

**BEFORE  
THE PUBLIC UTILITIES COMMISSION OF OHIO**

THE EAST OHIO GAS COMPANY d/b/a	)	
DOMINION ENERGY OHIO,	)	
1201 East 55 <sup>th</sup> Street	)	
Cleveland, Ohio 44103,	)	
	)	
Complainant,	)	
	)	
vs.	)	Case No. 18-0290-GA-PWC
	)	
THE CITY OF MARIETTA	)	
259 Butler Street	)	
Marietta, Ohio 45750	)	
	)	
Respondent.	)	

**COMPLAINT AND APPEAL FROM PUBLIC WAY ORDINANCE**

In accordance with R.C. 4939.06, R.C. 4905.26, R.C. 4909.34, and related statutes, The East Ohio Gas Company d/b/a Dominion Energy Ohio (DEO or Complainant), for its complaint against Respondent, The City of Marietta (the City) states:

**FACTS**

1. DEO is a natural gas company as defined by R.C. 4905.03(E) and a public utility pursuant to R.C. 4905.02.
2. Under R.C. 4905.26, a public utility may file, and the Commission possesses jurisdiction over, complaints “as to a matter affecting [the public utility’s] own . . . service.”
3. R.C. Chapter 4939 addresses the use of municipal public ways by, among others, public utilities.
4. R.C. Chapter 4939 provides that entities seeking to occupy or use a public way must first obtain the consent of the municipality owning or controlling the public way, and

imposes various requirements and limits on a municipality's administration of public ways and the related fees.

5. Under R.C. 4939.06(A), the Commission has jurisdiction over appeals by public utilities from municipal ordinances enacted pursuant to R.C. Chapter 4939, in addition to its jurisdiction under R.C. 4905.26 and R.C. 4909.34.

6. The City is an Ohio municipal corporation.

7. DEO has installed and maintains an interconnected system of pipelines and associated infrastructure and equipment in and around the limits of the City and provides natural gas service to numerous residents, businesses, and customers therein.

8. Any fees the City levies against public utilities for use or occupancy of a public way are subject to the requirements of R.C. Chapter 4939.

9. The City's administration of its public ways are also subject to the requirements of R.C. Chapter 4939.

10. On December 12, 2017, the City filed a public way notification with the Commission in Case No. 17-2489-AU-PWN.

11. On December 21, 2017, the City passed Ordinance 316 (16-17) (the Ordinance), which enacted Chapter 910 of the City's Codified Ordinances titled *Comprehensive Right-of-Way Policy of the Codified Ordinances of the City of Marietta, Ohio*. A true and correct copy of the Ordinance as provided by the City on request from DEO is attached as Exhibit A.

12. The Ordinance requires that every person or service provider who wishes to use or occupy the City's public way: (i) obtain the City's consent; (ii) pay annual application registration, amendment, or renewal fees; (iii) pay permit fees; and (iv) comply with its various provisions, and future regulations, governing the use and occupancy of the public way.

13. DEO uses the City's public ways to provide natural gas service to customers within the City and is therefore a "Provider" with "Facilities" in the Rights-of-Way, as defined by Ordinance Sections 910.01(A)(20) and (A)(10).

14. On February 21, 2018, the City informed DEO via electronic mail that the City did not plan to begin enforcing the Ordinance until March 1, 2018.

15. During meetings preceding the enactment of the Ordinance, DEO informed City representatives that it wished to receive and review information supporting the development and amount of the public way fees set forth in the Ordinance.

16. On March 13, 2018, DEO submitted a public records request to the City requesting information from the City regarding the development and amount of the fees and related matters.

17. At this time, DEO has not received any information in response to any of its requests for information regarding the development and amount of the public way fees set forth in the Ordinance.

18. As of the date of this Complaint, DEO has neither been charged with any fees under the Ordinance nor has any provision of the Ordinance otherwise been enforced against DEO. Given the scope of DEO's system and operations within the City and the breadth of the Ordinance, it is certain that the Ordinance will be applied to DEO in the near future. Thus, DEO submits that the instant Complaint raises allegations that are ripe for Commission review.

### **APPEAL FROM PUBLIC WAY FEES**

#### **COUNT I**

#### **(REGISTRATION AND APPLICATION FEES)**

19. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 18 of this Complaint.

20. Ordinance Sections 910.04, Section 910.07, and related Sections require Applicants for Right-of-Way Permits to pay fees related to application, amendments, and renewals. These Sections provide for a fee of \$70.00 for the initial registration, amendment, or renewal of a General Right-of-Way Permit. These Sections also provide for a fee of \$35.00 for the initial registration, amendment, or renewal of a Special Right-of-Way Permit for Residential Purposes, or \$70.00 for a Special Right-of-Way Permit for Non-Residential Purposes. It is not clear from the Ordinance what, if any, application fee is required to register for a Service Permit.

21. It is unclear as to whether a Right-of-Way Permit is required annually for existing facilities. Given that the term of these Permits is either one to two years, *see* Section 910.03(B)(4), and that these fees apply to renewals, it appears that it may be necessary to pay these fees every one to two years, regardless of the scope or type of Applicant's activities in the Right of Way and regardless of any other fees paid related to such activities.

22. The fees described above constitute public way fees as defined by R.C. 4939.01(M).

23. To continue providing service in the City, it will be necessary for DEO to continue to apply for permits from the City and to register or renew for one or more of the permits listed under these sections of the Ordinance.

24. On the face of the Ordinance, it is not clear how the above-stated fees were determined, or how those fees are applied to various applicants; nor are any underlying costs explained or provided. Despite informal and formal requests for such information, the City has not provided any explanation or documentation that supports the calculation or amount of the fees, the related classifications of occupants or users, or the assignment and allocation of related costs.



25. R.C. 4939.05(C) provides, in pertinent part, that “[p]ublic way fees levied by a municipal corporation shall be based on costs that the municipal corporation has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way.”

26. Upon information and belief, the registration application fees are neither based on the actual costs incurred by the City for the activities in question nor properly allocated and assigned to occupancy or use of a public way. The amount of these fees, the related classification of public way occupants or users, and the assignment or allocation of costs to the fee is unreasonable, unjust, unjustly discriminatory, and unlawful, and therefore the fees violate R.C. Chapter 4939.

## **COUNT II**

### **(PERMIT AND INSPECTION FEES)**

27. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 26 of this Complaint.

28. Ordinance Section 910.03, Section 910.07, and related Sections require any person desiring to work within the public Right-of-Way to obtain a Right-of-Way permit for every project and to submit to inspections.

29. According to Ordinance Section 910.03(B)(4), Section 910.07(G), and related Sections, the fee for a General Right-of-Way Permit is \$250.00; the fee for a Special Right-of-Way Permit Non-Residential is \$250.00; the fee for a Special Right-of-Way Permit Residential is \$100.00; and the Inspection Fee is prorated at \$48.00 per hour.

30. The fees described above constitute public way fees as defined by R.C. 4939.01(M).

31. DEO occupies and uses the City's public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

32. Despite requests for such information, the City has not provided any explanation or documentation that supports the calculation or amount of the fees, the related classifications of occupants or users, or the assignment and allocation of costs, and such support is not evident on the face of the Ordinance.

33. R.C. 4939.05(C) provides, in pertinent part, that "[p]ublic way fees levied by a municipal corporation shall be based on costs that the municipal corporation has actually incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way."

34. Upon information and belief, the permit fees are neither based on the actual costs incurred by the City for the activities in question nor properly allocated and assigned to occupancy or use of a public way. The amount of these fees, the related classification of public way occupants or users, and the assignment or allocation of costs to the fee is unreasonable, unjust, unjustly discriminatory, and unlawful, and therefore the fees violate R.C. Chapter 4939.

### **COUNT III**

#### **(PERFORMANCE BOND AND FINANCIAL GUARANTIES)**

35. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 34 of this Complaint.

36. Ordinance Section 910.10(G) and related Sections requires Applicants for Right-of-Way Permits, except for Residential Special Right-of-Way Permits, to provide:

. . . either a Performance Bond (or self bonding by Permittees having a capitalization in excess of Fifty Million Dollars), an Irrevocable Letter of Credit, or a Certified Check in an amount agreed to by the City and the Permittee to pay

the cost of restoration of the Right-of-Way should the Permittee fail to perform restoration required by this Chapter or the Right-of-Way Permit and to pay the cost of removal or relocation of any Facilities required by this Chapter or Right-of-Way Permit should the Permittee fail to perform said removal or re-location.

*See also* Ordinance Section 910.04(F)(3)(k) (referencing Ordinance Section 910.10(G)).

37. Additionally, Ordinance Section 910.12(B)(4) authorizes the City to revoke any Right-of-Way Permit if the Permittee has “[f]ailed to obtain and maintain the required bond.”

38. DEO occupies and uses the City’s public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

39. R.C. 4939.01(M) defines a public way fee as “a fee levied to recover the costs incurred by a municipal corporation and associated with the occupancy or use of a public way.” R.C. 4939.05(C) requires the public way fee be based “only on costs the municipal corporation has incurred and can clearly demonstrate are or can be properly allocated and assigned to the occupancy or use of a public way.”

40. The bond and financial guaranties required by the Ordinance Sections described above are public way fees, or the financial equivalents thereof, as defined in R.C. 4939.01(M) and therefore subject to the requirements of R.C. 4939.05(C).

41. Despite requests for such information, the City has not provided any explanation or documentation that supports the calculation or amount of the fees, or any creditworthiness or cost basis for collecting advance funds from DEO, and such support is not evident on the face of the Ordinance.

42. Upon information and belief, the performance bonds and financial guaranties are neither based on the actual costs incurred by the City for the activities in question nor properly allocated and assigned to occupancy or use of a public way. The amount of these requirements,

the related classification of public way occupants or users, and the assignment or allocation of costs to these fees is unreasonable, unjust, unjustly discriminatory, and unlawful, and therefore these fees violate R.C. Chapter 4939.

## **COMPLAINTS AS TO MATTERS AFFECTING THE UTILITY’S OWN SERVICE**

### **COUNT IV**

#### **INFORMATIONAL AND MISCELLANEOUS OBLIGATIONS**

43. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 42 of this Complaint.

44. Ordinance Section 910.04, Section 910.06, Section 910.08, and related Sections impose costly, burdensome, and arbitrary obligations upon registration Applicants, including but not limited to: (i) providing drawings of their existing Facilities, including “as built” on demand within 120 days; (ii) various certification requirements for Right-of-Way applications; (iii) removing graffiti from their Facilities; (iv) providing maps of its Facilities within 30 days of request; and (v) the assignment of corridors within the Right-of-Way, including the requirement to relocate existing facilities into assigned corridors.

45. Further, registration Applicants are obligated to meet the requirements of any Regulation the City may later adopt. *See, e.g.*, Ordinance Sections 910.04(B) and (C). These Sections neither define nor otherwise limit what requirements may be imposed under any future Regulation.

46. DEO occupies and uses the City’s public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

47. Under R.C. 4905.26, the Commission possesses jurisdiction over the “complaint of a public utility as to any matter affecting its own product or service,” and “if it appears that

reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.”

48. The City’s attempt to impose the obligations described above is unreasonable, contrary to law, unduly burdensome, and will result in excessive and unreasonable costs to DEO and its ratepayers.

49. Additionally, R.C. 4939.05(A) prohibits a municipality from requiring “any nonmonetary compensation or free service . . . for the right or privilege to occupy or use a public way.” These requirements, including that DEO provide drawings and maps, remove graffiti and relocate existing facilities into assigned corridors, on demand and at DEO’s own expense, subject DEO to an obligation to provide nonmonetary compensation or a free service to the City in violation of R.C. 4939.05(A).

50. The attempt to impose such obligations will detrimentally affect the cost and provision of service by DEO. Because these obligations are unreasonable and contrary to law, reasonable grounds for complaint have been stated.

## **COUNT V**

### **(PERFORMANCE BOND FOR RESTORATION AND/OR RELOCATION)**

51. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 50 of this Complaint.

52. Ordinance Section 910.10(G) and related Sections require Applicants for Right-of-Way Permits, except for Residential Special Right-of-Way Permits, to provide:

. . . either a Performance Bond (or self bonding by Permittees having a capitalization in excess of Fifty Million Dollars), an Irrevocable Letter of Credit, or a Certified Check in an amount agreed to by the City and the Permittee to pay the cost of restoration of the Right-of-Way should the Permittee fail to perform restoration required by this Chapter or the Right-of-Way Permit and to pay the cost of removal or relocation of any Facilities required by this Chapter or Right-of-Way Permit should the Permittee fail to perform said removal or re-location.

*See also* Ordinance Section 910.04(F)(3)(k) (referencing Ordinance Section 910.10(G)).

53. Additionally, Ordinance Section 910.12(B)(4) authorizes the City to revoke any Right-of-Way Permit if the Permittee “has failed to obtain and maintain the required bond.”

54. DEO occupies and uses the City’s public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

55. R.C. 4939.03(C)(5) prohibits a municipal corporation from withholding or conditioning its consent for a public utility to use or occupy a public way based upon the utility’s alleged failure to possess the financial resources necessary to protect the public health, safety, and welfare.

56. Under R.C. 4905.26, the Commission possesses jurisdiction over the “complaint of a public utility as to any matter affecting its own product or service,” and “if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.”

57. The Ordinance’s attempt to impose bonding and related financial-guaranty requirements upon DEO is unreasonable, contrary to law, unduly burdensome, and will result in excessive and unreasonable costs to DEO and its ratepayers.

58. Because these obligations are unreasonable and contrary to law, reasonable grounds for complaint have been stated.

## **COUNT VI**

### **(RELOCATION)**

59. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 58 of this Complaint.

60. Ordinance Sections 910.06(A)(4), Section 910.15, and related Sections purportedly mandate that a Permittee “promptly remove or rearrange Facilities” upon “written notice of not less than one hundred eighty (180) calendar days,” and at the Permittee’s sole cost, for the following:

. . . (a) during any construction, repair or modification of any street, sidewalk, City utility or other Public Improvement, (b) as part of the Director’s determination, to the extent permitted by Ohio law, that designated portions of its Rights-of-Way should accommodate only underground Facilities or that Facilities should occupy only one side of a street or other public way project, (c) if an additional or subsequent City or other public use of Rights-of-Way is inconsistent with the then current uses of such Permittee, (d) or for any other reasonable cause as determined by the Director pursuant to Section 910.16(B) . . . .

*See also* Ordinance Section 910.15(C) (permitting City “to cut or move any Facilities located within the Rights-of-Way as the City may deem necessary or appropriate in response to any Emergency”).

61. Ordinance Sections 910.08(H) and (I) and related Sections also provide that a Permittee shall design and relocate its Facilities at Permittee’s cost, following notice from the City, to facilitate the request of the City.

62. DEO occupies and uses the City’s public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

63. Under R.C. 4905.26, the Commission possesses jurisdiction over the “complaint of a public utility as to any matter affecting its own product or service,” and “if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof.”

64. R.C. 4939.05(A) prohibits a municipality from requiring “any nonmonetary compensation or free service . . . for the right or privilege to occupy or use a public way.” The

requirement that DEO remove or relocate its Facilities on demand and at DEO's own expense subjects to DEO to an obligation to provide nonmonetary compensation or a free service to the City in violation of R.C. 4939.05(A).

65. The attempt to impose such obligations will detrimentally affect the cost and provision of service by DEO. Because these obligations are unreasonable and contrary to law, reasonable grounds for complaint have been stated.

## **COUNT VII**

### **(REMOVAL)**

66. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 65 of this Complaint.

67. Ordinance Section 910.11 and related Sections mandate that a Permittee notify the City of abandoned or unused Facilities within the Right-of-Way and further specifies that a Permittee may not remove, destroy, or permanently disable any Facilities without written approval of the City. Moreover, these Sections provide that the City may require the removal of the Facilities at the Permittee's sole cost. If the Permittee does not comply, these Sections provide that the City may declare such Facilities to be a nuisance and the City may abate the nuisance, take possession of the Facilities, or remove the Facilities, at Permittee's cost.

68. Ordinance Section 910.15(E) and related Sections provide that, in the event any Right-of-Way used by a Permittee shall be vacated by the City, upon 30 days' notice, "the Permittee shall, at its sole expense, forthwith remove its Facilities therefrom unless specifically permitted by the City to continue use of the same or if such continuance or an easement is required by State Law."



69. DEO occupies and uses the City's public Right-of-Way as permitted by law. To continue to provide service within the City, DEO will be required to comply with the requirements of the Ordinance Sections described above.

70. Under R.C. 4905.26, the Commission possesses jurisdiction over the "complaint of a public utility as to any matter affecting its own product or service," and "if it appears that reasonable grounds for complaint are stated, the commission shall fix a time for hearing and shall notify complainants and the public utility thereof."

71. R.C. 4939.05(A) prohibits a municipality from requiring "any nonmonetary compensation or free service . . . for the right or privilege to occupy or use a public way." The requirement that DEO remove its Facilities on demand and at DEO's own expense subjects to DEO to an obligation to provide nonmonetary compensation or a free service to the City in violation of R.C. 4939.05(A).

72. The attempt to impose such obligations will detrimentally affect the cost and provision of service by DEO. Because these obligations are unreasonable and contrary to law, reasonable grounds for complaint have been stated.

## **COUNT VIII**

### **(UNDUE DISCRIMINATION)**

73. Complainant realleges and incorporates by reference the allegations contained in paragraphs 1 through 72 of this Complaint.

74. The Ordinance, including the Sections identified above, provides the City and its designees with considerable discretion in enforcing the provisions of the Ordinance, including but not limited to ordering relocation or removal, requiring financial guaranties, and imposing future Regulations.

75. Under R.C. 4939.04(A)(1) and (2), “A municipal corporation shall provide public utilities . . . with open, comparable, nondiscriminatory, and competitively neutral access to its public ways” and the application of “priorities . . . to public utilities . . . shall not be unduly discriminatory and shall be competitively neutral.”

76. The Ordinance provides no means of assuring that such discretionary provisions are enforced in non-discriminatory and competitively neutral manner, or in a manner that does not unduly favor any proprietary enterprise of the City.

77. The failure of the Ordinance to provide means of assuring non-discriminatory, competitively neutral application, and any failure to apply the Ordinance in such manner, violates R.C. 4939.04(A).

### **REQUEST FOR RELIEF**

WHEREFORE, Complainant respectfully requests that the Commission:

1. Pursuant to R.C. 4939.06(B) and R.C. 4905.26: (a) find that reasonable grounds for the Complaint have been stated; and (b) suspend the public-way fee provisions of the Ordinance for the duration of the Commission’s consideration of this Complaint;

2. Pursuant to R.C. 4939.06(C), find that the public way fees imposed by the Ordinance on Complainant are unjust, unreasonable, unjustly discriminatory, and unlawful, and determine the just and reasonable public way classification and fee applicable to Complainant in the City of Marietta;

3. Pursuant to R.C. 4905.26, find that those Sections of the Ordinance requiring Complainant to provide a bond are unjust and unlawful, detrimentally affect DEO’s service, and determine that DEO not be made subject to such provisions;

4. Pursuant to R.C. 4905.26, find that those Sections of the Ordinance requiring mapping of Facilities, removal of graffiti, the relocation or removal of Complainant’s Facilities

at Complainant's expense, and imposing other application, registration, operational, and reporting requirements by DEO are unreasonable, unduly burdensome, and unlawful, detrimentally affect DEO's service, constitute a requirement of nonmonetary compensation or free service, and determine that DEO not be made subject to such provisions;

5. Pursuant to R.C. 4905.26, find that those Sections of the Ordinance conferring discretion on the City or its designees without providing a means of assurance that such provisions are applied or enforced in non-discriminatory and competitively neutral manner, or in a manner that does not unduly favor any proprietary enterprise of the City, are unreasonable, unduly burdensome, and unlawful, detrimentally affect DEO's service, and determine that DEO not be made subject to such provisions; and

6. Grant any other necessary and proper relief in these circumstances.

Dated: March 30, 2018

Respectfully submitted,

/s/ Andrew J. Campbell

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(All counsel are willing to accept service by email)

ATTORNEYS FOR THE EAST OHIO GAS  
COMPANY D/B/A DOMINION ENERGY OHIO

ORDINANCE NO. 316 (16-17)(as amended)

An Ordinance to enact Chapter 910 of the Codified Ordinances of the City of Marietta, Ohio, relating to the creation of the Comprehensive Right-of-Way Ordinance for the City of Marietta, Ohio, and declaring an EMERGENCY.

WHEREAS, the City of Marietta, Ohio (the “City”) is vitally concerned with the use of the various Rights-of-Way in the City and the City realizes that such Rights-of-Way are a valuable and limited resource to be utilized to promote the public health, safety and welfare including the economic development of the City; and,

WHEREAS, changes in the public utilities and communication industries have increased the demand and need for access to Rights-of-Way and placement of facilities and structures therein; and,

WHEREAS, it is necessary to comprehensively regulate access to, and structures and facilities in, the Rights-of-Way to promote efficiency, discourage uneconomic duplication of facilities, lessen the public inconvenience of uncoordinated work in the Rights-of-Way, and promote public safety; and,

WHEREAS, the City has rights under the laws and Constitution of the State of Ohio, including Article 18, Sections 3, 4 and 7, to regulate public and private entities which use the Rights-of-Way; now, therefore:

BE IT ORDAINED BY THE COUNCIL OF THE CITY OF MARIETTA, OHIO:

Section 1: That Chapter 910 “Comprehensive Right-of-Way policy of the Codified Ordinances of the City of Marietta, Ohio”, shall be and is hereby enacted as more fully set forth herein in Exhibit A, are hereby adopted and approved.

Sections:

910.01	Definitions
910.02	Purpose and Scope of Chapter
910.03	Prohibition; Types of Right-of-way Permits, Length of Terms
910.04	Application Procedure, Appeal
910.05	Criteria for Granting Right-of-Way Permits
910.06	Obligations of Permittees; Conditions of Right-of-Way Permits
910.07	Permit Fees, Compensation for Right-of-Way Permits and Auditing
910.08	Joint Planning and Construction
910.09	Adoption of Regulations
910.10	Indemnity; Insurance
910.11	Removal of Facilities
910.12	Revocation
910.13	Foreclosure and Receivership
910.14	Continuing Operation and Holdover

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910.15	Reservation of Rights
910.16	Temporary Movement of Facilities
910.17	Non-enforcement and Waivers by City
910.18	Captions
910.19	Severability
910.20	Civil Forfeiture
910.99	Penalties: Unauthorized use of Right-of-Way

Section 2: That this Ordinance shall be and is hereby declared to be an EMERGENCY measure necessary for the immediate preservation of the public peace, health and safety of the City of Marietta, Ohio, and for the further reason that this Ordinance needs to be in effect prior to the end of the calendar year 2017; WHEREFORE, this Ordinance shall be in full force and effect from and immediately after its passage and approval by the Mayor.

Introduced by the Streets and Transportation Committee, Kathy Downer, Councilwoman.

  
Chairwoman

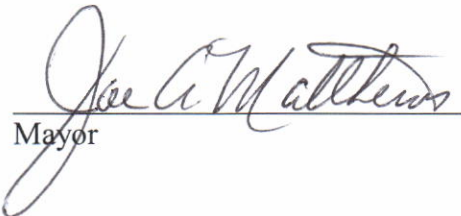
Passed this 21st day of December, 2017.

  
President of Council

ATTEST:

  
Clerk of Council

Approved this 21st day of December, 2017.

  
Mayor

First Reading \_\_\_\_\_

Second Reading \_\_\_\_\_

Third Reading December 21, 2017

**ORDINANCE NO. 316 (16-17)**

**EXHIBIT A**

**910.01 DEFINITIONS**

- A. For purposes of this Chapter, the following terms, phrases, words, and their derivations have the meanings set forth herein. When not inconsistent with the context, words in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The words "shall" and "will" are mandatory and "may" is permissive. Words not defined shall be given their common and ordinary meaning.
1. "Applicant" means any Person applying for a Right-of-Way Permit hereunder.
  2. "Application(s)" means the process, forms and information required for an Applicant to submit a request to obtain a Right-of-Way Permit and register to work within the public right-of-way in the City of Marietta, Ohio.
  3. "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, expedition, available technology and human resources and cost.
  4. "Chapter" means Chapter 910 of the Codified Ordinances of the City of Marietta, as amended from time to time, and any Regulations adopted hereunder.
  5. "City" means the City of Marietta, Ohio.
  6. "Confidentiality" means all information that has been identified or otherwise clearly marked as confidential property prior to any submission to the City. The City shall act in accordance with the requirements of ORC chapter 149 (the Ohio Public Records Act) and will use the same reasonable measures to protect all such information as the City uses to protect its own information from disclosure to third parties. When responding to requests for information that is marked as confidential or proprietary Information, the City will respond as required by law and will use all reasonable means to notify the Applicant of any such request as soon as possible prior to release of any such information. The Applicant shall have five (5) business days, after notification to file, with the Director, any objection to release of any confidential information. If there is an objection to the release of the information the Person making the request for the information will be referred to the Applicant for resolution of the matter.
  7. "Council" means the legislative body of the City.
  8. "Director" means the Safety-Service Director.



9. "Emergency" (Emergency Work): means a sudden or an unexpected occurrence or a combination of occurrences posing a clear, apparent and eminent danger to life or health or of a significant loss of or to property demanding prompt action usually necessitating work be undertaken beginning within the next twenty-four (24) hours or less. (Emergency Work). Refer to Section 910.06 G of this Chapter.
10. "Facility(ies)": means any tangible thing located in any Rights-of-Way within the City; but shall not include any boulevard plantings, ornamental plantings or gardens planted or maintained in the Rights-of-Way between a Person's property and the street edge of pavement.
11. "Force Majeure" means a strike, act of God, act of public enemy, order of any kind of a government of the United States of America or of the State of Ohio or any of their departments, agencies or political subdivisions; terrorism, riot, epidemic, landslides, lightning, earthquake, fire, tornado, storm, flood, civil disturbance, explosion, partial or entire failure of a utility or any other cause or event not reasonably within the control of the party disabled by such Force Majeure, but only to the extent such disabled party notifies the other party as soon as practicable regarding such Force Majeure and then for only so long as and to the extent that, the Force Majeure prevents compliance or causes non-compliance with the provisions hereof.
12. "Franchise" means a valid franchise permit or other franchise agreement issued by the City pursuant to the Codified Ordinances of the City or issued by any other appropriate governmental agency pursuant to the Constitution or Laws of the State of Ohio or the United States and accepted by any person pursuant to which such person may operate or provide natural gas, electric, cable television, communication or other utility services to consumers within the City.
13. "General Right-of-Way Permit" shall have the meaning set forth in Section 910.03(B)(1).
14. "Governmental Purposes" means those purposes classified as governmental under Ohio law, as well as any other City utility service to the extent such other City utility service is provided to City facilities.
15. "Open Video Service" means any video programming service provided to any person through the use of the public rights-of-way, which person is authorized to provide such systems under the Telecommunications Act of 1996 regardless of the facilities used.
16. "ORC" means the Ohio Revised Code.
17. "OUPS" means the Ohio Utilities Protection Service.
18. "Permittee" means any Person issued a Right-of-Way Permit pursuant to this Chapter to use or occupy all or a portion of the Rights-of-Way in accordance with the provisions of this Chapter and said Right-of-Way Permit.
19. "Person" means any natural person or any association, firm, partnership, joint venture, corporation, or other legally recognized entity, whether for-profit or not-for-profit.



20. "Provider" means a Person who owns or operates a System within the City Rights-of-Way and who has a valid Right-of-Way Permit. The City, County and Cable Television operators having a valid Cable Franchise shall also be considered as Providers.
21. "Public Property" means any real property owned by the City or easements held or used by the City, other than a Right-of-Way.
22. "Public Improvement" means any construction, reconstruction, improvement, enlargement, alteration, or repair of a building, highway, drainage system, water system, road, street, alley, sewer, ditch, sewage disposal plant, water works, and all other structures or works of any nature done by a public authority.
23. "Public Authority" means the state or a county, township, municipal corporation, school district, or other public subdivision, or any public agency, authority, board, commission, instrumentality, or special district of or in the state or a county, township, municipal corporation, school district, or other political subdivision.
24. "Registered Underground Utility Protection Service" means an underground utility protection service registered with the secretary of state and the public utilities commission of Ohio pursuant to ORC 153.64 (F).
25. "Regulation" means any rule adopted by the Director pursuant to the authority of this Chapter, and the procedure set forth in Section 10, to carry out its purpose and intent.
26. "Residential Purposes" means residential use of Right-of-Way for such uses as mailboxes, trees, landscaping, lawn sprinklers, decorative purposes or any curb cuts and driveways, and as may be further defined in any Regulations the City adopts.
27. "Right-of-Way" means the surface of and the space within, through, on, across, above or below any public street, public road, public highway, public freeway, public lane, public path, public way, public alley, public court, public sidewalk, public boulevard, public parkway, public drive and any other land dedicated or otherwise designated for a compatible public use which is now or hereafter owned or controlled by the City. Right-of-Way shall not include private easements or Public Property, except to the extent the use or occupation of Public Property is specifically granted in a Right-of-Way Permit or by Regulation.
28. "Right-of-Way Permit" means the non-exclusive grant of authority to use or occupy all or a portion of City's Rights-of-Way granted pursuant to this Chapter. A Right of Way Permit shall, within its proper use and meaning entitle a Person or Provider, in accordance with the terms hereof, to occupy and use the Right-of-Way for the purpose of installing or operating any poles, wires, cables, transformers, conductors, ducts, lines, mains, conduits, vaults, manholes, amplifiers, appliances, attachments or other property or facilities as may be reasonably necessary and pertinent to the provision of natural gas, electric power, cable television, communications or other utility services as set forth in any such Right-of-Way Permit.



29. "Right-of-Way Related Costs" means any and all direct costs by the City for the management, administration and control of the processes related to Rights-of-Way, to enforce compliance with provisions of this Chapter and other Ordinances related to management and/or administration of Rights-of-Way within the City. Right-of-Way Related Costs incurred by the City related to any City owned or operated utilities are excluded from said costs.
30. "Service Permit" means a valid permit, agreement, franchise agreement or operating agreement with the City in accordance with the codified Ordinances of the City, or by any other appropriate governmental entity pursuant to the Constitution or Laws of the State of Ohio or the United States, and accepted by any Person or Provider, pursuant to which such Person or Provider may operate or provide natural gas, electric power, cable television services, communications, telecommunications or other utility services within the City.
31. "System" means any set or arrangement of conduit, cables, ducts, pipes, wires, lines, towers, antennas, wave guides, optic fiber, microwave, laser beams and any associated converters, equipment, facilities or utilities designed and constructed for the purpose of producing, receiving, amplifying, delivering or distributing services within the City including but not limited to: electric distribution, and/or transmission, natural gas or artificial gas distribution or transmission, water distribution systems, storm sewer and sanitary sewers, cable television systems, telecommunications systems (whether voice, video, data or other) fiber optic, wireless communications systems and transit electrification systems.
32. "Telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information sent and received. It includes offering of telecommunications for a fee directly to the public, or to such classes or users as to be effectively available directly to the public, regardless of the facilities used.

## **910.02 PURPOSE AND SCOPE OF CHAPTER**

### **A. The City's policy regarding Rights-of-Way is:**

1. To promote the utilization of Rights-of -Way for the public health, safety and welfare and to promote economic development in the City;
2. To promote the availability of a wide range of utility, communication and other services, including the rapid deployment of new technology and innovative services, to the City's residents and taxpayers at reasonable costs;
3. To promote cooperation among the Permittees and the City in the occupation and use of Rights-of-Way, or work therein, in order to minimize public inconvenience during Right-of-Way work, and ensure safe and efficient use of the City's streets, Rights-of-Way, and easements, and eliminate wasteful, unnecessary or unsightly duplication of facilities;
- .4. To promote public safety and protect Public Property;

5. To ensure adequate public reimbursement for costs incurred for private use of the Rights-of-Way including the regulation thereof;
  6. To promote and require reasonable accommodation of all uses of Rights-of-Way; and when all requests for Right-of-Way use cannot be accomplished, to give priority for use of Rights-of-Way, in the order indicated, from highest to lowest, to the following users:
    - (a) The City for Governmental Purposes;
    - (b) Another governmental entity for Governmental Purposes with the City's concurrence, or other governmental use required by law;
    - (c) Permittees and proprietary uses by the City;
    - (d) Special Permittees; provided, however, that the Director may reasonably require cooperation and accommodation among all Permittees in the public interest;
    - (e) Priorities established shall not be unduly discriminatory and shall be competitively neutral.
- B. To provide for the issuance of Right-of-Way Permits to Persons or Providers for such use or occupancy and to set forth the policies of the City related thereto.
1. Each Person or Provider who presently occupies and uses or who seeks to occupy and use the Rights-of-Way to operate a System within the City shall register with the City or its designee and obtain a Right-of-Way Permit including Persons or Providers operating under any existing Permit, license or Franchise issued by the City prior to the effective date of this Chapter unless they are exempted by this Chapter. Application will consist of provision of the information required for Right-of-Way Permits set forth in this Chapter.
  2. No Person or Provider shall use, construct, occupy, own or operate structures as Facilities in, under, or over any Rights of Way or any public property within the City, or perform any work on or in the Rights-of-Way or use any System or any part thereof located in or on any Rights-of-Way without first obtaining a Right-of-Way Permit.
  3. Exceptions: The following are not required to obtain a Right-of-Way Permit:
    - (a) The City and resellers of services or Persons that do not own any System or Facilities within the Right-of-Way of the City.
  4. Any System or parts thereof found in Rights-of-Way within the City that do not have a Right-of-Way Permit or where such Permit has been revoked or denied shall be deemed an unauthorized use of the Rights-of-Way as stated in this Chapter, Section 13. The City may exercise any and all remedies it has at law or equity including, but not limited to, taking possession of the non-complying Facilities or Systems.
- C. Unless otherwise provided herein, a Right-of-Way Permit issued pursuant to this Chapter does not take the place of any Service Permit, franchise, license, or permit which may be additionally required by law, including any required by Codified Ordinances of the City. Each



Permittee, shall obtain any and all such additional state, federal or city franchises, licenses or permits necessary to the operation and conduct of its business or the occupation or use of any Right-of-Way.

- D. The Director is the principal official of the City responsible for the administration of this Chapter except as otherwise provided herein and is hereby directed and empowered to enforce the provisions of this Chapter. The Director may delegate any or all of the duties hereunder to another designee.
- E. All Right-of-Way Permits granted hereunder shall be nonexclusive and no property right of any nature shall be created by the granting of a Right-of-Way Permit under this Chapter.
- F. 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 City or any City operations that occupy or use the Rights-of-Way. It is specifically contemplated, however, that all City Departments or Divisions that utilize the Rights-of-Way shall carry out their operations in a manner consistent with the policy set forth in this Chapter and Regulations of the City, including participation and cooperation in all joint planning hereunder, identification of structures and Facilities located in the Rights-of-Way. In addition, Cable Operators shall be exempt from any requirements of the Right-of-Way permitting process that is in direct conflict with the requirements of and/or are specifically exempted by a valid Cable Franchise with the City.
- G. To assure that Applicants have the financial, technical and managerial resources to comply with this Chapter and the provisions of any Right-of-Way Permit issued hereunder; provided that, for purposes of this Chapter, an Applicant possessing valid authorization from the Public Utilities Commission of Ohio, including certification pursuant to ORC 4933.81 et seq. or Applicants that are under the jurisdiction of the PUCO as disclosed in a letter so stating sent by the Applicant to the City or of a cable operator possessing a valid franchise awarded pursuant to the Cable Communications Act of 1984, or a valid franchise granted under ORC 1332, 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.

### **910.03 PROHIBITION; TYPES OF RIGHT-OF-WAY PERMITS; LENGTH OF TERMS**

- A. Unless permitted by the Codified Ordinances of the City of Marietta, Ohio, no Person or Provider shall use, occupy, construct, own or operate structures or Facilities in, under or over any Rights-of-Way or any Public Property within the City unless such Person or Provider first obtains a Right-of-Way Permit and conforms to the requirements set forth therein and in this Chapter; provided, however, that Right-of-Way Permits shall not be required for the following uses:
  - 1. Newspaper Stands;
  - 2. Carts;

3. Sidewalk Cafes;
4. Parking Lots;
5. Awnings; and
6. Residential Purposes, so long as, in the opinion of the Director that such use:
  - (a) Has received or will receive all other necessary permits, including any permits set forth in the Codified Ordinances of the City of Marietta, Ohio, or as may be required under this Chapter, and;
  - (b) Is not inconsistent with policy of the City, and;
  - (c) Does not adversely affect the public health, safety or welfare; and
  - (d) Does not materially interfere with the other lawful use of the Right-of-Way.

The Director may adopt Regulations controlling and further defining Residential Purposes and to otherwise implement the regulations to be made under this Section.

B. The following types of Right-of-Way Permits are available:

1. General Right-of-Way Permit: Granted to Persons or Providers who desire and are granted authority to use the Right-of-Way generally for business purposes including the provision of natural gas, electric power, cable television, communications, telecommunications, video services, or other utility services to the City, its residents and taxpayers.
  - (a) Said Right-of-Way Permits are issued for a two (2) year period for a project unless a lesser amount of time is requested within the Application.
  - (b) Cable Television or other services that are covered by an existing Service Permit, Permit or Franchise Agreement, or the Codified Ordinances of the City are subject to their own term limits as so stated in the existing Franchise Agreement, Service Permit, or the Codified Ordinances of the City.
2. Special Right-of-Way Permit: Granted to persons for a specific, limited use of the Rights-of-Way or a specific portion thereof as further defined in the Special Right-of-Way Permit.

Special Right-of-Way Permits may be granted for any amount of Right-of-Way to agencies of the government of the United States, the State of Ohio, or its political subdivisions for Governmental Purposes. Said Permits shall be available in the following two categories:

- (a) For Non-residential Purposes: Right-of-Way Permit granted to an individual or business seeking to place facilities, and/or enhancements within the public Rights-of-Way for public or private business purposes. This type of Right-of-Way Permit shall be issued for all qualifying Governmental Purposes as defined in this Chapter regardless of the length of Right-of-Way used. This Right-of-Way Permit is issued for a one (1) year period for a project unless a lesser term is requested and approved within the Application.



(b) For Residential Purposes: Granted to an individual seeking to place enhancements within the public Right-of-Way immediately adjacent to their personal residence and/or residential properties. Said enhancements shall not be for any business purpose. Said Right-of-Way Permit is issued for a one (1) year period for a project unless a lesser term is requested and approved within the Application.

3. All Right-of-Way Permits shall specify the use or uses for which they are granted and shall contain such other nondiscriminatory terms and conditions as are appropriate and as are set forth in this Chapter and the Codified Ordinances of the City.

4. Summary of Right-of-Way Permit Types:

Type	Term	Fee
General Right-of-Way Permit	2 years	\$250
Special Right-of-Way Permit Non-residential	1 years	\$250
Special Right-of-Way Permit Residential	1 years	\$100

- C. Any person desiring to work within the public right-of-way must obtain a right-of-way permit for every project located on the public right-of way within the geographic boundaries of the City of Marietta, Ohio.
- D. Any such Right-of-Way Permit may also allow the use of specified Public Property for the uses set forth in the Right-of-Way Permit and in this Chapter.
- E. Each Right-of-Way Permit shall specify the use or uses for which it is granted and contain such other non-discriminatory terms and conditions as are appropriately specified by the City or as set forth in this Chapter, any Regulations the City may adopt, or any Codified Ordinances of the City. Any other or additional Right-of-Way use by any Person or Provider shall require a separate or amended Right-of-Way Permit as may be determined by the Director.
- F. Transferability: Unless otherwise set forth herein, Right-of-Way Permits or the rights of any Person or Provider thereunder are not transferable without the prior express written approval of the Director, upon written request. Such request shall contain evidence that the proposed transferee has the financial, technical and managerial resources to comply with the obligations of this Chapter and its Right-of-Way Permit and shall be granted if such transferee has such resources. In making said determination, a proposed transferee shall be presumed to possess the requisite, financial, technical and managerial resources if said transferee possesses a valid certification, such as a Certificate of Convenience and Necessity, or has certification pursuant to ORC 4933.81, et seq., from the Public Utilities Commission of Ohio, or is otherwise under the jurisdiction of the PUCO as so stated in a letter sent to the City by the proposed transferee. Unless otherwise provided in a Right-of-Way Permit, the Person or Provider shall reimburse the City for all direct and indirect fees, costs, and expenses reasonably incurred by the City in considering a request to transfer or assign a Right-of-Way Permit. Any transfer or assignment of a Right-of-Way Permit without prior approval of the City or its designee shall be null and void and is cause for revocation of same.



1. All requests for transfer shall be deemed approved if the Director does not disapprove the same within thirty (30) days of receipt of the completed written transfer request, and;
2. Transfer to affiliates under common ownership and control with the Person or Provider shall not require approval, so long as the Director is provided thirty (30) days written notice of such transfer.

G. Systems in Place without a proper Right-of-Way Permit: Any System or part thereof in the Rights-of-Way within the City for which a Right-of-Way Permit has not been obtained shall be deemed 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.

H. In allowing any Permittee to place Facilities in the Rights-of-Way the City shall not be liable for any damage caused thereby to any Permittee's Facilities that are already in place or that are placed in the Rights-of-Way unless such damage arises out of the sole negligence, gross negligence or willful conduct of the City.

#### **910.04 APPLICATION PROCEDURE, APPEAL**

Persons desiring to apply for Right-of-Way Permits to work within the public right-of-way within the City of Marietta, Ohio shall obtain copies of the Application Form (hereby incorporated by reference) from the City Safety-Service Director's Office. Applicants need only to apply or register to work within the public right-of-way one (1) time per calendar year.

In accordance with ORC 4939.03 (5) except in the case of a public utility subject to the jurisdiction and recognized on the rolls of the PUCO or of a cable operator possessing a valid franchise awarded under federal or applicable state law the City, for good cause shown, may withhold, deny or delay its consent to use or occupy the Rights-of-Way within the City to any Person based upon the Person's failure to possess the financial, technical, and managerial resources necessary to protect the public health, safety and welfare.

A. Applications for a General Right-of-Way Permit by a holder of a valid Service Permit shall be filed in such form and in such manner as required by this Chapter, any Regulations the City may adopt, the Codified Ordinances of the City or in the Person's or Provider's existing Service Permit. Any Person or Provider holding a valid Service Permit shall be granted a General Right-of-Way Permit. Such General Right-of-Way Permit shall be valid so long as the underlying Service Permit is valid and the applicable provisions of that Service Permit, the Right-of-Way Permit and of this Chapter are complied with; provided, however, that such Right-of-Way Permit shall only relate to and entitle the Person or Provider to utilize the Rights-of-Way, in accordance with this Chapter, for purposes directly related to the provision of the specific services for which it has a Service Permit. Any other Right-of-Way use by such Person or Provider shall require a separate or amended Right-of-Way Permit issued pursuant to Section 910.04(B).

B. All other Applications for General Right-of-Way Permits, or amendments or renewals thereof, shall be filed in such form and in such manner as required by this Chapter or any Regulations



the City may adopt, along with an application fee of \$70.00. The Director shall determine if the Application is in order and shall, within thirty (30) business days of the receipt of a complete Application, deny or grant the Right-of-Way Permit, subject to any appropriate terms and conditions, in accordance with the criteria set forth in this Chapter and shall state in writing, the reasons for granting or denying the request. The Director's approval or denial shall be served upon the Applicant by mail. Such conditional denial, grant or renewal shall become final unless appealed pursuant to Section 910.04(G).

- C. An Application for a Special Right-of-Way Permit, or amendments or renewals thereof, shall be filed in such form and in such manner as required by this Chapter, any Regulations the City may adopt or the Codified Ordinances of the City, along with an application fee of (1) \$35.00 for a Special Right-of-Way Permit for Residential Purposes, or (2) \$70.00 for a Special Right-of-Way Permit for Non-Residential Purposes. If the Director determines that the Application is in order and that the criteria set forth in Section 5 of this Chapter have been met, and that the application should be granted, the Director shall, within thirty (30) business days of a receipt of a completed Application, conditionally grant or renew such a Right-of-Way Permit subject to any appropriate terms and conditions or deny the same. The Director's conditional grant, renewal or denial shall be in writing and served upon the Applicant by mail. Such conditional denial, grant or renewal shall become final unless appealed pursuant to Section 910.04(G).

A Special Right-of-Way Permit for Residential Purposes may be granted for an indefinite term from issuance, but may be canceled by the Director with sixty (60) days written notice. Such notice will state the reasons for the cancellation. Should the Director find that an emergency exists, the Director may, by written notice, cancel this Right-of-Way Permit within a lesser time period.

- D. Director Review: Following receipt of a Right-of-Way Permit Application the Director shall review said Application for conformance with the provisions of this Rule as outlined in Section F (1)-(3) and Section H. If the Application should be determined to be incomplete, the Director shall promptly notify the Applicant of any and all information required. Further processing will be delayed until the Director has received all such additional information. Following the approval of the Director, the Applicant shall be notified in writing of the approval by the City forwarding an approved copy of the Application to the Applicant's Designated Single Point of Contact. The Applicant must then conform to the provisions of the Right-of-Way Permit and the provisions of this Chapter Section 910.04(F) and Section 910.04(H). Any required payment amounts must be received by the City in order to validate the Right-of-Way Permit.
- E. Right-of-Way Permit Renewal: A Permittee shall file an Application to renew its Right-of-Way Permit not more than one hundred-eighty (180) calendar days nor less than ninety (90) calendar days prior to expiration of its current Right-of-Way Permit. The Application shall be filed in a form required by the City and shall include the information required in the original Application.

The Director shall determine if the Application for a Right-of-Way Permit renewal is in order and shall, within thirty (30) business days of the receipt of a complete Application, issue a

written approval or denial in accordance with the criteria set forth in this Chapter stating the reasons for the approval or denial. The Director's shall notify the Applicant by mail.

No Right-of-Way Permit shall be renewed until any present or ongoing violations or defaults in the Permittee's performance of the existing Right-of-Way Permit, or of the requirements of this Chapter, have been cured, or until a plan detailing corrective action to be taken by the Permittee has been received, reviewed and approved by the Director.

F. Form of Application: Right-of-Way Permit Applications (initial, renewal or transfer) shall be filed with the City and shall include the following information to be considered complete:

1. Completed Application Form to include the following:

- (a) The name, address, telephone and fax number of the Applicant.
- (b) The name, address, telephone and fax number of the designated single point of business contact.
- (c) The applicable Ohio Utilities Protection Service (OUPS) Registration number.
- (d) A Twenty-four hour emergency contact number(s) as further specified in Section 6 (10) of this Chapter.
- (e) Type of Right-of-Way Permit requested.
- (f) Length of Right-of-Way Permit requested.
- (g) Required attachments (see list below).
- (h) Certification by an officer of the Applicant that all Application information is complete and correct.
- (i) Witnessed by a Notary Public.

2. Exhibits (Attachments) Required by Right-of-Way Permit type:

- (a) General Right-of-Way Permit: Exhibit B (in place of C, D, E, H), F, G, I, J, K, L, M,
- (b) Special Right-of-Way Permit for Non-Residential Purposes: Exhibit B (in place of C, D, E, H), F, I, J, K, L, M,
- (c) Special Right-of-Way Permit for Residential Purposes: Exhibit F, I, J & M

3. Exhibits Types Explanation:

- (a) Exhibit B: A copy of any applicable, valid certification from the Public Utilities Commission of Ohio (PUCO), labeled as Exhibit B, including any authorization and/or certification pursuant to ORC 4933.81, et seq. or the Applicant sends a letter to the City stating that the Applicant is under the jurisdiction of the PUCO. Applicants possessing such authorization and/or certification or Applicants who



furnish the aforementioned letter to the City are presumed to possess the required financial, technical, and managerial resources and will provide this Exhibit B in lieu of Exhibit C, D, E and H.

- (b) Exhibit C: (Not required if filing Exhibit B) A detailed statement relating to the Applicant's organizational structure, labeled Exhibit C, including, but not limited to the following:
  - (1) The names, titles and business addresses of all officers, and or directors of the Applicant;
  - (2) The names and addresses of any parent or subsidiary company of the Applicant and any other group owning or controlling or owned and controlled by the Applicant, and an explanation describing the nature of any such parent or subsidiary business entity;
- (c) Exhibit D: (Not required if filing Exhibit B) A detailed description, labeled Exhibit D, of the Applicant's previous experience in providing related and/or similar services as those being proposed in the Application;
- (d) Exhibit E: (Not required if filing Exhibit B) (1) A detailed and complete financial statement of the Applicant, prepared by a Certified Public Accountant, labeled Exhibit E, for the fiscal year next preceding the date of said Application including a written statement from a Certified Public Accountant, addressed to both the Applicant and the City, certifying that the Applicant has the financial capability to construct, operate and maintain the proposed system and/or Facility within the City; or (2) a letter or other acceptable written evidence from a recognized lending institution or funding source, addressed to both the Applicant and the City, setting forth the basis for provision for whatever capital shall be required by the Applicant to construct and operate the proposed system within the City.
- € Exhibit F: A statement, labeled Exhibit F, certifying that the Applicant is not delinquent on any taxes or other obligations to the City or County;
- (f) Exhibit G: A statement, labeled Exhibit G, certifying any Service Permits awarded to the Applicant, its parent or subsidiary, from the City, or any other appropriate governmental entity. A copy of any such Service Permit will also be attached herewith;
- (g) Exhibit H: (Not required if filing Exhibit B) A detailed description, labeled Exhibit H, of the operation plan for the Facility being proposed;
- (h) Exhibit J: A non-refundable Application fee (initial, renewal or transfer) in the form of a check, money order or wire transfer made payable to Treasurer City of Marietta, Ohio, labeled Exhibit J, in the proper amount for the type of Right-of-Way Permit being requested;

- (i) Exhibit K: A copy, labeled Exhibit K, of any agreement as described in Section 910.06(I) of this Chapter.
  - (j) Exhibit L: All General Right-of-Way Permit and Special Right-of-Way Permit for Non-Residential Purposes Applicants shall provide a copy of an insurance certificate as required by this Chapter, Section 910.10.
  - (k) Exhibit M: Except for Special Right-of-Way Permits for Residential Purposes, all Applicants for Right-of-Way Permits shall provide proper bonding, self-bonding, irrevocable letters of credit or certified checks as required by Section 910.10(G) of this Chapter
- G. Appeals: Any Applicant may appeal to the Council, the refusal of the Director to grant a Right-of-Way Permit. In order to perfect such appeal, the Applicant shall file an appeal with the Council within ten (10) business days of the Director's determination or recommendation, or within sixty (60) business days of the filing of the Application if the Director has taken no action. Such Appeals should be filed to attention of: City Council Clerk, City of Marietta. Council shall then review the matter and after affording the Applicant an opportunity to be heard either in person or in writing render a final determination within twenty (20) business days of the filing of the appeal, unless such period is waived by the Applicant. Except to the extent otherwise appealable by law, the Council's decision shall be final.
- H. Any Applicant shall, within thirty (30) business days of the granting or renewal of any Right-of-Way Permit hereunder, if and as applicable, pay a pro-rata portion of the fees required by Section 7 of Chapter; provided, however, that should the Applicant appeal, and during the pendency thereof the Applicant does not use or occupy any Right-of-Way, the Applicant shall not be required to pay such pro-rata portion of said fees until a final decision on the appeal has been rendered.
- I. Exemption From Disclosure: A Permittee shall notify the City if the Permittee believes that any specific document is exempt from the public disclosure requirements of ORC 149.43. Such notice shall be in writing and indicate the specific document or portion thereof that is exempt from disclosure and the reason for the exception. The notice should include the applicable statutory reference and any additional information necessary to make a determination that the document is exempt from disclosure. The City will use its Best Efforts to notify the Permittee of any request for the documents prior to making any said documents available to any third parties. Refer to Definitions 910.01 (A)(6), Confidentiality, in this Chapter.

**910.05 CRITERIA FOR GRANTING RIGHT-OF-WAY PERMITS**

- A. A General Right-of-Way Permit shall be granted to any Applicant holding a valid Service Permit.
- B. Except as provided in Section 910.05 (A) and (C), a General or a Special Right-of-Way Permit shall be granted to an Applicant upon a determination that:



1. The granting of the Right-of-Way Permit will be consistent with the policy of the City as set forth in Section 910.02(E); and
  2. The Applicant is not delinquent on any taxes or other obligations to the City or the County and has the requisite financial, managerial and technical ability to fulfill all of its obligations hereunder.
- C. As an alternative to denial of a Right-of-Way Permit and to the extent permitted by applicable law, the Director or the City may impose such reasonable and necessary conditions on the granting of a Right-of-Way Permit so that the granting of the Right-of-Way Permit will be consistent with the criteria set forth in this Section 5 and to promote the policy of the City set forth in Section 910.02(A).
- D. Cable Television Franchises shall be granted a permit pursuant to any applicable, specific Cable Franchise Agreement and the Codified Ordinances of the City of Marietta, Ohio or as may be required by Law.

**910.06 OBLIGATIONS OF PERMITTEES; CONDITIONS OF RIGHT-OF-WAY PERMITS**

- A. In addition to the other requirements set forth herein and in the Regulations each Permittee, excluding those with a Special Right-of-Way Permit for Residential Purposes shall:
1. Use its Best Efforts to cooperate with other Permittees and the City for the best, most efficient, most aesthetic and least obtrusive use of Rights-of-Way, consistent with safety, and to minimize traffic and other disruptions including street cuts;
  2. Participate in such joint planning, construction and advance notification of Right-of-Way work, excepting such work performed in an Emergency provided the Permittee uses its Best Efforts to contact the City at the earliest possible time after beginning any such Emergency Work requiring excavation or other interference with the flow of traffic, as may be required by the City Ordinances and this Chapter and as may be more specifically set forth in Regulations promulgated pursuant to this Chapter, and provided further, that mandatory joint planning shall not (a) commence prior to: February 1, 2018, or (b) require the exchange or provision of trade secrets or competitively sensitive materials or information;
  3. Reasonably cooperate with other Permittees in utilization of, construction in and occupancy of private Rights-of-Way within the City, but only to the extent the same is consistent with the grant thereof, is not additionally burdensome to any property owner or unreasonably burdensome to the Permittee; provided, however, that nothing in this paragraph shall be construed to require expenditure of funds or rearrangement of Facilities by a Permittee without fair compensation.
  4. Upon reasonable written notice of not less than one hundred eighty (180) calendar days, except in an Emergency threatening the public health, safety or welfare, and at the direction of the Director, and the Permittee shall promptly remove or rearrange Facilities as necessary and as further specified in the Regulations (a) during any



construction, repair or modification of any street, sidewalk, City utility or other Public Improvement, (b) as part of the Director's determination, to the extent permitted by Ohio law, that designated portions of its Rights-of-Way should accommodate only underground Facilities or that Facilities should occupy only one side of a street or other public way project, (c) if an additional or subsequent City or other public use of Rights-of-Way is inconsistent with the then current uses of such Permittee, (d) or for any other reasonable cause as determined by the Director pursuant to Section 910.16(B) of this Chapter; however, nothing in this provision shall be interpreted as foreclosing any rights of a Permittee has pursuant to ORC Title 49 to file an application with the Public Utilities Commission of Ohio to recover costs associated with the relocation of Facilities.

5. Perform all work, construction, maintenance or removal of structures and Facilities within the Right-of-Way, including tree trimming, pruning, tree removal or replacement in accordance with good engineering and construction practice including any appropriate state building codes, safety codes and professional standards and in accordance with the Codified Ordinances of the City of Marietta, Ohio and use its Best Efforts to repair and replace any street, curb or other portion of the Right-of-Way, or Facilities or structures located therein, to include any required replacement of trees, to a condition to be determined by the 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 Permittees, all in accordance with all applicable provisions of this Chapter, any Regulations the City may adopt including the Codified Ordinances of the City of Marietta, Ohio.
  - (a) Permittees shall construct, install, operate and maintain their Facilities 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.
  - (b) All worker Facilities, conditions and procedures that are used during construction, installation, operation and maintenance of the Permittee's Facilities within the Right-of-Way shall comply with all applicable standards of the Federal Occupational Safety and Health Administration.
6. Register, or cause to be registered, its Facilities with underground reporting services in compliance with ORC 3781.26 as follows:
  - (a) At the time of Application for a General Right-of-Way Permit, Special Right-of-Way Permit for Nonresidential Purposes, any underground Facilities registered as a voting member or limited basis participant, of the Ohio Utilities Protection Service (OUPS) shall provide a registration number.

- (b) If the Applicant is not a voting member or is not a limited basis participant the Applicant for the Right-of-Way Permit must supply a letter certifying how the Applicant's Facilities are registered and by whom along with a registration number in compliance with the ORC. Said information shall be furnished to the City within thirty (30) business days after the Right-of-Way Permit is issued.
- 7. Use its Best Efforts to cooperate with the City in any Emergency involving the Rights-of-Way as may be required in Subsection G or any other manner as this Chapter may require or any Regulations the City may adopt shall require including the maintenance of a twenty-four (24) hour emergency contact.
- 8. Field Identification of Facilities: Permittees shall identify their Facilities in the Rights-of-Way whenever such Permittees are notified by the City that the City has determined that such identification is reasonably necessary in order for the City 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. The City shall notify the Permittee of the City's date to begin the process at least sixty (60) business days prior to the commencement of said activities.
  - (a) Permittees shall identify all structures, poles and visible conduits that are within the affected Rights-of-Way using customary industry standards and distinct identification.
  - (b) Facilities will be so marked as to identify the Permittee responsible for said facilities.
  - (c) 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 Director.
  - (d) All marking should be clearly readable from the ground and include the Permittee's name or logo only. No advertising will be permitted.
  - (e) As required by the ORC 153.64. Any Public Improvement, which may involve underground utility facilities, requires the City, prior to preparing plans and specifications, to contact the underground utility protection services (OUPS). All Providers involved in any Public Improvement project will cooperate with the City regarding underground facility location and marking as may be required by law.
- 9. Single Point of Contact: Each Right-of-Way Permit application shall include a single point of contact to coordinate all business issues related to a Permittee's proposed and existing Facilities located within the City's Rights-of-Way. Included will be the name, title, business address, telephone and fax numbers for the party so designated. Each Permittee shall keep the City advised of any changes in this information. Position responsibilities shall include, but not be limited to the following:



- (a) Participation in joint planning, construction, and/or advanced notification of Right-of-Way work;
- (b) Internal distribution of any plans or specifications required by the City, its contractors, and consultants;
- (c) Attendance at any City meetings to discuss projects and project coordination;
- (d) Notification by the City to remove or relocate any Facilities;
- (e) Any temporary movement of Facilities located within the Rights-of-Way

The single point of contact may choose a designee to attend any of the meetings as needed.

10. Twenty-four (24) hour Emergency Contact: As required within the Application, each Applicant shall provide the City with an emergency telephone number(s) which is manned by a live operator and maintained twenty-four (24) hours, three hundred sixty-five (365) calendar days per year. Should no such number exist, the Permittee shall provide the names, titles, business telephone number, resident phone numbers, pager numbers and/or mobile phone numbers of a minimum of three (3) individuals responsible for the required hours per day and days of the year emergency contact. Such list should be prioritized as to first, second and third recommended contact. Any changes to said lists shall be brought to the attention of the Director immediately.

B. Each Permittee shall assure that any subcontractor or other Person performing any work or service in the Right-of-Way on behalf of said Permittee will comply with all applicable provisions of this Chapter and its Right-of-Way Permit and will identify the Permittee for whom such contractor is working. Said Permittee shall be responsible and liable hereunder for all actions of any such subcontractor or others as if said Permittee had performed or failed to perform any such obligation.

#### C. Mapping

1. General Right-of-Way Permit Applicants shall provide a semi-detailed schematic drawing of their existing or proposed Facilities in a form that is acceptable to the City. This drawing shall include: the location of said Facilities relative to the existing City Rights-of-Way and or public lands, the size, type and construction of the Facility involved.
2. Special Right-of-Way Permit Applicants for both Residential Purposes and Nonresidential Purposes shall provide a semi-detailed schematic drawing of their existing or proposed Facilities in a form that is acceptable to the City. This drawing shall include: the location of said Facilities relative to the existing City Rights-of-Way and or public lands, the size, type and construction of the Facility involved.
3. Permittees shall furnish drawings no later than one hundred twenty (120) calendar days after construction in the Right-of-Way has been completed. Such drawings shall show

the ownership of conduits, ducts, poles and cables used. Drawings shall be on a scale of one-inch (1") equals one hundred feet (100') and shall show horizontal dimensions for the curb line and elevations.

D. Establishment of Utility Corridors: For green field or new development construction only, the 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 Director expects may someday be located within the Rights-of-Way. All excavation, construction or other Right-of-Way Permit issued by the City involving the installation or replacement of equipment may designate the proper corridor for location of the equipment in question.

1. Any Permittee whose Facilities are in the Right-of-Way and are in a position at variance with the established utility corridors established by the Director shall, at the time of the next reconstruction or excavation of the area, excluding normal maintenance activities, move such equipment to its assigned position within the Rights-of-Way. This requirement may be waived by the Director for good cause shown including consideration of such factors as: the remaining economic life of the Facilities, public safety, customer service needs and hardship to the Permittee.
2. If there is insufficient space within the Right-of-Way to accommodate all of the requests of the Permittees, the Director shall have the power to prohibit or limit the placement of new or additional Facilities within the Rights-of-Way. The Director shall make every good faith attempt to accommodate all existing and potential users of the Right-of-Way as set forth in Section 910.02 of this Chapter.
3. Permittees shall cooperate to use existing poles and conduits for installing their systems within the Rights-of-Way.
4. No pole or other fixture placed in any Right-of-Way shall be placed in such a manner that interferes with normal travel on such Right-of-Way.
5. Unless otherwise stated in the Right-of-Way Permit, all Facilities within the Rights-of-Way shall be constructed, installed and located in accordance with the provisions of this Chapter and in accordance with the following provisions:
  - (a) Wherever all existing utilities are located underground in a certain area within the City, a Permittee who desires to place its Facility in the same area must also locate its Facilities, such as drops that cross private property, underground;
  - (b) Wherever the owner of poles are required to locate or re-locate Facilities underground within a certain area of the City, every Permittee with Facilities within the same area of the City shall concurrently re-locate their Facilities underground.

E. Cooperation with Adjacent Property Owners: Unless otherwise determined by the Director pursuant to this Chapter, Permittees shall cooperate with owners and developers of private property adjacent to the Rights-of-Way in the construction of private turn lanes, driveway



approaches, roadway widening or other improvements which may require the Permittee to remove or re-locate its Facilities, provided, however, that the Permittee's expenses have been reasonably secured by the owner or developer who initiated said removal or re-location.

- F. Facility Ownership Responsibility: Owners of Facilities, poles, conduits, vaults and other structures that are located within the Rights-of-Way of the City shall have the responsibility for removal or relocation of such Facilities whenever required and shall coordinate the removal or relocation with any other Permittee who has Facilities attached to or enclosed within the owner's Facilities. Permittees neglecting or refusing to cooperate with the Facility owner in a timely fashion concerning said removal or relocation of Facilities shall be deemed to be in violation of Section 910.06(A)(4) of this Chapter.
- G. Emergency Repairs: Each Permittee shall immediately notify the City of any Emergency situation that involves its Facilities and that will require excavation and/or occupancy of the Right-of-Way. The Permittee may proceed with whatever actions it deems necessary to respond to the Emergency, but must comply with all lawful orders or directions of appropriate safety personnel, including but not limited to police and fire personnel. Upon securing the site in question from imminent danger, all other provisions of this Chapter and any rules and regulations related thereto shall apply.
  - 1. To the reasonable extent that the City becomes aware of an Emergency regarding Permittee's Facilities within the Right-of-Way, the City shall attempt to contact the local representative of each Permittee known by the City to be affected by the situation. In doing so the City will use the twenty-four (24) hour emergency number(s) provided by each Permittee. However, the City cannot and does not insure that every such contact will be made in every such instance.
  - 2. Should the Permittee's Facilities create or contribute to an imminent danger to health, safety or property, the City may take such necessary, temporary steps as are required to protect the public safety the cost of which shall be borne by the Provider whose Facilities caused the Emergency.
  - 3. Work done Without a Permit in Emergency Situations: Each Provider shall, as soon as possible, notify the Director of any event concerning its Facilities that the Provider considers to be an Emergency. The Provider may proceed to take whatever actions it deems necessary to properly respond to the Emergency. Within thirty (30) business days, unless otherwise extended by the Director, after occurrence of the Emergency, the Provider shall apply for the necessary Permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this Chapter.
- H. Removal of Graffiti: Within fourteen (14) business days' notice, a Permittee shall remove any and all graffiti on any of the Permittee's Facilities located within the City Rights-of-Way. The Director can extend the fourteen (14) business day notice requirement upon receipt from the Permittee of a reasonable request to do so. Following the granting of any such request, and upon expiration of the granted period of time, should the Permittee fail to remove said graffiti,



the City may take whatever action is necessary to remove the graffiti and bill the Permittee for the cost thereof.

- I. Permittees shall obtain any and all regulatory approvals, permits, authorizations or licenses necessary for offering or providing of services within the City from the appropriate federal, state and local authorities and upon the City's reasonable request shall provide copies of such documents.
- J. Removal and/or Trimming of Trees Within Rights-of-Way: Any trimming, removal of any tree(s) located within the rights-of-way of the City and/or any construction, trenching, or auguring within a protected root zone (also known as the drip line defined as the area below the branches of a tree in which most of the surface roots of a tree exist) requires the written approval of the Director or his/her designee, except for minor maintenance.
  1. Construction, digging, trenching or auguring within the Rights-of-Way requires prior notification to OUPS (Ohio Utilities Protection Service) as required by the ORC to assure proper marking of the location of all utility facilities within the impacted portion of the City Rights-of-Way.
  2. Any said construction digging, trenching or auguring within the rights-of-way of the City, including any such construction where trees are involved, and all removal and/or trimming of trees within the rights-of-way of the City of Marietta shall be done in accordance with all professional industry accepted standards related thereto and in conformance with the established rules and regulations of the Tree Commission.
  3. Tree Damage Requiring Tree Removal: Any City owned tree, or trees, that are damaged by any contractor or subcontractor, to the extent that Tree Commission rules and regulations shall determine requires removal of said tree(s), shall also require that: (a). The City be compensated for any and all removal costs, as necessary, at the sole expense of the responsible Person and; (b). The City be compensated, at the sole expense of the responsible Person, for the value of the City owned tree (s) as determined by accepted industry professional standards and publications and in accordance with rules and regulations of the Tree Commission
  4. Tree Damage Not Requiring Tree Removal: Construction in the Tree Protected Root Zone shall be done in accordance with the document published by the Tree Commission entitled: Minimizing Construction Damage to Street Trees, and in accordance with the rules and regulations of the Tree Commission. Should any City owned tree trunk be damaged due to such construction, unapproved pruning or avoidable damage to the tree roots the following shall apply: (a). The Tree Commission will determine whether on said damage warrants removal of the tree(s), (b). In cases where said damage does not warrant removal of the tree(s), the City shall be compensated, at the option of the responsible Person, but at the responsible Person's sole expense, by the responsible Person planting two new trees of 1.5" caliper or by payment to the City of an amount that compensates the City for damage to the City owned tree (s). The amount of said compensation shall be determined in a commercially reasonable manner by the Director



or his/her designee. If the responsible Person chooses to provide a new tree (s), said new tree (s) shall be of a species specified by the Tree Commission and shall be planted in accordance with specifications and at locations within the City as determined by the Tree Commission.

5. Emergency and Emergency Work: Emergency trimming, pruning, removal of trees or any and all construction required due to any Emergency and all Emergency Work involving trees shall be undertaken in an expeditious manner to assure the public welfare and safety and to protect property from damage.

Any Permittee and/or contractor or subcontractor who is undertaking such Emergency Work will act in accordance with Section 910.06(G) of the City's Right-of-Way Ordinance.

Tree damage resulting from Emergency Work as a consequence of Force Majeure shall not be subject to Section 910.06 (J)(3-4) listed above.

The City and Permittees and/or their designees, contractors and/or subcontractors shall make their Best Effort, given the Emergency, to coordinate their activities to best resolve the Emergency and/or properly complete the Emergency Work.

#### **910.07 PERMIT FEES, COMPENSATION FOR RIGHT-OF-WAY PERMITS AND AUDITING**

- A. In addition to any other rights set forth in this Chapter, and in addition to any other fees charged pursuant to this Chapter, the Codified Ordinances and Regulations of the City of Marietta, Ohio, the City reserves its right to manage the public Rights-of-Way within the City and to require fair and reasonable compensation from users of the public Rights-of-Way within the City, on a competitively neutral and nondiscriminatory basis, for use of the public Rights-of-Way.
- B. Application Fees:
  1. The application fee for a General Right-of-Way Permit for an Applicant or for any Applicant seeking to provide services above and beyond those covered by any Service Permit is: \$70.00.per year.
  2. The application fee for a Special Right-of-Way Permit for Non-residential Purposes as defined in this Chapter is \$70.00.
  3. The application fee for a Special Right-of-Way Permit for Residential Purposes as defined in this Chapter or not exempted as part of this Chapter is \$35.00.
- C. All Fees pursuant to this Chapter shall be paid by check, money order or wire transfer to the City Treasurer as required. Payments shall be sent to the attention of the Director at the City's given address.
- D. The City shall maintain accounting books and records utilized to calculate the amount of payment of any Right-of-Way Permit Fees that are payable to the City by a permittee. The

City will treat all such accounting books, records, as confidential except to the extent that such records are public records under Ohio law.

- E. The fees as specified in this Chapter may be modified or adjusted by amendment to this Chapter or by any Regulation the City may adopt; provided, however, that (1) such fees remain reasonable and nondiscriminatory and, (2) that the said fees represent not more than a reasonable allocation of the total Right-of-Way Related Costs incurred by the City as defined in this Chapter.
- F. Fees for Right-of-Way Permits:
- G. As reimbursement for the City's cost to administer this Chapter and to manage, administer and control the Rights-of-Way, and maintain each Right-of-Way Permit issued, the following inspection and permit fees are established:
  - 1. The permit fee for a General Right-of-Way Permit as defined in this Chapter is \$250.00.
  - 2. The permit fee for a Special Right-of-Way Permit for Non-residential Purposes as defined in this Chapter is \$250.00.
  - 3. The permit fee for a Special Right-of-Way Permit for Residential Purposes as defined in this Chapter is \$100.00.
  - 4. Inspection Fee – an initial inspection fee by the Engineering Department on a project involves no charge. Additional inspections shall be charged the prorated rate of \$ 48.00 per hour.

## **910.08 JOINT PLANNING AND CONSTRUCTION**

Except for Special Right-of-Way Permits for Residential Purposes, and as required by this Chapter, the Director will conduct Joint Planning and Construction sessions for all Right-of-Way Permittees. Any Confidential Information furnished by any Permittee to the Director for such meetings and in possession of the City will be treated as such, to the extent determined legally appropriate by the City Attorney. Nothing in this Section shall be interpreted as preventing or prohibiting any ad hoc planning and/or construction sessions that may be required as circumstances dictate

- A. The City will hold an annual meeting early in the fourth quarter of each calendar year. At this meeting the City will distribute the schedule for all City Divisions planning to work in the Right-of-Way for the next year. A representative from each Permittee must attend said meeting.
- B. Following this meeting each Permittee, to the extent known, shall submit a one (1) year projection of its intended improvements, upgrades, extensions, or planned maintenance activities in the public Right-of-Way. Such projections shall include the nature, limits, and schedule for the improvements and shall be submitted to the Director within the fourth quarter of the calendar year in which said meeting is scheduled. To the extent permitted by law, the City shall treat any such information so designated as confidential; provided however, that



nothing herein should be construed to require the City to withhold such information upon an appropriate request for public records information.

The projection shall include, but not be limited to the following information:

1. The location and limits of the proposed improvements, upgrades, extensions and replacements including miles of Right-of-Way being used or to be used.
  2. The nature of the work being proposed.
  3. The estimated dates of all projects to be commenced during the one (1) year period.
- C. Any Permittee identified as having Facilities within the area of the proposed projects shall be responsible for providing a representative to attend the meetings to coordinate all said projects.
- D. In order to determine location of a Permittee's Facilities relative to the City's proposed improvements, and upon written request from the City, its contractors or consultants, each Permittee shall submit plans, maps or other details of its Facilities within thirty (30) calendar days, unless a greater period is specified and agreed to upon request. If the Permittee has no Facilities within the area of the proposed City project or Public Improvement, the Permittee shall notify the City within thirty (30) calendar days of the written request from the City.
- E. The Permittee shall review all preliminary plans submitted by the City, or its agents, to confirm or identify, to the extent reasonably ascertainable, the vertical and horizontal locations of its Facilities within the planned area and shall identify any conflicts between its Facilities and the planned City project or Public Improvements..
- F. The Permittee shall return said plans, with the Permittee's Facilities accurately located thereon, to the City within thirty (30) calendar days, unless a greater period of time is agreed upon.
- G. Conflicts identified during the preliminary review by the Permittee shall be reviewed by the City to consider if an alternative design or re-design of the system is appropriate and/or if additional Right-of-Way should be acquired to avoid any such conflicts.
- H. Upon receipt of final plans and project schedules from the City, the Permittee shall initiate the design of any re-locations required to facilitate the construction of the proposed project. The vertical and horizontal locations of proposed, and/or previously re-located Facilities shall be accurately shown on the plans and returned to the City within thirty (30) calendar days of original receipt, unless a greater period is specified upon such request. A proposed re-location schedule shall be attached to the plans. Scheduled advertising for construction bids for the City's proposed public improvements shall not be delayed due to the Permittee's re-location work.
- I. Upon written request from the City, the Permittee shall remove or rearrange any of the Permittee's Facilities within the public Rights-of-Way within one hundred eighty (180) calendar days of said notice at Permittee's cost. Failure to comply with such request will result in the Permittee being in violation of this Chapter and shall subject said Permittee to all penalties and fines stipulated therein.



**910.09 ADOPTION OF REGULATIONS**

- A. In accordance with the provisions of Section 910.09(C), the Director may promulgate Regulations, as the Director deems appropriate from time to time, to carry out the express purposes and intent of this Chapter, including Regulations governing the fees, procedures and the processes of this Chapter.
- B. Such Regulations shall not materially increase the obligations of any Permittee hereunder. In promulgating such Regulations, including those related to Section 910.06(A), provided, however, that: (1) adoption of Regulations increasing fees in accordance with this Chapter; (2) the requiring of placement of Facilities in designated portions of the Rights-of-Way underground pursuant to Section 910.06 (A)(4); shall not be construed as materially increasing the obligations of a Permittee.
- C. The Director shall promulgate proposed Regulations by filing the same with the Clerk of Council for publication in the City Bulletin. Each Permittee shall be served with a copy of the proposed Regulations by regular U.S. Mail; provided, however, that any failure of any Permittee to actually receive such notice shall not in any way affect the validity or enforceability of such Regulation. Any Permittee may file specific written comments or objections on the proposed Regulations within a thirty (30) calendar day period after such publication (hereinafter "Comment Period"). The proposed Regulations shall become effective thirty (30) calendar days after the end of the Comment Period (or such longer period as determined by Council), unless such Regulation is modified or rejected by City Council.
- D. The City may adopt Emergency Regulations to be immediately effective, when the City determines the same to be appropriate or required by the public health, safety or welfare; provided, however, that any such Regulation shall nonetheless be subject to the comment and review process as set forth in Section 910.10(C).

**910.10 INDEMNITY; INSURANCE**

- A. Each Permittee shall, as a condition of its Right-of-Way Permit, indemnify, protect and hold harmless the City from any and all lawsuits, claims (including without limitation worker's compensation claims against the City or others), causes of action, actions, liability, and judgments for injury or damages.
  - 1. To persons or property, in any way arising out of or through the acts or omissions of the Permittee, its subcontractors, agents, or employees attributable to the occupation by the Permittee of the Right-of-Way, to which the Permittee's negligence shall in any way contribute, and regardless of whether the negligence of any other party shall have contributed to such claim, cause of action, judgment, injury or damage excluding, however, claims arising from the City's sole negligence, gross negligence, willful misconduct, or fraud by the City.
  - 2. Arising out of any claim for invasion of the right of privacy, for the defamation of any 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 Permittee, excluding however, claims arising out of or related to City programming.

3. Arising out of Permittee's failure to comply with the provisions of any federal, state, or local statute, ordinances or regulations applicable to Permittee in its business hereunder.

B. The foregoing indemnification is conditioned upon the City:

1. Giving the Permittee prompt notice of any claim or the commencement of any action, suit or proceeding for which indemnification is sought.
2. Affording the Permittee the opportunity to participate in and fully control any compromise, settlement, or other resolution disposition of any claim or proceeding subject to indemnification.
3. Fully cooperating in the defense of such claim and making available to the Permittee all pertinent information under the City's control.

C. 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.

D. Insurance: Except as provided in Subsection F hereof, each Permittee shall be required to, at their own cost and expense, obtain, and maintain during the term of any permit, a liability insurance policy or policies naming the City as an additional insured. A Certificate of Insurance regarding such policies shall be furnished to the Director at or before the granting of a Right-of-Way Permit. The insurance company issuing said policies shall carry a financial rating of not less than "A" in the latest edition of "Bests Key Rating Guide" published by A. M. Best, and shall be duly licensed to do business in the State of Ohio. Said policies shall be maintained for such other period of time during which the operator operates or is engaged in the removal of the System. Each such policy shall contain the following endorsement:

"It is hereby understood and agreed that this policy may not be canceled nor the intention not to renew be stated until thirty (30) days after the receipt by the City, by registered mail, of a written notice of such intent to cancel or not renew."

1. 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 Permittee shall obtain and furnish to the City a Certificate of Insurance evidencing replacement insurance policies conforming to the insurance requirements of this Chapter.
2. Additional Insurance: The City reserves the right to require any additional insurance coverage it deems necessary after the review of the proposal submitted by the Permittee.

E. Except as provided in Subsection F hereof, each Permittee shall maintain insurance coverage [or self-insurance coverage by Permittee having capitalization in excess of ten million dollars (\$10,000,000), as determined by the Director] in accordance with the following:

1. General Liability Insurance: The Permittee shall maintain general liability coverage on a comprehensive coverage form, including the following: premises/operations, explosion and collapse hazard, underground hazard, products/completed operations hazard, contractual insurance, broad form property damage, and personal injury. The following limits of liability are a minimum:
    - (a) \$1,000,000 per occurrence;
    - (b) \$2,000,000 annual aggregate;
    - (c) \$1,000,000 excess general liability per occurrence and annual aggregate.
  2. Auto Liability Insurance: The Permittee shall maintain comprehensive auto liability insurance covering owned, hired, and non-owned vehicles in the minimum amounts of:
    - (a) \$1,000,000 per occurrence;
    - (b) \$2,000,000 annual aggregate;
    - (c) \$1,000,000 excess automobile liability per occurrence.
  3. Worker's Compensation and Employer's Liability Insurance: The Permittee shall maintain worker's compensation and employer's liability insurance, valid in the State of Ohio, in the minimum amount of:
    - (a) Statutory limit for Worker's Compensation;
    - (b) \$1,000,000 for employer's liability per occurrence; and
    - (c) \$1,000,000 excess employer liability coverage.
- F. Self-Insurance: Those Applicants maintaining a net book value in excess of ten million dollars (\$10,000,000) may self insure for any and all coverage's listed above in Subsection E by submitting a statement requesting to do same.
- G. Except for Special Right-of-Way Permits for Residential Purposes, all Permittees shall provide either a Performance Bond (or self bonding by Permittees having capitalization in excess of Fifty Million Dollars), an Irrevocable Letter of Credit or a Certified Check in an amount agreed to by the City and the Permittee to pay the cost of restoration of the Right-of-Way should the Permittee fail to perform restoration required by this Chapter or the Right-of-Way Permit and to pay the cost of removal or relocation of any Facilities required by this Chapter or Right-of-Way Permit should the Permittee fail to perform said removal or re-location.

## **910.11 REMOVAL OF FACILITIES**

- A. Discontinuance of Operations, Abandoned and Unused Facilities. Except for Special Right-of-Way Permits for Residential Purposes, any Permittee that discontinues operations of Facilities or abandons or has unused Facilities within the Rights-of-Way shall submit a written notice to the Director describing the portion of the facilities to be discontinued and abandoned, any plan for securing the same and the proposed date of abandonment, which date shall not be less than



one hundred eighty (180) calendar days from the date such notice is submitted to the Director. Abandoned Facilities within the Rights-of-Way shall be deemed to be a nuisance and the City may take all reasonable action to abate the nuisance.

A Permittee shall not remove, destroy or permanently disable any such Facilities after such notice without the written approval of the City. The Permittee shall, in accordance with industry and good engineering practices, either abandon such Facilities in place or remove or secure such Facilities as set forth in the notice unless the City reasonably determines otherwise.

- B. Upon such abandonment, the City may elect to accept full title and ownership of the abandoned Facility. Such acceptance shall be in writing and upon such acceptance; full title and ownership of such abandoned Facilities shall pass to the City without the need to pay compensation to the Permittee. The Permittee shall continue to be responsible for all taxes on said Facilities or other liabilities associated with said Facilities, until the date the same was accepted by the City.
- C. The Permittee may submit to the City within a reasonable amount of time and in accordance with ORC 4905.20 and 4905.21 a proposal for transferring ownership of its Facilities to the City. If a Permittee proceeds under this clause, the City may, at its option where lawful, purchase the Facilities or require the Permittee to post a bond in an amount sufficient to reimburse the City for reasonably anticipated costs in removing said Facilities
- D. Should any Permittee fail, after notice, to remove or rearrange said Facilities at the Director's request as specified in Section 910.06(A)(4) or comply with the Director's order pursuant to Section 910.12(A), the City may declare such Facilities to be a nuisance and 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 restoring them to a useable condition, subject to a finding of the PUCO pursuant to the requirements of ORC 4905.20 and 4905.21 or, requiring removal of said Facilities by the Permittee at the Permittee's sole cost or, at its option and in addition to the imposition of any penalties or other remedies hereunder, undertake or cause to be undertaken, any reasonable and lawful action necessary to remove, secure, or rearrange the Facilities. The City shall have no liability for any damage to said Facilities as a result of such action.
- E. If the City requires a Permittee to remove said Facilities within the Rights-of-Way, the City shall use reasonable efforts to have this removal occur in conjunction with other scheduled excavations in the Rights-of-Way.
- F. If the City abates the nuisance it may take all action necessary to recover its costs to do so, including but not limited to, those methods set forth in ORC 715.261

## **910.12 REVOCATION**

- A. In addition to any other rights set out in this Chapter, the City reserves the right to revoke, in accordance with the procedures set forth in Section 910.12(B), any Right-of-Way Permit in the event a Permittee violates any material provision of this Chapter or its Right-of-Way Permit.



B. Notice Required: The Director shall give a Permittee thirty (30) days prior written notice of intent to revoke said Permittee's Right-of-Way Permit if the City determines that the Permittee has:

1. Violated any material provision or requirement of the Permit Application process or has violated any Law or terms and conditions of the Permit or this Chapter or failed to cure any such violation as may be required;
2. Made an evasion or an attempt to evade or circumvent the Permit application or issuing process;
3. Made any material misrepresentation of fact in the Permit application or practiced any fraud or deceit upon the City.
4. Failed to obtain and maintain the required bond and/or insurance.

Such notice shall state the reasons for such action including the manner in which the Director believes the Permittee has violated its Right-of-Way Permit or provisions of this Chapter.

C. Cure Required: If the Permittee cures the violation or other cause within the thirty (30) calendar day notice period, or if the Permittee initiates efforts satisfactory to the Director to remedy the stated violation, the Director may rescind said notice of revocation. If the Permittee does not cure the stated violation or other cause or undertake efforts satisfactory to the Director to remedy the stated violation, the Director may recommend said Right-of-Way Permit be revoked.

The Permittee may appeal said Permit revocation to the Mayor within thirty (30) calendar days. If the Mayor determines there was no breach or reason for the revocation then the Mayor shall overturn the decision of the Safety-Service Director. Otherwise the Mayor shall affirm the decision of the Director to revoke the Permit. The decision of the Mayor shall be final.

## **910.13 FORECLOSURE AND RECEIVERSHIP**

- A. Upon the filing of any voluntary or involuntary petition under the Bankruptcy Act by or against the Permittee, or any action for foreclosure or other judicial sale of the Permittee's facilities located within the Rights-of-Way, the Permittee shall so notify the Director within fourteen (14) calendar days thereof and such Permittee's Right-of-Way Permit shall be deemed void and of no further force and effect.
- B. The City shall have the right to revoke, pursuant to the provisions of Section 910.12 of this Chapter, any Right-of-Way Permit granted pursuant to this Chapter, subject to any applicable provisions of law, including the Bankruptcy Act, one hundred and twenty (120) calendar days after the appointment of a receiver or trustee to take over and conduct the business of the 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) calendar days or unless:

1. Within one hundred and twenty (120) calendar days after election or appointment, such receiver or trustee shall have fully complied with all the provisions of the relevant Right-of-Way Permit and of this Chapter and remedied all defaults thereunder; and,
2. Said receiver or trustee, within said one hundred and twenty (120) calendar days, shall have executed an agreement, duly approved by the Court having jurisdiction over the premises, whereby such receiver or trustee assumes and agrees to be bound by each and every provisions of the relevant Right-of-Way Permit and this Chapter.

**910.14 CONTINUING OPERATION AND HOLDOVER**

Should a Permittee continue to operate all or any part of their Facilities or Systems after termination, lapse, or revocation of a Right-of-Way Permit said Permittee shall continue to comply with all applicable provisions of this Chapter and Laws. Such continued operation shall in no way be considered as a renewal or extension of the Right-of-Way Permit nor as a limitation on any remedy available to the City as a result of said continuing operation.

**910.15 RESERVATION OF RIGHTS.**

- A. Nothing in this Chapter should be construed so as to grant any right or interest in any Right-of-Way or Public Property other than that explicitly set forth herein.
- B. Nothing in this Chapter shall be construed to prevent the City from undertaking Public Improvements, constructing, maintaining, repairing or relocating any City utility, including street lighting, communications or like Facilities; grading, paving, maintaining, repairing, relocating or altering any street, Public Property or Right-of-Way; or constructing, maintaining, relocating, or repairing any sidewalk or other public work or Public Improvement. To the extent that such work requires temporary or permanent relocation or rearrangement of any Facilities or structures of any Permittee, such relocating or rearrangement shall be accomplished at the sole cost of the Permittee in such time and in such manner as set forth in this Chapter, any Regulations the City may adopt or Codified Ordinances of the City.
- C. The City reserves the right and privilege to cut or move any Facilities located within the Rights-of-Way as the City may deem necessary or appropriate in response to any Emergency. The City will make its Best Effort to so notify any Permittee of such activity.
- D. Unless directly and proximately caused by the willful, intentional or malicious act by the City, the City shall not be liable for any damage to or loss of any Telecommunications Facility within the Rights-of-Way as a result of or in connection with any public works, Public Improvements, construction, excavation, grading, filling, or any kind of work in the Rights-of-Way.
- E. Vacation: Vacation of Rights-of-Way will be in accordance with ORC Sections 723.04 or 723.05 or as may be required in ORC Section 723.09 or unless preempted by State or Federal Law. In the event any Right-of-Way used by a Permittee shall be vacated by the City during the term of any Right-of-Way Permit granted pursuant to this Chapter, the Permittee shall, at

its sole expense, forthwith remove its Facilities therefrom unless specifically permitted by the City to continue use of the same or if such continuance or an easement is required by State Law. All Permittees and the City agree that any such removal may require notification of OUPS or any other Registered Underground Utility Protection Service as required by ORC before any such removal or relocation of any Facilities within the Rights-of-Way. Upon removal of said Facilities the Permittee shall, at Permittee's sole cost, restore, repair or reconstruct the area where said removal occurred to a condition materially equivalent to that existing before such removal. The City shall give the Permittee thirty (30) calendar days written notice to remove the Facilities and to repair, restore, reconstruct, improve or maintain said vacated area. Should the Permittee neglect or refuse to do such work or cause it to be done, the City may undertake completion of the work and the cost thereof as found and declared by the City, shall be paid by the Permittee as directed by the City.

#### **910.16 TEMPORARY MOVEMENT OF FACILITIES**

In the event it is necessary to move or temporarily remove any of a Permittee's wires, cables, poles, or other Facilities placed pursuant to this Chapter, in order to lawfully move a large object, vehicle, building or other structure over the streets of the City, said Permittee shall, upon sixty (60) business days written notice from the Director, comply with the Director's request. The Director may agree to extend the period of time required if the Permittee requests a reasonable time period extension to comply. Any such movement of Facilities will be at the expense of the person requesting the movement. Prior to issuing such notice the Director will require Persons requesting such movement or temporary removal to furnish evidence of prior payment by the requester to the Permittee of the estimated cost of such movement or temporary removal.

#### **910.17 NONENFORCEMENT AND WAIVERS BY CITY.**

No Permittee shall be relieved of its obligation to comply with any of the provisions of its Right-of-Way Permit or this Chapter by reason of any failure of the City to enforce prompt compliance.

#### **910.18 CAPTIONS**

The captions and headings in this Chapter are for convenience and reference purposes only and shall not affect in any way the meaning of interpretation of this Chapter.

#### **910.19 SEVERABILITY**

If any section, subsection, clause or provision or any part thereof of this Chapter shall be finally adjudicated by a court of competent jurisdiction to be invalid, the remainder shall be unaffected by such adjudication and all the remaining provisions shall remain in full force and effect.

#### **910.20 CIVIL FORFEITURE**

In addition to any other penalties set forth in this Chapter and the remedy of specific performance, which may be enforced in a court of competent jurisdiction, the director of public service may assess an additional penalty of civil forfeiture for failure to comply with any provision of this Chapter. Such penalty shall be a monetary sum, payable to the city, in the amount of five hundred dollars (US \$500.00) per twenty-four-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 city will provide written notice to the provider detailing the failure to comply with a specific provision of this Chapter. Such notice shall also indicate that said penalty shall be assessed in fifteen (15) calendar days subsequent to the date of receipt if compliance is not achieved. If a provider desires to challenge such penalty, provider must request a public hearing before the city manager within ten (10) days of service of the notice. Such public hearing shall be held within thirty (30) days of the provider's request. If provider requests such hearing before the city manager, such penalty shall be temporarily suspended. However, if, after the public hearing, the city manager determines that provider failed to comply with the specific provision(s) of this Chapter referenced in the notice, such penalty shall be assessed starting with the fifteen (15) calendar days after receipt of the notice referenced in this section and continuing each day thereafter until compliance is achieved. The determination of the city manager shall be final. The provider may file an administrative appeal pursuant to ORC Chapter 2506. The penalty shall continue to accrue during the appeal unless the provider obtains a stay and posts a supersedeas bond pursuant to ORC § 2505.09 or the provider comes into full compliance with this Chapter.

Any Permittee may be excused for violations of this Chapter and its Right-of-Way Permit due to Force Majeure.

#### **910.99 PENALTIES: UNAUTHORIZED USE OF RIGHTS-OF-WAY**

- (a) Any person who constructs or authorizes the construction of facilities regulated by this chapter without first obtaining the required application and permits shall be in violation of the provisions of this Chapter and guilty of a third degree misdemeanor.
- (b) Any person who constructs or authorizes the construction of facilities regulated by this chapter after having his application for registration denied, refused or revoked shall be in violation of the provisions of the Chapter and guilty of a second degree misdemeanor.
- (c) Each and every violation of this Chapter will be deemed to be a distinct and separate offense. Each and every day any violation of this Chapter continues will constitute a distinct and separate offense.
- (d) Work done in the Rights-of-Way without a Permit due to any Emergency situation will not be considered an Unauthorized Use of the Rights-of-Way unless there is a failure of the Provider to comply with the requirements of this Chapter.

**This foregoing document was electronically filed with the Public Utilities**

**Commission of Ohio Docketing Information System on**

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**Case No(s). 18-0290-GA-PWC**

Summary: Text Complaint and Appeal from Public Way Ordinance against the City of Marietta electronically filed by Ms. Rebekah J. Glover on behalf of The East Ohio Gas Company d/b/a Dominion Energy Ohio