known address; or
5. If the notice is attempted to be served by certified, preposted U.S. mail and then returned showing that the letter was not delivered, or the certified letter is not returned within fourteen (14) days after the date of mailing, then notice may be sent by regular, preposted, first-class U.S.; or
6. If the notice is attempted to be served by regular, first class U.S. mail, postage prepaid, and the letter is then returned showing that the letter was not delivered, or is not returned within fourteen (14) days after the date of mailing, then notice shall be posted in a conspicuous place in or about the structure, building, premises or property effected by such notice.

901.123.5 APPLIES TO ALL PROVIDERS. This Chapter shall apply to all Providers and all Permittees unless expressly exempted.

901.123.6 POLICE POWERS. All Person's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to protect the health, safety, and welfare of the public. All Persons shall comply with all applicable Laws enacted by City pursuant to its police or other powers. In particular, all Persons shall comply with City zoning and other land use requirements pertaining to the placement and specifications of Facilities.

901.123.7 COMPLIANCE. No Person shall be relieved of its obligation to comply with any of the provisions of this Chapter by reason of any failure of City to enforce prompt compliance.

901.123.8 CHOICE OF LAW AND FORUM. This Chapter and the terms and conditions of any Certificate of Registration or Permit shall be construed and enforced in accordance with the substantive Laws of the State of Ohio. All Providers and Permittees as a condition for the grant of any Permit or issuance of any Certificate of Registration agree that all disputes shall be resolved in a court of competent jurisdiction in Montgomery County, Ohio or as otherwise agreed to in writing by the City.

901.123.9 FORCE MAJEURE. In the event any Person's performance of any of the terms, conditions, or obligations required by this Chapter 901 is prevented by a cause or event not within such Person's control, such inability to perform shall be deemed excused and no penalties or sanctions shall be imposed as a result thereof. For the purpose of this Section, causes or events not within the control of a Provider shall include, without limitation, acts of God, strikes, sabotage, riots or civil disturbances, explosions, acts of public enemies, and natural disasters such as floods, earthquakes, landslides, and fires.

901.123.10 NO WARRANTY. The City makes no representation or warranty regarding its right to authorize the Construction of Facilities on any particular Rights of Way. The burden and responsibility for making such determination shall be upon the Person constructing Facilities in the Rights of Way.

901.123.11 CONTINUING OBLIGATION AND HOLDOVER. In the event a Provider continues to operate all or any part of the Facilities after the term of a Certificate of Registration, such Provider shall continue to comply with all applicable provisions of this Chapter and other Laws throughout the period of such continued operation, provided that any such continued operation shall in no way be construed as a renewal or other extension of the Certificate of Registration, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after the term, including, but not limited to, damages and restitution. Any conflict between the issuance of a Certificate of Registration or of a Permit and any other present or future lawful exercise of the City's regulatory or police powers shall be resolved in favor of the latter.

901.123.12 APPEALS. All appeals provided for by this chapter and any notification to the City required by this Chapter shall be in writing and sent via certified mail to the City Manager or Director of Public Services as specified in this Chapter.

901.123.13 CITY STANDARDS. As part of City required standards wherever Rights of Way are under Construction, if deemed advisable and practicable by the Director of Public Service, the City may install all such Facilities deemed necessary to accommodate future Provider needs. Any such installed Facilities shall be City property and may be conveyed to any Person under such terms and conditions as are deemed advisable by the City Manager.

901.123.14 CHAPTER HEADINGS. Chapter headings are for convenience only and shall not be used to interpret any portion of this Chapter.

**Legislative history:** Ord. 2484-73; passed 6-12-73. Ord. 3438-90; passed 4-10-90. Ord. 3579-92; passed 10-27-92. Ord. 3823-99; passed 12-28-99.