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*Notice of Consideration of Right of Way Administration
Ordinance by City of Springboro, Ohio*

02-3303-AU-PWN

December 4, 2002

Via certified mail, return-receipt requested

The Public Utilities Commission of Ohio
180 East Broad Street
Columbus, Ohio 43215-3793

Dear Sir/Madam:

The undersigned is the Law Director for the City of Springboro, Ohio. Enclosed is a draft Right of Way Administration Ordinance currently being considered for by the City of Springboro, Ohio.

This notice is provided for informational purposes. The City of Springboro does not believe it is required to submit this Ordinance pursuant to 4939.05(E) because the law as written violates the home rule power outlined in the Ohio Constitution.

If you have any questions or concerns, please do not hesitate to contact me at (937)748-5162. Thank you for your assistance.

Very truly yours,

Roger C. Eckert

encl.

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City of Springboro
320 West Central Avenue
Springboro, Ohio 45066
Phone 937 748 4343
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www.ci.springboro.oh.us

AN ORDINANCE REPLACING CHAPTER 1022 OF THE CODIFIED ORDINANCES OF SPRINGBORO AND AMENDING SECTION 1040.02 OF THE CODIFIED ORDINANCES OF SPRINGBORO, ASSERTING CONTROL OVER PUBLIC RIGHTS OF WAY IN THE CITY, AND REGULATING AND SETTING TERMS AND CONDITIONS FOR THEIR USE.

WHEREAS, the City of Springboro owns or has other rights and interests in public Rights of Way, public lands, and some easements; and

WHEREAS, these ownerships and other interests, in addition to the benefits they confer on the municipality and its inhabitants, also imply a stewardship obligation to oversee their use and manage them in a way that assures that the public health, welfare and safety are protected, and that the interests of residents are protected from unwarranted exploitation and injury by private parties wishing to make use of these lands for their own purposes; and

WHEREAS, recent and impending changes in state and federal laws and policies have rendered obsolete the existing framework within which many public utility and other services are delivered through use of public properties; and

WHEREAS, Section 253(c) of the Telecommunications Act of 1996 preserves a municipality's right to manage and receive fair and reasonable compensation for the use of public Rights of Way; and

WHEREAS, the laws and constitution of the State of Ohio, including Article 18, Sections 3 and 4, confer the right to manage and regulate uses of Rights of Way on municipalities; and

WHEREAS, the City does not believe the current Ohio legislation regarding Rights of Way is constitutional.

NOW, THEREFORE, THE MUNICIPALITY OF SPRINGBORO HEREBY ORDAINS:

SECTION I

The City of Springboro hereby reasserts its claim to ownership of all public Rights of Way within the City.

SECTION II

Chapter 1022 of the Codified Ordinances is hereby repealed, and the following is hereby adopted and shall be codified as Chapter 1022 of the Codified Ordinances and entitled "Right of Way Administration":

1022.01 PURPOSE AND SCOPE OF CHAPTER

(a) It is the purpose and intent of this Chapter to define which Persons may make use of those Rights of Way owned or otherwise controlled by this City; how, when and under what terms and conditions such Persons may engage in their uses; and provide a process and framework for registering, permitting, regulating and controlling such uses. It is hereby declared to be the policy of this City with regard to Rights of Way that:

- (1) they are a valuable resource of the community to be managed and protected;
- (2) no use thereof should endanger the public health, safety or welfare, and any private uses should be accomplished in ways that minimize disruption and inconvenience to the public;
- (3) in addition to promoting and protecting the primary uses of public lands for transportation and communications, it is the policy of this City to use their value to stimulate and maintain good conditions for economic development;
- (4) use of public lands to make available a broad range of utility and communications services and other new technologies and services at attractive rates is a valid use of that resource;
- (5) they be made available to competing service providers on a competitively neutral basis;
- (6) the City will use its ownership and control to require and promote advance planning, sharing of information and facilities among multiple users, and eliminate, where practicable, duplication and conflicting uses;
- (7) it be assured that Applicants have the financial, technical, and managerial resources to comply with this Chapter and the provisions of any Certificate of Registration or Permit issued hereunder; and
- (8) it collect fees from private users of public resources in amounts adequate to offset all costs of oversight, management and administration of Rights of Way.

(b) This Chapter does not apply, and nothing herein should be construed to apply, the provisions of this Chapter to structures or facilities owned or operated by the Municipality or any Municipal operations that occupy or use the Rights of Way. It is specifically contemplated, however, that all Municipal Departments or Divisions that utilize the Rights of Way shall carry out their operations in a manner which promotes the policy set forth in this Chapter, including participation and cooperation in all joint planning hereunder and identification of structures and facilities located in the Rights of Way.

1022.02 REPEAL OF DUPLICATIVE OR CONFLICTING ORDINANCES AND REGULATIONS

All presently existing ordinances and other regulations that duplicate or conflict with this Ordinance are hereby repealed, except that this Ordinance does not repeal or otherwise affect the requirements contained in Chapter 1270 of the Codified Ordinances regulating Personal Wireless Service Facilities.

1022.03 DEFINITIONS

For the purposes of this Chapter, the following terms, phrases, words and their derivations shall have the meanings given 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," "must" and "will" are mandatory. "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.

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

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

(c) "**Bankruptcy Act**" means the regulations promulgated by Title 11 of The United States Code.

(d) "**Best Efforts**" means the best reasonable efforts under the circumstances, taking into consideration, among other appropriate matters, all applicable laws, regulations, safety, engineering and operational codes, available technology, human resources, and cost.

(e) **"Cable Operator," "cable service," and "franchise"** have the same meaning as in the "Cable Communications Policy Act of 1984," 98 Stat. 2779, 47 U.S.C.A.522.

(f) **"Certificate of Registration"** means the document issued to each Provider and its unique System to occupy the Rights of Way within the City and outlines the terms of that occupancy of the Rights of Way.

(g) **"City"** means the City of Springboro, Ohio or any of its boards, departments, officers, agents or employees acting on behalf of the City of Springboro, or the designee of any of the foregoing or any successor thereto.

(h) **"Co-locate"** means to attach, locate or otherwise install two or more systems on, within or in a facility or part of a facility.

(i) **"Construct"** means, but shall not be limited 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 Right of Way.

(j) **"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.

(k) **"Construction Bond"** means a bond posted to ensure proper and complete Construction, replacement and/or repair of a Facility and/or the affected Rights of Way pursuant to a Permit.

(l) **"Construction Permit"** means the Permit which must be obtained before a Person may Construct in a Right of Way.

(m) **"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.

(n) **"County"** means Warren County, Ohio or Montgomery County, Ohio, as geographically applicable.

(o) "**Credible**" means worthy of being believed.

(p) "**Department of Public Works**" means the Department of Public Works of the City.

(q) "**Easement**" shall refer to rights to use of defined portions of private lands for the installation, maintenance, repair and replacement of various infrastructures. Where easements for general or unspecified uses have been secured by the municipality as a part of the process of subdividing or platting lands for development, the municipality hereby asserts that it shall control and regulate use of such easements by third parties, including levying fees for such oversight.

(r) "**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.

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

(t) "**FCC**" means the Federal Communications Commission, or any successor thereto.

(u) "**Force Majeure**" means a strike, acts of God, acts of public enemies, orders of any kind of a government entity of the United States, State of Ohio, or any of their departments, agencies or political subdivisions; riots, epidemics, landslides, lightning, earthquakes, fires, tornadoes, storms, floods, civil disturbances, explosions, partial or entire failure of utilities or any other cause or event not reasonably within the control of the disabled party, but only to the extent that the disabled party notifies the municipality as soon as practicable regarding such Force Majeure, and then only for so long as and to the extent that the Force Majeure prevents compliance or causes non-compliance with the provisions hereof.

(v) "**Full**" means unable to accommodate any additional Facilities in light of applicable standards and using standard engineering practices as determined by the Public Works Director; or, without negatively impacting public health and safety; or, without violating any applicable Laws, Rules and/or Regulations.

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

(x) "**Inspector**" means any Person authorized by the Public Works Director to carry out inspections related to the provisions of this Chapter.

(y) "**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.

(z) “**Major Facilities**” means those Facilities defined as such in the Rules and Regulations adopted by the Public Works Director.

(aa) “**Minor Maintenance Permit**” means a permit which must be obtained before a Person can perform Minor Maintenance in the Rights of Way.

(bb) “**Occupy**” or “**use**” means, with respect to a Right of Way, to place a tangible thing in a public way for any purpose, including, but not limited to, constructing, repairing, positioning, maintaining, or operating lines, poles, pipes, conduits, ducts, equipment, or other structures, appurtenances, or facilities necessary for the delivery of public utility services or any services provided by a cable operator.

(cc) “**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.

(dd) “**O.R.C.**” means the Ohio Revised Code.

(ee) “**Ohio Utility Protection Service**” means the utility protection service as defined in O.R.C. §§153.64 and 3781.26 or its statutory successor.

(ff) “**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.

(gg) “**Over Build**” means to make a facility larger, stronger or greater in capacity in order to provide for future expansion of the facility on co-location of other facilities.

(hh) “**Permit Cost(s)**” means, as allowed by Law, all costs borne by the City for Permit Issuance.

(ii) “**Permit Fee(s)**” means money paid to the City for a Permit to Construct or perform Minor Maintenance in the Rights of Way.

(jj) “**Permittee**” means any Person to whom a Construction Permit or a Minor Maintenance Permit has been granted by the City and not revoked.

(kk) “**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, whether for profit or not for profit.

(ll) **"Provider"** means a Person who owns or operates a System. The City or County, and cable television operators operating pursuant to a valid cable franchise shall also be considered Providers.

(mm) **"Public Works Director"** means the Director of the Department of Public Works of the City of Springboro, Ohio, or his or her designee.

(nn) **"PUCO"** means the Public Utilities Commission of Ohio as defined in O.R.C. § 4901.02.

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

(pp) **"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.

(qq) **"Restoration"** means the process and the resultant effects by which Rights of Way are returned to a condition at least as good, using the same materials (or other similar materials approved by the Public Works Director), as its condition immediately prior to Construction. Restoration shall occur in accordance with the Rules and Regulations established by the Public Works Director and as amended from time to time.

(rr) **"Right(s) of Way"** means the surface and space in, on, above, within, over, below, under or through any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, conduit or any other abutting place, area, or real property owned by or under the easements that have not been dedicated to compatible uses, 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, except to the extent the use or occupation of such property is specifically granted in a Permit or by Law. Rights of Way do not include the City's real property owned, acquired by easement or leased by the City which is used for parks, recreation, municipal buildings and any other real property determined by the Public Works Director to not be a Right-of-Way.

(ss) **"Right(s) of Way Cost"** means all direct, incidental and indirect costs accruing to the City for the management, administration and regulation of the Rights of Way and this Chapter.

(tt) **"Rule(s) and Regulation(s)"** means any rule and or regulation adopted by the Public Works Director pursuant to Law.

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

alternatively, the provision of any service or Utility between two or more points for a proprietary purpose to a class of users other than the general public that in the opinion of the Director constitutes a Service.

(vv) **"Service Agreement"** means a valid service agreement, franchise agreement, or operating agreement issued by the City pursuant to Law and accepted by a Person, which allows such Person to operate or provide Utility service within the geographic limits of the City.

(ww) **"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.

(xx) **"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.

(yy) **"System Representative(s)"** means the specifically identified agent(s)/employee(s) of a Provider who are authorized to direct field activities of that Provider and serve as an official notice agent(s) for System related information and Emergencies.

(zz) **"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 fifty-one percent (51%) cumulatively 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.

(aaa) **"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.

(bbb) **"Underground Facilities"** means all lines, cables, conduits, pipes, posts, tanks, wires and any other facilities which are located wholly or partially underneath Rights of Way.

(ccc) **"Unused Facilities"** means Facilities located in the Rights of Way which have remained unused for twelve (12) months and for which the Provider is unable to provide the City with a credible plan detailing the procedure by which either the Provider intends to begin actively using such Facilities within the next twelve (12) months, or that the Provider has a potential purchaser or user for its System.

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

(eee) **"Utility Corridor(s)"** means those specific areas of the Rights of Way designated as such by the Director of Public Service.

(fff) **"Working Day"** means any Monday, Tuesday, Wednesday, Thursday, or Friday excluding legal holidays observed by the City.

1022.04 RIGHTS OF WAY ADMINISTRATION

(a) Administration. The Public Works Director shall be the principal City official responsible for the administration of this Chapter except as otherwise provided herein. The Public Works Director may delegate any or all of the duties hereunder to a designee of his or her choice.

(b) Establishment of Utility Corridors. The Public Works Director may assign specific corridors within the Rights of Way, or any particular segment thereof as may be necessary, for each type of Facilities that are, or that the Public Works Director expects may someday be, located within the Rights of Way. Any Provider whose Facilities are in the Rights of Way and are in a position at variance with Utility Corridors established by the Public Works Director shall at the time of the next Construction of the area, excluding normal maintenance activities, move such Facilities to their assigned position within the Rights of Way. This requirement may be waived by the Public Works Director for good cause shown including, but not limited to, consideration of such factors as: the remaining economic life of the Facilities, public safety, customer service needs, and substantial hardship to the Provider.

(c) No Occupancy in Rights of Way without Certificate of Registration. 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 six (6) months of the effective date of this Chapter. Applications will consist of providing the application information set forth in Section 1022.06 and any other information required by the Public Works Director.

(d) No Construction in Rights of Way Without Certificate of Registration. No Person shall Construct or perform any work, or use any System or any part thereof, located in, on, above, within, over, below, under, or through 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.

(e) Exceptions. The City, the County, and resellers of Services that do not own any System or Facilities in the Rights of Way are excepted from the requirements of this Chapter.

1022.05 NATURE OF ISSUANCE

(a) 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 1022 and all Laws including any Rules and Regulations adopted by the Public Works Director.

(b) The right to locate Facilities and/or a System in, and the right to occupy Rights of Way may not be subdivided or subleased; provided, however a Provider may sublease capacity (or other non-material Facility aspects) and two or more Providers may co-locate Facilities in the same area of the Rights of Way so long as each such Provider complies with the provisions of this Chapter.

(c) 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.

(d) 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.

(e) A Certificate of Registration does not excuse a Provider from complying with any provisions of this Chapter or other applicable Law.

1022.06 CERTIFICATE OF REGISTRATION APPLICATIONS

(a) Certificate of Registration Applications. To obtain a Certificate of Registration to Construct, own, or maintain any System within the City an Application must be filed with the City on the form adopted by the Public Works Director which is hereby incorporated by reference. All Applications shall be accompanied by a non-refundable Two Thousand Dollar (\$2,000.00) Application Fee which will pay for internal processing and administrative costs associated with the Application process.

(b) Application Information. The Applicant shall keep all of the submitted information required in this Chapter current at all times, provided that an Applicant or Provider shall notify the City of any changes and/or additions to the information required by this Chapter within fifteen (15) days following the date on which the Applicant or Provider has knowledge of any 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 one (1) or more System Representative(s). At least one (1) System Representative shall be available at all times. Current information regarding how to contact the System Representative(s) 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 shall be provided that 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 that carries a financial rating of not less than "A" in the most recent addition of "Bests Key Rating Guide" published by AM Best (or its equivalent successor);

(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 of Springboro, Ohio, by registered mail, return receipt requested, of a written notice addressed to the Public Works Director 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 Public Works Director a certificate of insurance evidencing appropriate replacement insurance policies.

(E) Satisfy the requirements for comprehensive liability coverage to cover liability, bodily injury, premises operation, 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)

(iv) State that completed operations and products liability shall be maintained for six (6) months after the termination of or expiration of a Certificate of Registration.

(v) Include coverage for Property damage liability insurance for the following hazards: E -explosion, C -collapse, U- underground.

(F) Satisfy requirements for 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. Coverage must be written on an occurrence basis, with the following 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)

(G) The City reserves the right in unusual or unique circumstances to require any other insurance coverage it deems reasonably necessary after review of any Application submitted by Applicant.

(H) The 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.

(4) 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.

(5) 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 forth in Section 1022.13.

(6) 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.

1022.07 CRITERIA FOR ISSUANCE OF A CERTIFICATE OF REGISTRATION

In deciding whether to issue a Certificate of Registration, the City shall consider:

(a) Whether the issuing of the Certificate of Registration will contribute to the health, safety, and welfare of the City and its citizens; and

(b) Whether the issuing of the Certificate of Registration will be consistent with this Chapter; and

(c) Whether the 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; and

(d) Whether the Applicant is delinquent on any taxes or other obligations owed to the City, Warren County or the State of Ohio; and

(e) 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 (for purposes of this Chapter, an Applicant possessing valid certification from the Public Utilities

Commission of Ohio, including certification pursuant to R.C. 4933.81 et seq., for the services to be provided by the facilities subject to this chapter shall be presumed to possess the requisite financial, technical, and managerial resources, unless otherwise shown by clear and convincing evidence); and

(f) Any other applicable Law.

1022.08 DECISION ON APPLICATION FOR CERTIFICATE OF REGISTRATION

(a) The Public Works Director shall either approve or deny the Application for a Certificate of Registration not later than sixty (60) days after a complete application has submitted. If the Public Works Director denies the Application for a Certificate of Registration, the Public Works Director shall provide the Applicant with a written notice of denial containing the reasons for denial.

(b) An Applicant may appeal the denial of a Certificate of Registration to the City Manager. In order to perfect such an appeal, the Applicant shall file, within ten days of the Public Works Director's denial, a notice of appeal in the City Manager's office. The City Manager shall review the matter and render a final determination after affording the Applicant an opportunity to be heard in writing or in person. The decision as to whether the matter will be heard in writing or in person is within the City Manager's sole discretion. The City Manager's decision shall be final.

1022.09 CERTIFICATE OF REGISTRATION TERM

Each Certificate of Registration granted under this Chapter shall be valid from the date of issuance until such time as it is revoked, terminated, has lapsed, or is properly amended.

1022.10 COMPENSATION

(a) 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 and any Person operating a System shall annually pay to the City Registration Maintenance Fees determined as follows:

(1) Providers utilizing less than ten (10) miles of the Rights of Way within the City shall pay a fee of two thousand dollars (\$2,000.00) per year.

(2) Providers utilizing equal to or greater than ten (10) miles of the Rights of Way within the City shall pay a fee of four thousand dollars (\$4,000.00) per year.

(3) Cable companies operating under non-exclusive franchises that are compensating the City under other mechanisms and any Person that possesses a Service Agreement shall not be required to pay Registration Maintenance Fees. This exclusion is specifically limited to the subject of the existing franchise agreement or service agreement.

(b) 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 shall be prorated from the effective date of the Certificate of Registration to the end of the calendar year.

(c) 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.

(d) 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 portion thereof for which payment is not made.

(e) 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 a payment be construed as a release of any claim the City may have for additional sums payable.

1022.11 OBLIGATIONS OF A PROVIDER UPON RECEIPT OF A CERTIFICATE OF REGISTRATION

In addition to the other requirements set forth in this Chapter and in the Rules and Regulations, each Provider shall:

(a) Use its Best Efforts to cooperate with other Providers and users of the Rights of Way and the City for the best, most efficient, and least obtrusive use of Rights of Way, consistent with safety, and to minimize traffic and other disruptions including street cuts; and

(b) Participate in joint planning, Construction and advance notification of Rights of Way work; and

(c) Upon reasonable written notice, and at the direction of the Public Works Director, promptly remove or rearrange Facilities as necessary for public safety; and

(d) Perform all work, Construction, maintenance or removal of Facilities within the Rights of Way, including tree trimming consistent with the Comprehensive Tree Ordinance, in accordance with good engineering, Construction and arboricultural practice including any appropriate state building codes, safety codes and Law and use Best Efforts to repair and replace any street, curb or other portion of the Rights of Way, or Facilities located therein, to a condition to be determined by the Public Works Director to be adequate under current standards and not less than materially equivalent to its condition prior to such work and to do so in a manner which minimizes any inconvenience to the public, the City and other Providers, all in accordance with all applicable provisions of this Chapter, any Rules and Regulations the City may adopt and the Codified Ordinances of the City; and

(e) Construct, install, operate and maintain its Facilities and System in a manner consistent with all Laws, ordinances, Construction standards and governmental requirements including, but not limited to, The National Electric Safety Code, National Electric Code and applicable FCC or other Federal, State and local regulations; and

(f) Be on notice that removal of trees within the Rights of Way of the City requires prior written approval by the Public Works Director and full compliance with the City's Comprehensive Tree Ordinance. Any such tree that is removed without the Public Works Director's written permission or not in full compliance with the City's Comprehensive Tree Ordinance shall be replaced, at the sole expense of the responsible Person, with a healthy tree of like kind and size; and

(g) Warrant that all worker Facilities, conditions and procedures that are used during Construction, installation, operation and maintenance of the Provider's Facilities within the Rights of Way shall comply with all applicable standards of the Federal Occupational Safety and Health Administration; and

(h) Use its best efforts to cooperate with the City in any emergency involving the Rights of Way; and

(i) Field identify their Facilities in the Rights of Way whenever Providers are notified by the City that the City has determined that such identification is reasonably necessary in order for the City or another Provider to begin planning for the Construction, paving, maintenance, repairing, relocating or in any way altering any street or area in the Rights of Way as defined in this Chapter.

(1) Providers shall identify all Facilities that are within the affected Rights of Way using customary industry standards and distinct identification.

(2) Facilities will be so marked as to identify the Provider responsible for said

Facility.

(3) Should any such marking interfere with the Facilities function, create a safety problem or violate any safety code, alternative methods of marking the Facilities may be approved by the Public Works Director.

(4) Provider shall, weather permitting, remove all graffiti within fourteen (14) calendar days of notice. Provider shall remove any and all graffiti on any of the Provider's Facilities located within the City Rights of Way. Should the Provider fail to do so, the City may take whatever action is necessary to remove the graffiti and bill the Provider for the cost thereof.

(5) All marking should be clearly readable from the ground and include the Provider's name or logo only. No advertising is permitted.

1022.12 ASSIGNMENT OR TRANSFER OF OWNERSHIP AND RENEWAL

(a) Assignment of Transfer Approval Required. A Certificate of Registration shall not be assigned or transferred, either in whole or in part, without actual service of a written request to the Public Works Director by Certified Mail, Return Receipt Requested.. Upon the written request of the Public Works Director, a Provider requesting an assignment or transfer shall provide the City with a completed copy of any application documents required by the PUCO and/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 all copies of the required PUCO and/or FCC application documents. If no objection is served upon the Provider within thirty (30) days of the City's receipt of all copies of the required PUCO and/or FCC application documents, then the City shall be deemed to have consented to the requested assignment or transfer.

(b) Certificate of Registration and Assignee/Transferee Signature Required. In no event shall a transfer or assignment of ownership or control be deemed finally accepted by the City without the transferee or assignee requesting and being issued a replacement Certificate of Registration with ninety (90) days of the transfer or assignment.

1022.13 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. Upon the City's request, a Provider 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.

1022.14 ADOPTION OF RULES AND REGULATIONS

In accordance with the provisions of this Chapter, the Public Works Director may promulgate administrative Rules and Regulations, as the Public Works Director deems appropriate, to carry out and promote the express purposes and intents of this Chapter. The Public Works Director may develop and implement Rules and Regulations by filing same with the Clerk of Council. Such Rules and Regulations shall not materially increase the obligation of any Provider hereunder, except that the Public Works Director may adopt Rules and Regulations that:

- (a) establish or increase Permit Fees;
- (b) require the placement of Facilities in designated portions of the Rights of Way underground; and
- (c) require the overbuilding or joint building of Facilities.

1022.15 REPORTING REQUIREMENTS

(a) Reporting Obligations of Providers. Each Provider shall at the time of initial Application, and between January 1st and February 28th of each following calendar year, meet with the Public Works Director to discuss the Provider's upcoming Construction activities and planned System maintenance. The Provider shall file a Construction and Major Maintenance Plan with the Department of Public Works within sixty (60) days of such meeting. The Major Maintenance Plan shall address all areas within the City for which there are upcoming Construction activities and planned System Maintenance. It shall be submitted using a format(s) mutually agreeable to the Provider and the City and shall contain the information determined by the Public Works Director to be necessary to facilitate the coordination and reduction in frequency of Construction in the Rights of Way. The Major Maintenance Plan shall include, 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.

(b) Mapping Data.

(1) Upon Application for a Certificate of Registration, a provider shall provide the City with information regarding the location of its Major Facilities in the Rights of Way in a format that is commonly used by the City and compatible with the City's GIS system. Following the initial provision of information and at the same time as the filing

of the Major Maintenance Plan, or upon the request of the Public Works Director, a Provider shall provide to the City all location information for all Major 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 entire geographic area of the City and any subsequent annexations thereto, unless otherwise specified by the Public Works Director.

(2) The Public Works Director may in the future adopt Rules and Regulations and further define the mapping data requirement(s) under this Section.

(c) 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").

1022.16 OVERSIGHT AND REGULATION

(a) Reports. Upon request of the Public Works Director, 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 affects the operation of the System or a Provider's representations and warranties set forth herein. 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.

(b) Provider's Expense. All reports and records required under this Chapter shall be furnished at the sole expense of a Provider.

(c) Right of Inspection and Audit. If a Provider asserts that the compensation it is required to pay under Section 1022.10 for a Certificate of Registration should be less than the City is requiring the Provider to pay, or if the City reasonably believes that such Provider should be paying a greater amount of compensation as required under Section 1022.10, then 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 Chapter. All such documents shall be made available during regular

business hours and within the City or in such other place that the City and the Provider may mutually agree upon in writing in order to facilitate said inspection, examination, or audit. If such documents are located outside of the City, then the Provider shall pay the reasonable expenses incurred by the City's designated representatives in traveling to and from such location. The Provider shall also reimburse the City for the total cost incurred by the City if the City finds it necessary to utilize a third party to assist with or conduct an investigation or audit.

1022.17 TERMINATION OF CERTIFICATE OF REGISTRATION

(a) The Public Works Director 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 City; or
- (4) Made a material misrepresentation of fact in its Application for a Certificate of Registration.

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

(1) The City shall serve the Provider with a written notice of the reason or cause for proposed termination and shall allow the Provider fifteen (15) calendar days to cure its breach.

(2) If the Provider fails to cure within fifteen (15) calendar days, the Public Works Director may declare the Certificate of Registration terminated.

(3) The Provider shall have ten (10) calendar days to appeal the termination to the City Manager by filing a request for appeal with the Office of 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 Public Works Director. Otherwise, the City Manager shall affirm the decision of the Public Works Director to terminate. The determination of the City Manager shall be final.

1022.18 PERMITS NOT REQUIRED FOR CERTAIN WORK

No Permit is required if work to be done in the Rights of Way involves no Construction, involves no traffic control, and can be completed within eight (8) contiguous hours. The Person performing such work must send written notification to the Director of Public Works within ten days after performing such work. This notification shall include the identity of the Person who performed the work, the date and approximate time of the work, and the location of the work.

1022.19 MINOR MAINTENANCE PERMITS

(a) 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 two (2) hours at anyone location; (ii) or the routine repair or replacement of Facilities with like Facilities not involving Construction and taking place on thoroughfares and arterials between the hours of 9:00 A.M. and 3:00 P .M.; (iii) or the routine repair or replacement of Facilities with like Facilities not involving Construction on all Rights of Ways, other than thoroughfares and arterials, that does not impede traffic and is for a period of less than eight (8) contiguous hours; (iv) or 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 cut. A Minor Maintenance Permit allows the Minor Maintenance Permittee to perform all minor maintenance in any part of the Rights of Way as required. A Minor Maintenance Permit 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. A Minor Maintenance Permit must be displayed or upon request produced within twelve (12) business hours. A Minor Maintenance Permit by itself shall under no circumstances provide a Permittee with the ability to cut pavement.

(b) Minor Maintenance Permit Applications. Application for a Minor Maintenance Permit shall be made to the Public Works Director. In addition to any information required by the Public Works Director, 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 Public Works Director.

(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.

(c) Issuance of Minor Maintenance Permits; Conditions.

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

(2) The City may impose reasonable conditions, in addition to the Rules and Regulations enacted by the Public Works Director, 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.

(d) Minor Maintenance Permit Fees. The Public Works Director shall develop and maintain a schedule of Permit Fees in an amount sufficient to recoup all reasonable costs associated with processing Minor Maintenance Permits, as allowed by Law. No Minor Maintenance Permit shall be issued without payment of Minor Maintenance Permit Fees except to the City or County, 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 Public Works Director may revoke the Minor Maintenance Permit as any other Permit may be revoked under this Chapter.

(e) An Applicant may appeal the denial of a Minor Maintenance Permit to the City Manager. In order to perfect such an appeal, the Registrant shall file, within ten days of the Public Works Director's denial, a notice of appeal in the City Manager's office. The City Manager shall review the matter and render a final determination after affording the Registrant an opportunity to be heard in writing or in person. The decision as to whether the matter will be heard in writing or in person is within the City Manager's sole discretion. The City Manager's decision shall be final.

1022.20 CONSTRUCTION PERMITS

(a) 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.

(1) A Construction Permit allows the Permittee to Construct and to obstruct travel, 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.

(2) Unless otherwise specified, 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.

(b) Construction Permit Applications. Application for a Construction Permit shall be made to the Public Works Director. In addition to any information required by the Public Works Director, all Construction Permit Applications shall contain, and will only be considered complete upon compliance with, the following provisions:

(1) 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 been issued a Certificate of Registration; and

(2) Submission of a completed Construction Permit Application in the form required by the Public Works Director, including, but not limited to, all required attachments, scaled, and dated drawings (or other information acceptable to the Public Works Director) 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 Public Works Director that the drawings, plans and specifications submitted with the Application comply with applicable technical codes, rules and regulations; and

(3) A 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; and

(4) If the Applicant proposes to replace existing poles with larger poles within the Rights of Way, the Applicant shall, upon the reasonable request of the Public Works Director, provide:

(A) evidence satisfactory to the City that there is no excess capacity on existing poles or in existing underground systems; and

(B) evidence satisfactory to the City 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 replacement poles; and

(D) evidence satisfactory to the City that the Applicant will adhere to all the applicable Laws concerning the installation of such replacement poles.

(5) If Applicant is proposing an underground installation in existing ducts or conduits within the Right of Way, the Applicant shall provide credible information satisfactory to the City to sufficiently detail and identify the location, approximate depth, size, and quantity of the existing ducts and conduits.

(6) If Applicant is proposing an underground installation within new ducts or conduits to be constructed within the Rights of Way, the Applicant shall provide credible information satisfactory to the City to sufficiently detail and identify the location, approximate depth, size, and quantity of proposed new ducts or conduits.

(7) A preliminary Construction schedule and completion date.

(8) Payment of all money due to the City for:

(i) Permit Fees; and

(ii) 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

(iii) any Certificate of Registration issued to the Applicant/Person whose Facilities are being Constructed; and

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

(9) 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 in accordance with Section 1022.24 of this Chapter for the additional Systems or any part of a System is required.

(c) Issuance of Construction Permit: Conditions. If the Public Works Director determines that the Applicant has satisfied the requirements of this Chapter and the Construction Permit process, the Public Works Director shall issue a Construction Permit subject to the provisions of this Chapter. The City may impose reasonable conditions in addition to the Rules and Regulations enacted by the Public Works Director, 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.

(d) Construction Permit Fees. The Public Works Director shall develop and maintain a schedule of Permit Fees in an amount sufficient to recoup all reasonable costs that the City incurs in permit issuance, including Permit Costs and Rights of Way costs, as allowed by Law. No Construction Permit shall be issued without payment of Construction Permit Fees. Construction Permit Fees for a Permit the City has revoked due to non-compliance are not refundable.

(e) 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 among themselves, in proportions the parties find appropriate, any applicable Construction Permit Fees.

(f) An Applicant may appeal the denial of a Construction Permit to the City Manager. In order to perfect such an appeal, the Registrant shall file, within ten days of the Public Works Director's denial, a notice of appeal in the City Manager's office. The City Manager shall review the matter and render a final determination after affording the Registrant an opportunity to be heard in writing or in person. The decision as to whether the matter will be heard in writing or in person is within the City Manager's sole discretion. The City Manager's decision shall be final.

1022.21 CONSTRUCTION, RELOCATION AND RESTORATION

(a) Technical Information Required. Prior to commencement of any initial Construction of Facilities in the Rights of Way, a Construction Permittee, upon the request of the Public Works Director, shall provide technical information about the proposed route of Construction. The technical information required may consist of 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 of and the approximate horizontal and vertical 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 the reasonable request of the Public Works Director, 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) If a Provider records the information requested above in an electronic format, the Provider shall provide the City with an electronic copy of the data obtained from completion of the tasks described in this section. Incorporation of the data required herein by electronic means shall include only data for new Facilities that can be readily incorporated into the City's database.

(5) Where the proposed location of Facilities and the location of existing Underground Facilities appear to conflict with the plans as drafted, the 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 to complete this task.

(6) Based on all of the data collected upon completion of the tasks described in this Section, adjust the proposed System design to avoid the need to relocate other Underground Facilities.

(b) Qualified Firm. All utility engineering studies conducted pursuant to this Section shall be performed by a firm specializing in utility engineering or may be performed by the Construction Permittee if the Construction Permittee is qualified to complete the project itself.

(c) Cost of Study. The Construction Permittee shall bear the cost of compliance with Section 1022.21 of this Chapter.

(d) Construction Schedule. Unless otherwise provided for in this Chapter, or unless the Public Works Director 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 except Emergency situations.

(e) 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, 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) Upon the concurrence of the City, or if it is determined by the Construction Permittee and any appropriate local, state, or federal agency (or other entity with jurisdictional authority) 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 only after 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.

(4) No Facility placed in the Rights of Way shall be placed in such a manner that interferes with normal travel on, or sight from, such Rights of Way.

(5) Unless otherwise stated in a Certificate of Registration or Permit, all Facilities within the Rights of Way shall be Constructed and located in accordance with this Chapter and with the following provisions:

(A) Whenever all existing Facilities that have been traditionally located overhead are located underground in a certain area within the City, a Provider who desires to place its Facilities in the same area must also locate its Facilities underground;

(B) Whenever a Provider is required to locate or relocate Facilities underground within a certain area of the City, every Provider with Facilities within the same area of the City shall concurrently relocate their Facilities underground.

(6) Providers may enter into written agreements to use existing poles and conduits with the owners of same.

(f) 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.

(g) Relocation of Facilities.

(1) A Provider shall, 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 a condition at least as good as its condition immediately 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 reasonably obtainable poles of the same or similar size unless otherwise permitted by the City. The Public Works Director may request relocation and/or removal in order to prevent unreasonable interference by the Provider's Facilities:

(A) with a public improvement undertaken or approved by the City, County or State; or

(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) If, in the sole judgment of the Public Works Director, 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 or timely complete such removal including all associated repair of the Rights of Way of the City, 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. If such a declaration is made and, to the extent consistent with applicable Law, any portion of the Provider's Facilities in the Rights of Way of the City designated by the City for removal and not timely removed by the Provider shall 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; or

(B) Authorize removal of the Facilities installed by the Provider in the Rights of Way at the 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, including administrative costs and attorney fees..

(h) 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 using Best Efforts, to mark the approximate vertical placement of all its Facilities. All Providers shall notify and work closely with the excavation contractor and with each other in an effort to establish the exact location of their Facilities and the best procedure for excavation.

(i) Rights of Way Restoration.

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

(2) The Permittee shall perform the work according to the standards and with the materials specified and approved by the Public Works Director.

(3) In restoring the Rights of Way, the Permittee guarantees its work and shall maintain it for twelve (12) months following its completion. At any time during the thirteen (13) months following completion, the City may notify the Provider and/or Permittee to honor this guarantee by correcting all work necessary using the method required by the Department of Public Works. Weather permitting, said work shall be completed within five (5) calendar days of the receipt of the notice from the Department of Public Works.

(4) 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, with notice to Provider and a reasonable time to cure, 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.

(j) Damage to Provider's Facilities and 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. 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/or 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 such Provider's Facilities.

(k) Rights of Way Vacation. If the City vacates a Right of Way which contains the Facilities of a Provider, such vacation shall be subject to the provisions of O.R.C. §723.041.

(l) 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 promulgated by the Public Works Director.

(m) Inspection.

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

(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, 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 shall be served on the Permittee as provided in Section 1022.27(d). An order may be appealed to the Public Works Director. The decision of the Public Works Director shall be final. If not appealed, within ten (10) days after issuance of the order, the Provider shall present proof to the Public Works Director that the violation has been corrected. If such proof has not been presented within the required time, the Public Works Director may revoke the Permit.

(n) 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 (OUPS) and/or its lawful successor.

(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.

(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.

(o) Undergrounding Required. An owner of property abutting upon a street or alley where Service Facilities are now 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.

1022.22 ENFORCEMENT OF PERMIT OBLIGATION

(a) Mandatory Denial of Permit. Except in the case of an Emergency, no Construction 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 Public Works Director, 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 Public Works Director, 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.

(b) Permissive Denial. The Public Works Director 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 Public Works Director, 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 affect 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.

(c) Discretionary Issuance. Notwithstanding the provisions of Sections 1022.22(a) & (b), the Public Works Director 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.

(d) Work Done Without a Permit.

(1) Emergency Situations. Each Provider shall, as soon as reasonably practicable, notify the Public Works Director of any event regarding its Facilities which it considers to be an Emergency. The Provider shall take whatever actions are necessary in order to respond to the Emergency. Within two (2) business days, unless otherwise extended by the Public Works Director, 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 affected, or potentially affected, 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 a Right of Way without a valid Permit shall cease any further work upon the order of the inspector or Public Works Director and before commencing any additional work shall, within 10 business days of initiating such construction, 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.

(e) Revocation 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 breach of the terms and conditions of any Law or any provision or condition of the Permit. A 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 by the City.

(2) If the Public Works Director determines that the Permittee has committed a breach of a term or condition of any Law or any provision or condition of the Permit, the Public Works Director 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 breach, as stated above, the Public Works Director, 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, the Permittee shall contact the Public Works Director with a plan, acceptable to the Public Works Director, for its correction. The Permittee's failure to so contact the Public Works Director, 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 Public Works Director may establish a list of standard conditions for a Permit. A breach of any condition shall also constitute an unauthorized use of the public Rights of Way.

(5) If a Permittee, commits a second 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 and any related dispute.

1022.23 DISCONTINUANCE OF OPERATIONS; UNUSED AND ABANDONED FACILITIES

(a) Discontinuance. 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 limited Rights of Way capacity. Said proposal must be approved by the Public Works Director; 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 Public Works Director; or

(4) Completely remove its entire system within an 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 1022.24, 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.

(b) Unused and Abandoned Facilities. Facilities of a Provider failing 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 Rights of Way. If the City abates the nuisance it may take all action necessary to recover its costs, including but not limited to attorney's fees, to abate said nuisance, including but not limited to, those methods set forth in O.R.C. Section 715.261.

1022.24 BONDS

(a) Construction Bond. Prior to the commencement of any Construction, a Construction Permittee shall deposit with the Public Works Director, in a form acceptable to the Director of Law, an irrevocable, unconditional letter of credit and/or surety bond in an amount determined by the Public Works Director to be appropriate. The amount of the bond shall be sufficient to cover the cost of restoring the Rights of Way to a condition at least as good as existed immediately prior to Construction.

(1) During the thirteenth (13th) month after completion of the work, the Provider shall contact the Public Works Director and request an inspection of the location(s) where the work was performed. The City shall then inspect the location(s) and either approve the work and declare the Provider's guarantee fulfilled, or order the Permittee to remedy unacceptable conditions. If the City's Inspector determines that the Rights of Way have

been properly restored, the surety on the Construction Bond shall be released within thirty (30) days of such inspection.

(2) Unless a Construction default, problem, or deficiency involves an Emergency or endangers the safety of the general public, the Public Works Director shall serve the Construction Permittee with notice detailing any Construction default, problem, or deficiency. If the Public Works Director 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 Public Works Director.

(b) 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 Public Works Director notifies the Provider that a reasonably longer period shall apply), a Provider shall deposit with the Public Works Director and maintain, in a form acceptable to the Director of Law, 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 Public Works Director shall make all reasonable efforts to allow Provider a period of five (5) business days after serving notification to correct or repair any default, problem or deficiency prior to Public Works Director's 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 Public Works Director.

(c) Blanket Bond. In lieu of the Construction Bond and the Removal Bond, a Provider may deposit with the Public Works Director, in a form acceptable to the Law Director, 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 Public Works Director shall make all reasonable efforts to allow Permittee a period of ten (10) business days after sending notification in writing to correct or repair any Construction default, problem or deficiency prior to Public Works Director's attachment of letter of credit or surety bond. Upon attachment, written notice shall be provided to the Provider by the Public Works Director.

(d) Purposes. The bonds required by this Section shall serve as security for:

(A) The faithful performance by the Permittee or Provider of all terms, conditions and obligations of this Chapter;

(B) 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;

- (C) The payment of all compensation due to the City, including Permit Fees;
- (D) The payment of premiums for the liability insurance required pursuant to this Chapter;
- (E) The removal of Facilities from the Rights of Way pursuant to this Chapter;
- (F) The payment to the City of any amounts for which the Permittee or Provider is liable that are not paid by insurance or other surety; and
- (G) The payment of any other amounts which become due to the City pursuant to this Chapter or other Law.

(e) 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 until at least ninety (90) days' written notice to the City of Springboro, Ohio of surety's intention to cancel or not renew this bond."

1022.25 INDEMNIFICATION AND LIABILITY

(a) City Does Not Accept Liability. By reason of the acceptance of an Application, the issuance of a Certificate of Registration, or the granting 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.

(b) Future Uses. In allowing Facilities to be placed in the Rights of Way, the City does not assume any liability 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.

(c) Indemnification. By applying for and being issued a Certificate of Registration or by accepting a Permit, Permittees and Providers are required and agree to defend, indemnify, and hold harmless the City's agents, elected officials, officers, employees, volunteers, contractors and subcontractors from all costs, liabilities, claims, and suits for damages of any kind arising out of the Construction, presence, installation, maintenance, repair, replacement, Restoration, 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. 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, contractors 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) Arising from injuries to persons or damages to property, to the extent 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.

(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.

1022.26 UNAUTHORIZED USE OF PUBLIC RIGHTS OF WAY

(a) Beginning six (6) months 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 a nuisance and an unauthorized use of the Rights of Way. The City may exercise any remedies or rights it has at Law or in equity, 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.

(b) 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. No Provider shall place or have placed any Facilities in the Rights of Way, unless allowed under this Chapter or having been issued a Certificate of Registration.

(c) In addition to any other penalties set forth in this Chapter, and the remedy of specific performance or other remedies, which may be enforced by any court of competent jurisdiction, the Public Works Director 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 Public Works Director 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, the Provider shall request a hearing before the City Manager by filing a request for appeal with the Office of the City Manager within ten (10) calendar days after service of the notice. Said hearing shall be held within thirty (30) days of the Provider's request. If the Provider requests such hearing, said penalty shall be temporarily suspended. However, if, after the hearing, the City Manager determines that the 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.

1022.27 **GENERAL PROVISIONS**

(a) 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 at law or in equity. 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 by other provisions of applicable Law.

(b) Captions. The captions and headings in this ordinance are for convenience and reference purposes only and shall not affect in any way the meaning or interpretation of this ordinance.

(c) Reservation of Regulation 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 under the Constitution and Laws of the United States, State of Ohio, and under the Charter of the City of Springboro to protect its property and 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 its police or other powers. All Persons shall comply with City zoning and other land use or requirements or business regulations pertaining to the placement and specifications of Facilities.

(d) Method of Service. Any notice or order of the Public Works Director 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. Mail.

(e) Applies to all Providers. This Chapter shall apply to all Providers and all Permittees unless expressly exempted.

(f) 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 the City to enforce prompt compliance.

(g) Foreclosure and Receivership.

(1) Upon the filing of any voluntary or involuntary petition under the Bankruptcy Act by or against any Provider and/or Permittee, or any action for foreclosure or other judicial sale of the Provider and/or Permittees Facilities located within the Rights of Way, the Provider and/or Permittee shall so notify the Public Works Director within fourteen (14) calendar days thereof and the Provider and/or Permittee's Certificate of Registration or Permit (as applicable) shall be deemed void and of no further force and effect.

(2) The City shall have the right to revoke, pursuant to the provisions of this Chapter, any Certificate of Registration or Permit granted pursuant to this Chapter, subject to any applicable provisions of Law, including the Bankruptcy Act, one hundred and twenty (120) days after the appointment of a receiver or trustee to take over and conduct the business of the Provider and/or Permittee, whether in receivership, reorganization, bankruptcy or other action or proceeding, unless such receivership or trusteeship shall have been vacated prior to the expiration of said one hundred and twenty (120) days or unless:

(A) Within one hundred and twenty (120) days after election or appointment, such receiver or trustee shall have fully complied with all the provisions of the relevant Certificate of Registration, any outstanding Permit and of this Chapter and remedied all defaults thereunder; and,

(B) Said receiver or trustee, within said one hundred and twenty (120) days, shall have executed an agreement, duly approved by a court having jurisdiction over the Facilities, whereby such receiver or trustee assumes and agrees to be bound by each and every provisions of the relevant Certificate of Registration, Permit, and this Chapter.

(h) 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 and the Laws of the United States of America, specifically in that order. 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 the Warren County Court of Common Pleas, Warren County, Ohio.

(i) Force Majeure. In the event any Person's performance of any of the terms, conditions, or obligations required by this Chapter is prevented by force majeure, such inability to perform shall be deemed excused and no penalties or sanctions shall be imposed as a result thereof.

(j) No Warranty. The City makes no representation or warranty regarding 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.

(k) Continuing Obligation and Holdover. In the event a Provider continues to operate all or any part of the Facilities after the termination, lapse, or revocation 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.

(l) 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 the Public Works Director as specified in this Chapter.

(m) City Standards. As part of City required standards, wherever Rights of Way are under Construction, if deemed advisable and practicable by the Public Works Director, 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 approved by Resolution of the City Council.

(n) Reservation of Rights. Nothing in this ordinance shall be construed to:

(1) Prevent or restrict in any way the Municipality from having the unrestricted use of its rights-of-way, including constructing, maintaining, repairing, relocating, improving or altering any street, sidewalk, utility or communications facility, or any other public work or improvement.

(2) Grant any right or interest in any Rights of Way or other public property other than as explicitly set forth in a permit.

(3) Waive the City's right to challenge the constitutionality of any Ohio Revised Code Section relating to Rights of Way or Public Ways.

(4) Evidence the City's consent to the validity or application of Ohio Revised Code Sections 4939.01 to 4939.08 as an enforceable mechanism for restricting the City's constitutional powers.

(o) Severability.

(1) 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.

(2) If any Application fee, Registration Maintenance Fee, or Permit Fee contained in this Chapter is for any reason held invalid, unconstitutional, illegal, unenforceable, or excessive by any court or administrative agency of competent jurisdiction, then such fees shall be deemed amended to the highest amount which is valid, constitutional, legal, enforceable and not excessive as determined by any court or administrative agency of competent jurisdiction.

1022.99 PENALTIES

In addition to any other penalties which may be imposed under the terms of this ordinance, anyone found to be in violation of the terms of this ordinance shall be guilty of a misdemeanor of the fourth (4th) degree. Each day or part thereof that a violation continues shall be deemed a separate and distinct offense. Such violations shall be punishable by a fine of not more than \$500.00 for each violation.

In addition to the penalty discussed above, the City of Springboro hereby reserves and retains any and all equitable (including but not limited to specific performance) and legal remedies available to obtain compliance.

SECTION III

Section 1040.02 of the Codified Ordinances of Springboro is hereby amended as follows, with **bold** type indicating new language and with ~~strike-thru~~ type indicating the deleted language:

No person who sells electricity, telephone service, gas or oil, through wires, poles, pipe and meters, shall string, erect, set, construct, lay or install any such wire, pole, pipe or meter in, under, upon or across any street or other public way or utilize any public property of the Municipality for any such installations, equipment, appurtenances or facilities without first ~~submitting to the Manager for his or her approval such~~ contemplating moving, stringing, setting, erecting, constructing, stretching, hanging, burying, laying or installing and such wire, pole, pipe, meter or other installation, equipment, appurtenance or facility. **obtaining a permit pursuant to Chapter 1022 of the Codified Ordinances of Springboro.** ~~If the Manager approves the same, he or she shall issue a permit for the same, without fee, according to a general plan of the Municipality for the purposes mentioned.~~

SECTION IV

This Ordinance shall take effect thirty days after its adoption, the earliest date allowed by law.

Adopted: _____, 2003.

Mayor

ATTEST:

Clerk of Council

This Ordinance was prepared by Roger C. Eckert, Law Director.