

ORDINANCE NO. 3636

AN ORDINANCE OF THE CITY OF KIRKLAND, STATE OF WASHINGTON, PERTAINING TO TELECOMMUNICATIONS, ESTABLISHING STANDARDS FOR THE GRANTING AND RENEWAL OF TELECOMMUNICATIONS FRANCHISES, PROVIDING FOR THE REGULATION OF USE OF PUBLIC RIGHTS-OF-WAY, PROVIDING FOR INSURANCE, BONDING AND CONSTRUCTION STANDARDS FOR TELECOMMUNICATIONS FACILITIES LOCATED IN PUBLIC RIGHTS-OF-WAY, ESTABLISHING PROCEDURES FOR APPEALS OF DECISIONS REGARDING TELECOMMUNICATIONS FACILITIES AND PROVIDING FOR ENFORCEMENT OF THIS ORDINANCE.

WHEREAS, pursuant to RCW statutes and other lawful authority, the City of Kirkland ("City") has the authority to regulate the use of its streets and other municipal property; and

WHEREAS, based on extensive materials contained in the legislative history files for this ordinance, the City Council finds that an increasing number of telecommunications carriers and providers have requested access to and the use of rights-of-way and public property; and to the extent permitted by law, the City finds it is in the public interest to require the obtaining of registration, licenses, franchises, cable franchises and leases from the persons or entities that use public property, easements and rights-of-way; and

WHEREAS, to ensure orderly and reasonable access to the rights-of-way and public property for telecommunications carriers and providers while protecting the public health, safety and welfare, the City Council determines that it needs to include regulations and standards for the use of such areas; Now, Therefore,

THE CITY COUNCIL OF THE CITY OF KIRKLAND, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

Section 1. Adopting a new Title No. 26 - Telecommunications, to the Kirkland Municipal Code. The City Council hereby adopts a new Title No. 26 - Telecommunications to the Kirkland Municipal Code as set forth below:

TITLE 26

TELECOMMUNICATIONS

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Chapter 26.04. Telecommunications

Section 26.04.010 Purpose. The purpose of this Title is to:

- a. Establish a local policy concerning telecommunications providers and services;
- b. Establish clear and nondiscriminatory local guidelines, standards and time frames for the exercise of local authority with respect to the regulation of telecommunications providers and services;
- c. Promote competition in telecommunications;
- d. Minimize unnecessary local regulation of telecommunications providers and services;
- e. Encourage the provision of advanced and competitive telecommunications services on the widest possible basis to the businesses, institutions and residents of the City;
- f. Permit and manage reasonable access to the public rights-of-way of the City for telecommunications purposes on a competitively neutral basis;
- g. Conserve the limited physical capacity of the public rights-of-way held in public trust by the City;
- h. Assure that the City's current and ongoing costs of granting and regulating private access to and use of the public rights-of-way are fully paid by the persons seeking such access and causing such costs;
- i. Secure fair and reasonable compensation to the City and the residents of the City, in a non-discriminatory manner, for permitting private use of the rights-of-way;
- j. Assure that all telecommunications carriers providing facilities or services within the City comply with the ordinances, rules and regulations of the City;
- k. Assure that the City can continue to fairly and responsibly protect the public health, safety and welfare;
- l. Enable the City to discharge its public trust consistent with rapidly evolving federal and state regulatory policies, industry competition and technological development.

Section 26.04.020 Definitions. Terms used in this Title shall have the following meanings:

"Affiliate" means a Person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with another Person.

"Cable Acts" means the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992, as amended by portions of The Telecommunications Act of 1996, and as hereafter amended.

"Cable Operator" means a Telecommunications Carrier providing or offering to provide "Cable Service" within the City as that term is defined in the Cable Acts.

"Cable Service" shall have the same meaning as defined in the Cable Acts.

"City" means the City of Kirkland.

"City Property" means all real property now or hereafter owned by the City whether in fee ownership or other interest.

"Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, handhold or other utility facility within the right-of-way that is or will be available for use for additional Telecommunications Facilities.

"FCC" or "Federal Communications Commission" means the Federal administrative agency, or lawful successor, authorized to regulate and oversee Telecommunications Carriers, Services and Providers on a national level.

"Grantee" means both Licensees and Franchisees granted certain rights and obligations as more fully described herein.

"Overhead Facilities" means Utility Facilities and Telecommunications Facilities located above the surface of the ground, including the underground supports and foundations for such facilities.

"Person" means corporations, companies, associations, joint stock companies, firms, partnerships, limited liability companies, other entities and individuals.

"Public Ways" includes the surface of and space above and below any real property in the City in which the City has a regulatory interest, or interest as a trustee for the public, as they now or hereafter exist, including, but not limited to, all public streets, highways, avenues, roads, alleys, sidewalks, tunnels, viaducts, bridges, skyways, or any other public place, area or property under the control of the City, and any unrestricted public or utility easements established, dedicated, platted, improved or devoted for public utility purposes; provided, however, this shall not include public parks for which a separate authorization and agreement to utilize any part of same shall be required from the City.

"Rights-of-Way" means all City Property and Public Ways, collectively, within the City.

"State" means the State of Washington.

"Surplus Space" means that portion of the usable space on a utility pole which has the necessary clearance from other pole users, as required by the orders and regulations of the Washington Utilities and Transportation Commission, to allow its use by a Telecommunications Carrier for a pole attachment.

"Telecommunications Carrier" includes every Person that directly or indirectly owns, controls, operates or manages plant, equipment or property within the City, used or to be used for the purpose of offering Telecommunications Service.

"Telecommunications Facilities" means the plant, equipment and property within the City used to transmit, receive, distribute, provide or offer Telecommunications Service.

"Telecommunications Provider" includes every Person who provides Telecommunications Service over Telecommunications Facilities.

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

"Underground Facilities" means Utility and Telecommunications Facilities located under the surface of the ground, excluding the underground foundations or supports for Overhead Facilities.

"Usable Space" means the total distance between the top of a utility pole and the lowest possible attachment point that provides the minimum allowable vertical clearance as specified in the orders and regulations of the Washington Utilities and Transportation Commission.

"Utility Facilities" means the plant, equipment and property including, but not limited to, the poles, pipes, mains, conduits, ducts, cables, wires, plant and equipment located under, on or above the surface of the ground within Rights-of-Way and used or to be used for the purpose of providing Utility or Telecommunications Services.

"Washington Utilities and Transportation Commission" or "WUTC" means the State administrative agency, or lawful successor, authorized to regulate and oversee Telecommunications Carriers, Services and Providers in the State of Washington to the extent prescribed by law.

Section 26.04.030 Registration and Fees. Except as otherwise provided herein, all Telecommunications Carriers or Providers engaged in the business of transmitting, supplying or furnishing of Telecommunications Service originating, terminating or existing within the City shall register with the City pursuant to this Title and pay all the fees as provided herein.

Section 26.04.040 License and Fees. Except as otherwise provided herein, any Telecommunications Carrier who desires to construct, install, operate, maintain or otherwise locate Telecommunications Facilities in Rights-of-Way for the purpose of providing Telecommunications Service to Persons and areas outside the City shall first obtain a license granting the use of such Rights-of-Way from the City pursuant to this Title and pay all the fees as provided herein.

Section 26.04.050 Franchise and Fees. Except as otherwise provided herein, any Telecommunications Carrier who desires to construct, install, operate, maintain or otherwise locate Telecommunications Facilities in Rights-of-Way and to also provide Telecommunications Service to Persons or areas in the City, shall first obtain a franchise granting the use of such Rights-of-Way from the City pursuant to this Title and pay all the fees as provided herein.

Section 26.04.060 Cable Franchise and Fees. Except as otherwise provided herein, any Telecommunications Carrier who desires to construct, install, operate, maintain or locate Telecommunications Facilities in Rights-of-Way for the purpose of providing Cable Services shall first obtain a cable franchise from the City pursuant to this Title and pay all the fees as provided herein and in the cable franchise.

Section 26.04.070 Application to Existing Franchise Ordinances and Agreements. Except as otherwise provided in this Title 26, this Title 26 shall have no effect on any existing franchise agreement until:

- a. The expiration of said franchise agreement; or
- b. An amendment to an unexpired franchise agreement, unless both parties agree to defer full compliance to a specific date not later than the present expiration date.

Section 26.04.080 Penalties. Any Person found violating, disobeying, omitting, neglecting or refusing to comply with any of the provisions of this Title shall be guilty of a misdemeanor. Upon conviction any person violating any provision of this Title shall be subject to a fine of up to one thousand dollars (\$1,000.00) or by imprisonment for a period of up to ninety (90) days, or both such fine and imprisonment. A separate and distinct violation shall be deemed committed each day on which a violation occurs or continues.

Section 26.04.090 Other Remedies. Nothing in this Title shall be construed as limiting any other remedies that the City may have, at law or in equity, for enforcement of this Title.

Section 26.04.100 Further Rules and Regulations. The City Manager or designee is authorized to establish further rules, regulations and procedures for the implementation of this Title.

Section 26.04.110 Severability. If any section, subsection, sentence, clause, phrase, or other portion of this Title, or its application to any Person is, for any reason, declared invalid, in whole or in part by any court or agency of competent jurisdiction, said decision shall not affect the validity of the remaining portions hereof.

Chapter 26.08 Registration

Section 26.08.010 Registration Required. All Telecommunications Carriers having Telecommunications Facilities within the corporate limits of the City, or all Telecommunications Carriers or Providers that offer or provide Telecommunications Service within the City, in whole or in part, shall register with the City hereunder on forms provided by the City Clerk which shall include the following:

- a. The identity and legal status of the registrant, including any affiliates.
- b. The name, address and telephone number of the officer, agent or employee responsible for the accuracy of the registration statement.
- c. A description of registrant's existing or proposed Telecommunications Facilities within the City.
- d. A description of the Telecommunications Service that the registrant intends to offer or provide, or is currently offering or providing, to Persons, firms, businesses or institutions within the City.
- e. Information sufficient for the City to determine whether the registrant is subject to public way licensing or franchising under this Title.
- f. Information sufficient for the City to determine whether the transmission, origination or receipt of the telecommunications services provided or to be provided by the registrant constitutes an occupation or privilege subject to any municipal tax, permit, license or franchise fee.
- g. Copies of the applicant's registration filed with the Washington Utilities and Transportation Commission pursuant to WAC 480-121, and any tariff or price list or other authorization or related filings as may be required by the WUTC to provide Telecommunications Services. Alternatively, applicant shall submit a statement

detailing the basis (along with pertinent supporting materials) for its authorizations to provide Telecommunications Services and any tariffs, filings or authorizations that affect the City's rates or costs or, in the further alternative, the reasons that registration and related filings with the WUTC are not required.

- h. Information sufficient for the City to determine that the applicant has applied for and received any permit, operating license or other right or approvals required by the Federal Communications Commission to provide Telecommunications Services or Facilities.
- i. Such other information as the City may reasonably require.

Section 26.08.020 Purpose of Registration. The purpose of registration is to:

- a. Provide the City with accurate and current information concerning the Telecommunications Carriers and Providers who offer or provide Telecommunications Services within the City, or that own or operate Telecommunication Facilities within the City;
- b. Assist the City in enforcement of this Title;
- c. Assist the City in the collection and enforcement of any municipal taxes, franchise fees, license fees or charges that may be due to the City; and
- d. Assist the City in monitoring compliance with local, state and federal laws.

Section 26.08.030 Exception to Registration. A Person which provides Telecommunications Services solely to itself, its affiliates or members between points in the same building, or between closely located buildings under common ownership or control, provided that such company or Person does not use or occupy any Rights-of-Way of the City or other ways within the City, is excepted from the registration requirements pursuant to this Title.

Chapter 26.12 License

Section 26.12.010 License. A license shall be required of any Telecommunications Carrier who desires to occupy any Rights-of-Way with any Telecommunications Facilities for the purpose of providing Telecommunications Services to Persons or areas outside the City.

Section 26.12.020 License Application. Any Person that desires a license hereunder shall file an application on a form provided by the City Clerk.

Section 26.12.030 **Determination by the City.** Within 120 days after receiving a complete application hereunder, the City Clerk shall make a determination on behalf of the City granting or denying the application in whole or in part. If the application is denied, the determination shall include the reasons for denial. The following standards shall apply when determining to grant or deny the application:

- a. The financial and technical ability of the applicant.
- b. The legal status of the applicant.
- c. The capacity of the Rights-of-Way to accommodate the applicant's facilities.
- d. The capacity of the Rights-of-Way to accommodate additional Utility and Telecommunications Facilities if the application is granted.
- e. The damage or disruption, if any, to public or private facilities, improvements, service, travel or landscaping if the application is granted, giving consideration to an applicant's willingness and ability to mitigate and/or repair same.
- f. The public interest in minimizing the cost and disruption of construction within the Rights-of-Way.
- g. The service that applicant will provide to the region.
- h. The effect, if any, on general public health, safety and welfare in the City's sole opinion if the application is granted.
- i. The availability of alternate routes or locations for the proposed facilities.
- j. Applicable federal, state and local laws, regulations, rules and policies.
- k. Such other factors as may demonstrate that the grant to use the Rights-of-way will serve the community interest.

Section 26.12.040 **Agreement.** No license granted hereunder shall be effective until the applicant and the City have executed a written agreement setting forth the particular items and provisions under which the license to occupy and use Rights-of-Way will be granted. All licenses granted pursuant to this Title shall contain substantially similar terms which, taken as a whole and considering relevant characteristics of applicants, do not provide more or less favorable terms and conditions than those required of other licensees.

Section 26.12.050 **Nonexclusive Grant.** No license granted hereunder shall confer any exclusive right, privilege or license to occupy or use the Rights-of-Way for delivery of Telecommunications Services or any other purposes.

Section 26.12.060 **Rights Granted.**

- a. No license granted hereunder shall convey any right, title or interest in Rights-of-Way but shall be deemed a license only to use and occupy the Rights-of-Way for the limited purposes and term stated in the grant.
- b. No license granted hereunder shall authorize or excuse a licensee from securing such further easements, leases, permits or other approvals as may be required to lawfully occupy and use Rights-of-Way.
- c. No license granted hereunder shall be construed as any warranty of title.

Section 26.12.070 **Term of Grant.** Unless otherwise specified in a license agreement, a license granted hereunder shall be in effect for a term of not more than five (5) years.

Section 26.12.080 **License Route.** A license granted hereunder shall be limited to a grant of specific Rights-of-Way and defined portions thereof, as may be indicated in the license agreement.

Section 26.12.090 **Construction Permits.** All licensees are required to obtain construction permits and pay all fees as required by the City, provided, however, that nothing in this Title shall prohibit the City and a licensee from agreeing to alternative plan review, permit and construction procedures in a license agreement, provided such alternative procedures provide substantially equivalent safeguards for reasonable construction practices.

Section 26.12.100 **Compensation to City.** To the extent permitted by law, each license granted hereunder is subject to the City's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for use of property pursuant to the license, provided nothing in this Title shall prohibit the City and a licensee from agreeing upon the compensation to be paid.

Section 26.12.110 **Service to City Users.** A licensee may be permitted to offer or provide Telecommunications Services to Persons or areas within the City upon submitting an application for franchise approval pursuant to this Title.

Section 26.12.120 **Amendment of Grant.**

- a. A new license application and grant shall be required of any Telecommunications Carrier that desires to extend or locate its Telecommunications Facilities in Rights-of-Way which are not included in a license previously granted hereunder.
- b. If ordered by the City to locate or relocate its Telecommunications Facilities in Rights-of-Way not included in a previously granted license, the City shall grant a license amendment without further application.
- c. A new license application and grant shall be required of any Telecommunications Provider that desires to add to or modify the Telecommunications Services provided pursuant to a license previously granted.

Section 26.12.130 Renewal Applications. A licensee that desires to renew its license hereunder shall, not more than 180 days nor less than 90 days before expiration of the current license, file an application with the City for renewal of its license which shall include the following information:

- a. The applicable information required pursuant to the license application.
- b. Any other information required by the City.

Section 26.12.140 Renewal Determinations. Within 90 days after receiving a complete application hereunder, the City Clerk shall make a determination on behalf of the City granting or denying the renewal application in whole or in part. If the renewal application is denied, the determination shall include the reasons for non-renewal. The standards enumerated in Section 26.12.030 shall apply when determining to grant or deny the application, plus a determination of the applicant's compliance with the requirements of this Title and the license agreement.

Section 26.12.150 Obligation to Cure As a Condition of Renewal. No license shall be renewed until any ongoing violations or defaults in the licensee's performance of the license agreement, of the requirements of this Title, and all applicable laws, statutes, codes, ordinances, rules and regulations have been cured, or a plan detailing the corrective action to be taken by the licensee has been approved by the City Clerk.

Chapter 26.16 Franchise

Section 26.16.010 Franchise. A franchise shall be required of any Telecommunications Carrier who desires to occupy Rights-of-Way and to provide Telecommunications Services to any Person or area in the City.

Section 26.16.020 Franchise Application. Any Person that desires a franchise hereunder shall file an application provided by the City Clerk.

Section 26.16.030 Determination by the City. Within 120 days after receiving a complete application hereunder, the City shall make a determination granting or denying the application in whole or in part. If the application is denied, the determination shall include the reasons for denial. The standards enumerated in Section 26.12.030 shall apply when determining to grant or deny the application.

Section 26.16.040 Agreement. No franchise shall be granted hereunder unless the applicant and the City have executed a written agreement setting forth the particular terms and provisions under which the franchise to occupy and use Rights-of-Way will be granted. All franchises granted pursuant to this Title shall contain substantially similar terms and conditions which, taken as a whole and considering relevant characteristics of the applicants, do not provide more or less favorable terms and conditions than those required of other franchisees.

Section 26.16.050 Nonexclusive Grant. No franchise granted hereunder shall confer any exclusive right, privilege or franchise to occupy or use the Rights-of-Way for delivery of Telecommunications Services or any other purposes.

Section 26.16.060 Rights Granted.

- a. No franchise granted hereunder shall convey any right, title or interest in the Rights-of-Way but shall be deemed a franchise only to use and occupy the Rights-of-Way for the limited purposes and term stated in the grant.
- b. No franchise granted hereunder shall authorize or excuse a franchisee from securing such further easements, leases, permits or other approvals as may be required to lawfully occupy and use Rights-of-Way.
- c. No franchise granted hereunder shall be construed as any warranty of title.

Section 26.16.070 Term of Grant. Unless otherwise specified in a franchise agreement, a telecommunications franchise granted hereunder shall be valid for a term of not more than ten (10) years.

Section 26.16.080 Franchise Territory. A telecommunications franchise granted hereunder shall be limited to the specific geographic area of the City to be served by the franchisee, and the specific Rights-of-Way and portions thereof, as may be identified in the franchise agreement.

Section 26.16.090 **Construction Permits.** All franchisees are required to obtain permits and pay all fees for Telecommunications Facilities as required by the City, provided, however, that nothing in this Title shall prohibit the City and a franchisee from agreeing to alternative plan review, permit and construction procedures in a franchise agreement, provided such alternative procedures provide substantially equivalent safeguards for responsible construction practices.

Section 26.16.100 **Compensation to City.** To the extent permitted by law, each franchise granted hereunder is subject to the City's right, which is expressly reserved, to annually fix a fair and reasonable compensation to be paid for use of property pursuant to a franchise, provided nothing in this Title shall prohibit the City and a franchisee from agreeing upon the compensation to be paid.

Section 26.16.110 **Nondiscrimination.** A franchisee shall make its Telecommunications Services available to any customer within its franchise area who shall request such service, without discrimination as to the terms, conditions, rates or charges for franchisee's services, provided, however, that nothing in this Title shall prohibit a franchisee from making any reasonable classifications among differently situated customers.

Section 26.16.120 **Service to the City.** A franchisee shall make its telecommunications services available to the City at its most favorable rate for similarly situated users, provided, however, to the extent permitted by law, the City may negotiate more favorable rates or free service, the provision of in-kind services, equipment and facilities, or any combination thereof in lieu of other obligations of franchisee.

Section 26.16.130 **Amendment of Grant.**

- a. A new franchise application and grant shall be required of any Telecommunications Carrier that desires to extend its franchise territory or to locate its Telecommunications Facilities in Rights-of-Way which are not included in a franchise previously granted hereunder.
- b. If ordered by the City to locate or relocate its Telecommunications Facilities in Rights-of-Way not included in a previously granted franchise, the City shall grant a franchise amendment without further application.
- c. A franchise application and grant shall be required of any Telecommunications Provider that desires to add to or modify the Telecommunications Services provided pursuant to a franchise previously granted.

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Section 26.16.140 Renewal Applications. A franchisee that desires to renew its franchise hereunder shall, not more than 180 days (except as otherwise provided by federal law) nor less than 120 days before expiration of the current franchise, file an application with the City for renewal of its franchise which shall include the following information:

- a. The applicable information required pursuant to the franchise application.
- b. Any other information required by the City.

Section 26.16.150 Renewal Determinations. Within 120 days after receiving a complete application hereunder from cable franchisees, and within 90 days from other Telecommunications Providers, the City Clerk shall make a determination on behalf of the City granting or denying the renewal application in whole or in part. If the renewal application is denied, the determination shall include the reasons for non-renewal. The standards enumerated in Section 26.12.030 shall apply when determining to grant or deny the application, plus a determination of the applicant's compliance with the requirements of this Title and the franchise agreement.

Section 26.16.160 Obligation to Cure As a Condition of Renewal. No franchise shall be renewed until any ongoing violations or defaults in the franchisee's obligations under the franchise agreement, of the requirements of this Title, and all applicable laws, statutes, codes, ordinances, rules and regulations have been cured, or a plan detailing the corrective action to be taken by the franchisee has been approved by the City.

Chapter 26.20 Cable Franchise

Section 26.20.010 Grant of Franchise. The City may grant one or more cable television franchises containing such provisions as are reasonably necessary to protect the public interest, and each such franchise shall be awarded in accordance with and subject to the provisions of this Ordinance. This Ordinance may be amended from time to time, and in no event shall this Ordinance be considered a contract between the City and a franchisee such that the City would be prohibited from amending any provision hereof, provided no such amendment shall in any way impair any contract right or increase obligations of a franchisee under an outstanding and effective franchise except in the lawful exercise of the City's police power. This Chapter 26.20 shall be in addition to the requirements of Chapter 7.61 Cable Television - Procedures and Terms For Grant Of Franchises (as such Chapter 7.61 now exists or may be amended from time to time, and in the event of a conflict between Chapter 26.20 and Chapter 7.61, Chapter 7.61, as it now or hereafter exists, shall control).

Section 26.20.020 Franchise Required. No Person may construct, operate or maintain a cable system or provide cable service over a cable system within the City without a franchise

granted by the City authorizing such activity. No Person may be granted a franchise without having entered into a Franchise Agreement with the City pursuant to this Ordinance. For the purpose of this provision, the operation of part or all of a cable system within the City means the use or occupancy of Rights-of-Way by facilities used to provide Cable Service. To the extent permitted by law, a system used to provide Telephone Service also used to provide Cable Service shall be subject to this Ordinance and shall also require a franchise. Services similar to Cable Service, such as open video system service, shall also be subject to this Ordinance to the extent provided by law. A system shall not be deemed as operating within the City even though service is offered or rendered to one or more subscribers within the City, if no Right-of-Way is used or occupied. All cable franchises granted pursuant to this Title shall contain substantially similar terms and conditions, which, taken as a whole and considering relevant characteristics of the applicants, do not provide more or less favorable terms and conditions than those required of other cable franchisees.

Section 26.20.030 Length of Franchise. Unless otherwise specified in a cable franchise, no cable franchise shall be granted for a period of more than ten (10) years.

Section 26.20.040 Cable Franchise Characteristics.

- a. A cable franchise authorizes use of Rights-of-Way for installing, operating and maintaining cables, wires, lines, optical fiber, underground conduit and other devices necessary and appurtenant to the operation of a cable system to provide Cable Services within the City, but does not expressly or implicitly authorize a franchisee to provide service to, or install a cable system on private property without owner consent, or to use publicly or privately owned poles, ducts or conduits without a separate agreement with the owners to the extent provided by law.
- b. A cable franchise shall not mean or include any exclusive right for the privilege of transacting and carrying on a business within the City as generally required by the ordinances and laws of the City. A cable franchise shall not confer any authority to provide Telecommunications Services or any other communications services besides Cable Services, and to the extent permitted by law, a separate franchise shall be required for the provision of Telecommunications Services in addition to the cable franchise. A franchise shall not confer any implicit rights other than those mandated by federal, state or local law.
- c. A cable franchise is nonexclusive and will not explicitly or implicitly: preclude the issuance of other franchises to operate cable systems within the City; affect the City's right to authorize use of Rights-of-Way by other Persons to operate cable systems or for other purposes as it determines appropriate; or affect the City's right to itself construct, operate or maintain a cable system, with or without a franchise.

- d. Once a cable franchise has been accepted and executed by the City and a franchisee, such cable franchise shall constitute a valid and enforceable agreement between the franchisee and the City, and the terms, conditions and provisions of such franchise, subject to this Ordinance and all other duly enacted and applicable laws and regulations, shall define the rights and obligations of the franchisee and the City relating to the franchise.
- e. All privileges prescribed by a cable franchise shall be subordinate to any prior lawful occupancy of the Rights-of-Way and the City reserves the right to reasonably designate where a franchisee's facilities are to be placed within the Rights-of-Way through its generally applicable permit procedures.
- f. A cable franchise shall be a privilege that is in the public trust and personal to the original franchisee. No franchise transfer shall occur without the prior written consent of the City Council upon application made by the franchisee pursuant to this Ordinance, and the franchise, and applicable law, which consent shall not be unreasonably withheld, and any purported franchise transfer made without application and prior written consent shall be void and shall be cause for the City to revoke the cable franchise.

Section 26.20.050 Cable Franchisee Subject to Other Laws, Police Powers.

- a. A cable franchisee shall at all times be subject to and shall comply with all applicable federal, state and local laws and regulations, including this Ordinance. A cable franchisee shall at all times be subject to all lawful exercise of the police power of the City including, but not limited to, all rights the City may have under the Cable Acts, all powers regarding zoning, supervision of construction, control of Rights-of-Way and consumer protection.
- b. The City shall have full authority to regulate cable systems, cable franchisees and franchises as may now or hereafter be lawfully permissible.

Section 26.20.060 Interpretation of Franchise Terms.

- a. In the event of a conflict between this Ordinance and a cable franchise, the provisions of the cable franchise shall control.
- b. The provisions of this Ordinance and a cable franchise will be liberally construed in accordance with generally accepted rules of construction to promote the public interest.

Section 26.20.070 **Operation of a Cable System Without a Franchise.** Any Person who occupies Rights-of-Way for the purpose of operating or constructing a cable system or provides Cable Service over a cable system and who does not hold a valid franchise from the City shall be subject to all requirements of this Ordinance. In its discretion, the City at any time may by ordinance: require such Person to enter into a franchise within thirty (30) days of receipt of written notice to such Person from the City that a franchise is required; require such Person to remove its property and restore the affected area to a condition satisfactory to the City; direct municipal personnel to remove the property and restore the affected area to a condition satisfactory to the City and charge the Person the costs therefor, including by placing a lien on the Person's property; or take any other action it is entitled to take under applicable law. In no event shall a franchise be created unless it is issued by the City pursuant to this Ordinance and subject to a written Franchise Agreement.

Section 26.20.080 **Eminent Domain.** Nothing herein shall be deemed or construed to impair or affect, in any way or to any extent, the City's power of eminent domain.

Section 26.20.090 **Exclusive Contracts and Anti-Competitive Acts Prohibited.**

- a. To the extent permitted by law, no cable franchisee or other multichannel video programming distributor shall enter into or enforce an exclusive contract for the provision of cable service or other multichannel video programming with any person, or demand the exclusive right to serve a person or location, as a condition of extending service to that person or location.
- b. To the extent permitted by law, no cable franchisee or other multichannel video programming distributor shall engage in acts that have the purpose or effect of limiting competition for the provision of Cable Service or services similar to Cable Service in the City.

Section 26.20.100 **Cable Franchise Fees.** Cable franchisees shall be subject to the cable franchise fees, payments and costs provided in their cable franchise and herein.

Chapter 26.24 **Conditions of Grant of License, Franchise or Cable Franchise**

Section 26.24.010 **General Duties.**

- a. All Grantees, before commencing any construction in the Rights-of-Way, shall comply with all requirements of the Kirkland Municipal Code or other ordinances of the City.

- b. All Grantees shall have no ownership rights in Rights-of-Way, even though they may be granted a license or franchise to construct or operate their facilities.

Section 26.24.020 Interference with the Rights-of-Way. No Grantee may locate or maintain its Telecommunications Facilities so as to unreasonably interfere with the use of the Rights-of-Way by the City, by the general public or other Persons authorized to use or be present in or upon the Rights-of-Way.

Section 26.24.030 Damage to Property. No Grantee or any Person acting on a Grantee's behalf shall take any action or permit any action to be done which may impair or damage any Rights-of-Way, or other property located in, on or adjacent thereto except in accordance with Section 26.24.120.

Section 26.24.040 Notice of Work. Unless otherwise provided in a license or franchise agreement, no Grantee, or any Person acting on the Grantee's behalf, shall commence any non-emergency work involving undergrounding, excavation or obstructing in or about the Rights-of-Way without five (5) working days advance written notice to the City. Any private property owner whose property will be affected by a Grantee's work shall be afforded the same notice.

Section 26.24.050 Repair and Emergency Work. In the event of an unexpected repair or emergency, a Grantee may commence such repair and emergency response work as required under the circumstances, provided the Grantee shall notify the Public Works Director as promptly as possible, before such repair or emergency work or as soon thereafter as possible if advance notice is not practicable.

Section 26.24.060 Maintenance of Facilities. Each Grantee shall maintain its facilities in good and safe condition and in a manner that complies with all applicable federal, state and local requirements.

Section 26.24.070 Relocation or Removal of Facilities. Within thirty (30) days following written notice from the City, a Grantee shall, at its own expense, temporarily or permanently remove, relocate, change or alter the position of any Telecommunications Facilities within the Rights-of-Way whenever the Public Works Director shall have determined that such removal, relocation, change or alteration is reasonably necessary for:

- a. The construction, repair, maintenance or installation of any City or other public non-telecommunications improvement in or upon the Rights-of-Way.
- b. The operations of the City or other governmental entity in or upon the Rights-of-Way.

- c. The vacation of a public street or the release of a utility easement.
- d. The construction, repair, maintenance or installation of any City or other parties' telecommunications improvement in or upon the Rights-of-Way.

Notwithstanding the foregoing and anything to the contrary elsewhere in this Ordinance, in the event that relocation or removal is due to the installation of Telecommunications Services of a competitive Telecommunications Provider (including the City or another third party), the terms and conditions regarding same may otherwise be as set forth in the license, franchise or cable franchise.

Section 26.24.080 Removal of Unauthorized Facilities. Within thirty (30) days following written notice from the City, any Grantee, Telecommunications Carrier or other Person that owns, controls or maintains any unauthorized telecommunications system, facility or related appurtenances within the Rights-of-Way shall, at its own expense, remove such facilities or appurtenances from the Rights-of-Way. If such Grantee fails to remove such facilities or appurtenances, the City may cause the removal and charge the Grantee for the costs incurred. A telecommunications system or facility is unauthorized and subject to removal in the following circumstances:

- a. Upon expiration or termination of the Grantee's license or franchise.
- b. Upon abandonment of a facility within the Rights-of-Way.
- c. If the system or facility was constructed or installed without the prior grant of a license or franchise.
- d. If the system or facility was constructed or installed without the prior issuance of a required construction permit.
- e. If the system or facility was constructed or installed at a location not permitted by the Grantee's license or franchise.
- f. Any such other reasonable circumstances affecting public health, safety and welfare deemed necessary by the Public Works Director.

Section 26.24.090 Failure to Relocate. If a Grantee is required to relocate, change or alter the Telecommunications Facilities hereunder and fails to do so, the City may cause such to occur and charge the Grantee for the costs incurred.

Section 26.24.100 Emergency Removal or Relocation of Facilities. The City retains the right and privilege to cut or move any Telecommunications Facilities located within the Rights-

of-Way as the City may determine to be necessary, appropriate or useful in response to any public health or safety emergency.

Section 26.24.110 **Damage to Grantee's Facilities.** To the extent permitted by Washington law, 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 work of any kind in the Rights-of-Way by or on behalf of the City.

Section 26.24.120 **Restoration of Rights-of-Way.** Restoration shall comply with the following:

- a. When a Grantee, or any Person acting on its behalf, does any work in or affecting any Rights-of-Way, it shall, at its own expense, promptly remove any obstructions therefrom and restore such ways or property to the same condition which existed before the work was undertaken. As used in this section, "promptly" shall mean as required by the City's Public Works Director in the reasonable exercise of the Director's discretion.
- b. If weather or other conditions do not permit the complete restoration required hereunder, the Grantee shall temporarily restore the affected ways or property. Such temporary restoration shall be at the Grantee's sole expense, and the Grantee shall promptly undertake and complete the required permanent restoration when the weather or other conditions no longer prevent such permanent restoration.
- c. A Grantee or other Person acting on its behalf shall use suitable barricades, flags, flagmen, lights, flares and other measures as required for the safety of all members of the general public and to prevent injury or damage to any person, vehicle or property by reason of such work in or affecting such Rights-of-Way.

Section 26.24.130 **Facilities Maps.** Each Grantee shall provide the City with an accurate as-built map or maps certifying the location of all Telecommunications Facilities within the Rights-of-Way. Each Grantee shall provide updated as-built maps annually.

Section 26.24.140 **Duty to Provide Information.** Within ten (10) days of a written request from the City Clerk, each Grantee shall furnish the City Clerk with information sufficient to demonstrate:

- a. That Grantee has complied with all requirements of this Title.

- b. That all taxes and fees due the City in connection with the Telecommunications Services and Facilities provided by the Grantee have been properly collected and paid by the Grantee.
- c. That all books, records, maps and other documents maintained by the Grantee with respect to its facilities within the Rights-of-Way have been made available for inspection by the City Clerk and the Public Works Director at reasonable times and intervals.

Section 26.24.150 Leased Capacity. Subject to the provisions of Section 26.24.230, a Grantee shall have the right to offer or provide capacity or bandwidth to another Telecommunications Provider, with prior City approval, provided that:

- a. Grantee shall furnish the City in advance with a copy of any such proposed lease or agreement.
- b. The proposed lessee or Person shall comply with all of the requirements of this Title.

Section 26.24.160 Grantee Insurance. Unless otherwise provided by a franchise or license, each Grantee shall, as a condition of the grant, secure and maintain the following liability insurance policies insuring both the Grantee and the City, and its elected and appointed officers, officials, agents, representatives and employees as additional insureds:

- a. Comprehensive general liability insurance with limits not less than:
 - (i) Five Million Dollars (\$5,000,000) for bodily injury or death to each Person;
 - (ii) Five Million Dollars (\$5,000,000) for property damage resulting from any one accident; and
 - (iii) Five Million Dollars (\$5,000,000) for all other types of liability.
- b. Automobile liability for owned, non-owned and hired vehicles with a limit of Three Million Dollars (\$3,000,000) for each Person and Three Million Dollars (\$3,000,000) for each accident.
- c. Worker's compensation within statutory limits and employer's liability insurance with limits of not less than One Million Dollars (\$1,000,000).

- d. Comprehensive form premises-operations, explosions and collapse hazard, underground hazard and products completed hazard with limits of not less than Three Million Dollars (\$3,000,000).
- e. The liability insurance policies required by this section shall be maintained at all times by the Grantee. Each such insurance 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 30 days after receipt by the City, by registered mail, of a written notice addressed to the City Manager of such intent to cancel or not to renew."

- f. Within ten (10) days after receipt by the City of said notice, and in no event later than twenty (20) days prior to said cancellation, the Grantee shall obtain and furnish to the City replacement insurance policies meeting the requirements of this Title.

Section 26.24.170 General Indemnification. In addition to and distinct from the insurance requirements of this Title, each Grantee hereby agrees to defend, indemnify and hold the City and its officers, officials, employees, agents and representatives harmless from and against any and all damages, losses and expenses, including reasonable attorneys' fees and costs of suit or defense, arising out of, resulting from or alleged to arise out of or result from the acts, omissions, failure to act or misconduct of the Grantee or its affiliates, officers, employees, agents, contractors or subcontractors in the construction, operation, maintenance, repair or removal of its Telecommunications Facilities, and in providing or offering telecommunications services over the facilities or network, whether such acts or omissions are authorized, allowed or prohibited by this Title or by an agreement made or entered into pursuant to this Title.

Section 26.24.180 Performance and Financial Guarantees. Before a license or franchise granted pursuant to this Title is effective, and as necessary thereafter, the Grantee shall provide and deposit such monies, bonds, letters of credit or other instruments in form and substance acceptable to the City as may be required by this Title, or by an applicable license or franchise agreement or other applicable code, ordinance, rules or regulations of the City.

Section 26.24.190 Security Fund. Each Grantee shall establish a permanent security fund with the City by depositing the amount of up to \$50,000 with the City in cash, an unconditional letter of credit, or other instrument acceptable to the City, which fund shall be maintained at the sole expense of Grantee so long as any of Grantee's Telecommunications

Facilities are located within the Rights-of-Way. This security fund shall be separate and distinct from any other bond or deposit required.

- a. The fund shall serve as security for the full and complete performance of Grantee's obligations under this Title, including any costs, expenses, damages or loss the City pays or incurs because of any failure attributable to the Grantee to comply with the codes, ordinances, rules, regulations or permits of the City.
- b. Before any sums are withdrawn from the security fund, the City Manager or designee shall give written notice to the Grantee:
 - (i) describing the act, default or failure to be remedied, or the damages, cost or expenses which the City has incurred by reason of the Grantee's act or default;
 - (ii) providing a reasonable opportunity for the Grantee to first remedy the existing or ongoing default or failure, if applicable;
 - (iii) providing a reasonable opportunity for the Grantee to pay any monies due the City before the City withdraws the amount thereof from the security fund, if applicable; and
 - (iv) that the Grantee will be given an opportunity to review the act, default or failure described in the notice with the City Manager or designee.
- c. Grantee shall replenish the security fund within fourteen (14) days after written notice from the City Clerk that there is a deficiency in the amount of the fund.

Section 26.24.200 Construction and Completion Bond. Unless otherwise provided in a license or franchise agreement, a bond written by a surety acceptable to the City equal to at least 100% of the estimated cost of constructing the Grantee's Telecommunications Facilities within the Rights-of-Way shall be deposited before a construction permit is issued.

- a. The construction bond shall remain in force until ninety (90) days after substantial completion of the work, as determined by the Public Works Director, including restoration of Rights-of-Way and other property affected by the construction. However, in addition to the foregoing, the City reserves the right to require a maintenance bond as per Chapter 175 of the City Zoning Code.
- b. The construction bond shall guarantee, to the satisfaction of the City:

- (i) timely completion of construction;
- (ii) construction in compliance with applicable plans, permits, technical codes and standards;
- (iii) proper location of the facilities as specified by the City;
- (iv) restoration of the Rights-of-Way and other property affected by the construction;
- (v) the submission of "as-built" maps after completion of the work as required by this Title;
- (vi) timely payment and satisfaction of all claims, demands or liens for labor, material or services provided in connection with the work.

Section 26.24.210 Acts at Grantee's Expense. Any act that a Grantee is or may be required to perform under this Ordinance, a license, franchise, or cable franchise or applicable law shall be performed at the Grantee's expense.

Section 26.24.220 Coordination of Construction Activities. All Grantees are required to cooperate with the City and with each other as follows:

- a. By February 1 of each year, each Grantee shall provide the Public Works Director with a schedule of its proposed construction activities which may affect the Rights-of-Way for that year. Failure to provide such schedule on a timely basis may impact upon the ability of a Grantee to obtain permits for its construction activities during the course of that year.
- b. Each Grantee shall meet with the City, other Grantees and users of the Rights-of-Way annually or as determined by the City to schedule and coordinate construction.
- c. All construction locations, activities and schedules shall be coordinated, as ordered by the Public Works Director, to minimize public inconvenience, disruption or damages.

Section 26.24.230 Assignments or Transfers of Grant. Ownership or control of a telecommunications system, license or franchise or any part of transmission capacity may not directly or indirectly, be transferred, assigned or disposed of by sale, lease, merger, consolidation or other act of the Grantee, by operation of law or otherwise, nor may there be a transfer of working control (which includes not only actual control, but also the ability to affect or influence decisions)

without the prior written consent of the City, which consent shall not be unreasonably withheld, as expressed by ordinance and then on such conditions as may be prescribed therein and:

- a. No grant shall be assigned or transferred in any manner within twelve (12) months after the initial grant of the license or franchise unless otherwise provided by law.
- b. Absent extraordinary and unforeseeable circumstances, no grant, system or integral part of a system shall be assigned or transferred before construction of the telecommunications system has been completed.
- c. The Grantee and the proposed assignee or transferee of the grant or system shall provide and certify the following information to the City Clerk:
 - (i) Complete information setting forth the nature, terms and conditions of the proposed transfer or assignment;
 - (ii) All information required of a license or franchise applicant pursuant to this Title with respect to the proposed transferee or assignee;
 - (iii) All information required by federal, state and local law or regulation [i.e., FCC 394's];
 - (iv) Any other information reasonably required by the City Clerk.
- d. No transfer shall be approved unless the assignee or transferee has the legal, technical, financial and other qualifications in the City's discretion to own, hold and operate the telecommunications system pursuant to this Title.
- e. The Grantee shall reimburse the City for all direct and indirect fees, costs and expenses incurred by the City in considering a request to transfer ownership in or assign a license or franchise unless otherwise prohibited by law.
- f. Any transfer of ownership in or assignment of a grant, system or integral part of a system without prior approval of the City under this Title shall be void and is cause for revocation of the grant.
- g. Upon receipt of all information required herein, and any other information required by the City, the City shall have one hundred and twenty (120) days to review and approve or deny the requested assignment or transfer (with respect to cable franchisees) and ninety (90) days with respect to other Telecommunications Providers, unless such period is extended by agreement of the City and Grantee.

- h. In addition to the other requirements herein, a copy of the transfer or assignment document, deed or other documentation deemed necessary by the City shall also be filed with the City Clerk within ten (10) days of any change in ownership or control.

Section 26.24.240 Transactions Affecting Control of Grant. Any transaction which results in any change of the ownership or in any manner the working control of the Grantee, of the ownership or working control of a licensee or franchisee, of the ownership or working control of affiliated entities having ownership or working control of the Grantee or of a telecommunications system, or of control of the capacity or bandwidth or any part of the transmission capacity of the Grantee's telecommunications system, Telecommunications Facilities or any parts thereof, all defined as 5% or more ownership or control (including, but not limited to, a change of 5% or more of change in financial ownership or make up or the nature of the business entity of which the Grantee is comprised), shall be considered an assignment or transfer requiring City approval hereunder, which approval shall not be unreasonably withheld. Transactions between affiliated entities are not exempt from City approval.

Section 26.24.250 Revocation or Termination of Grant. A license or franchise granted by the City to use or occupy Rights-of-Way may be revoked for any one or more of the following reasons:

- a. Construction or operation at an unauthorized location.
- b. Unauthorized transfer of control of the Grantee.
- c. Unauthorized assignment of a license or franchise.
- d. *Unauthorized sale, assignment or transfer of the Grantee's franchise or license assets or an interest therein.*
- e. Misrepresentation or lack of candor by or on behalf of a Grantee in any application to the City.
- f. Abandonment of Telecommunications Facilities in the Rights-of-Way.
- g. Failure to relocate or remove Telecommunications Facilities as required in this Title.
- h. Failure to pay taxes, compensation, fees or costs when and as due the City.
- i. Insolvency or bankruptcy of the Grantee.

- j. Violation of a material provision of this Title.
- k. Violation of a material term of a license or franchise.

Section 26.24.260 Notice and Duty to Cure. In the event that the City Clerk believes that grounds exist for revocation of a license or franchise, the Grantee shall be given written notice of the apparent violation or noncompliance, be provided a short and concise statement of the nature and general facts of the violation or noncompliance, and be given a reasonable period of time not exceeding thirty (30) days to furnish evidence:

- a. That corrective action has been, or is being actively and expeditiously pursued, to remedy the violation or noncompliance.
- b. That rebuts the alleged violation or noncompliance.
- c. That it would be in the public interest to impose some monetary damages, penalty or sanction less than revocation.

Section 26.24.270 Hearing. In the event that a Grantee fails to provide evidence reasonably satisfactory to the City Clerk as provided hereunder, the City Clerk shall make a preliminary determination as to whether an event of default by Grantee has occurred and initially prescribe remedies in accordance with Section 26.24.280. In the event that a Grantee wants to appeal such determination, it shall do so to the Hearing Examiner. In the event a further appeal is sought by the Grantee, it shall make such appeal to the City Council. With respect to apparent violations or noncompliance, appeals provided for herein shall be made within _____ days of a determination adverse to Grantee. In any event, the City shall provide the Grantee with notice and a reasonable opportunity to be heard concerning the matter.

Section 26.24.280 Standards for Revocation or Lesser Sanctions. If persuaded that the Grantee has violated or failed to comply with a material provision of this Title or of a franchise or license or applicable codes, ordinances, statutes, or rules and regulations, the City Clerk shall make a preliminary determination whether to revoke the license or franchise, and issue a written decision relating thereto, or to establish some monetary damages, penalty, lesser sanction and cure, considering the nature, circumstances, extent and gravity of the violation as reflected by one or more of the following factors:

- a. Whether the misconduct was egregious.
- b. Whether substantial harm resulted.

- c. Whether the violation was intentional.
- d. Whether there is a history of prior violations of the same or other requirements.
- e. Whether there is a history of overall compliance.
- f. Whether the violation was voluntarily disclosed, admitted or cured.

Chapter 26.28 Construction

Section 26.28.010 Construction Standards. No Person shall commence or continue with the construction, installation or operation of Telecommunications Facilities within the City except as provided in this Title, provided, however, this Chapter 26.28 shall be in addition to the requirements of the City Standard Plans, Policy Section dated May 5, 1993 as such was enacted or has or in the future is amended from time to time ("Utility Policy"), and in the event of a conflict between the aforesaid Utility Policy and this Chapter 26.28, the standards of the Utility Policy shall control.

Section 26.28.020 Construction Codes. Telecommunications Facilities shall be constructed, installed, operated and maintained in accordance with all applicable federal, state and local codes, rules and regulations including, but not limited to, the National Electrical Safety Code. Telecommunications Facilities shall comply with the most recent standards in the Utility Policy and other public works standards and applicable City codes including, but not limited to, Title 19 - Streets and Sidewalks, as it now exists or is hereafter amended. In the event of a conflict between the standards in the Utility Policy, public works standards and other local standards and Titles, those Titles, public works standards and other local standards shall apply.

Section 26.28.030 Construction Permits. No Person shall construct or install any Telecommunications Facilities within the City without first obtaining a construction permit therefore, provided, however:

- a. No permit shall be issued for the construction or installation of Telecommunications Facilities within the City unless the Telecommunications Carrier has filed a registration statement with the City pursuant to this Title.
- b. No permit shall be issued for the construction or installation of Telecommunications Facilities in the Rights-of-Way unless the Telecommunications Carrier has applied for and received a franchise or license pursuant to this Title.

- c. Unless otherwise provided by law, a franchise or license, no permit shall be issued for the construction or installation of Telecommunications Facilities without payment of all fees pursuant to this Title.
- d. No permit shall be issued to cut any Public Way, the surface of which is less than five (5) years old, unless the Grantee overlays the surface of any Public Way which is cut by the Grantee.

Section 26.28.040 Applications. Applications for permits to construct Telecommunications Facilities shall be submitted upon forms provided by the City. The applicant shall pay all associated fees and shall include any additional information as requested by the Public Works Director. The application shall be accompanied by drawings, plans and specifications in sufficient detail to demonstrate:

- a. That the facilities will be constructed in accordance with all applicable codes, rules and regulations.
- b. The location and route of all facilities to be installed on existing utility poles.
- c. The location and route of all facilities to be located under the surface of the ground, including line and grade proposed for the burial at all points along the route which are within the Rights-of-Way.
- d. To the extent such information is made accessible to Grantee, the location of all existing underground utilities, conduits, ducts, pipes, mains and installations which are within the Rights-of-Way along the route proposed by the applicant.
- e. The location of all other facilities to be constructed within the City, but not within the Rights-of-Way.
- f. The construction methods to be employed for protection of existing structures, fixtures and facilities within or adjacent to the Rights-of-Way.
- g. The location, dimension and types of all trees within or adjacent to the Rights-of-Way along the route proposed by the applicant, together with a landscape plan for protecting, trimming, removing, replacing and restoring any trees or areas to be disturbed during construction.

Section 26.28.050 Engineer's Certification. Unless otherwise provided in a license or franchise, all permit applications shall be accompanied by the certification of a registered professional engineer that the drawings, plans and specifications submitted with the application

comply with applicable technical codes, rules and regulations. The engineer shall also provide a certificate of the construction cost estimate.

Section 26.28.060 **Traffic Control Plan.** All permit applications which involve work on, in, under, across or along any Rights-of-Way shall be accompanied by a traffic control plan demonstrating the protective measures and devices that will be employed.

Section 26.28.070 **Issuance of Permit.** Within forty-five (45) days after submission of all plans and documents required of the applicant and payment of necessary permit fees, the Public Works Director, if satisfied that the application, plans and documents comply with all requirements of this Title, shall issue a permit authorizing construction of the facilities, subject to such further conditions, restrictions or regulations affecting the time, place and manner of performing the work as the Public Works Director may deem necessary or appropriate.

Section 26.28.080 **Construction Schedule.** The permittee shall submit a written construction schedule to the Public Works Director ten (10) working days before commencing any work in or about the Rights-of-Way. The permittee shall further provide written notification to the Public Works Director not less than five (5) working days in advance of any excavation or work in the Rights-of-Way.

Section 26.28.090 **Compliance with Permit.** All construction practices and activities shall be in accordance with the permit and approved final plans and specifications for the facilities. The Public Works Director and his or her representative shall be provided access to the work and such further information as he or she may require to ensure compliance with such requirements.

Section 26.28.100 **Display of Permit.** The permittee shall maintain a copy of the construction permit and approved plans at the construction site, which shall be displayed and made available for inspection by the Public Works Director at all times when construction work is occurring.

Section 26.28.110 **Survey of Underground Facilities.** If the construction permit specifies the location of facilities by depth, line, grade, proximity to other facilities or other standards, the permittee shall cause the location of its facilities to be verified by a registered Washington land surveyor. The permittee, at its expense, shall relocate any facilities which are not located in compliance with permit requirements.

Section 26.28.120 **Noncomplying Work.** Upon order of the Public Works Director, all work which does not comply with the permit, the approved plans or specifications for the work or the requirements of this Title shall be removed.

Section 26.28.130 Completion of Construction. The permittee shall promptly complete all construction activities so as to minimize disruption of the Rights-of-Way and other public and private property. All construction work authorized by a permit within Rights-of-Way, including restoration, must be completed within ninety (90) days of the date of issuance or at such other interval as the City may specify in writing upon issuance of the permit.

Section 26.28.140 As-Built Drawings. Within thirty (30) days after completion of construction, the permittee shall furnish the Public Works Director with two (2) complete sets of plans, drawn to scale and certified to the City as accurately depicting the location of all Telecommunications Facilities constructed pursuant to the permit.

Section 26.28.150 Restoration of Improvements. Upon completion of any construction work, the permittee shall promptly repair, but in no event longer than such time as may be established by the City during permit review, any and all public and private property, improvements, fixtures, structures and facilities which are damaged during the course of construction, restoring the same to their condition before construction commenced.

Section 26.28.160 Landscape Restoration.

- a. All trees, landscaping and grounds removed, damaged or disturbed as a result of the construction, installation, maintenance, operation, repair or replacement of Telecommunications Facilities, which is done pursuant to a franchise, license or permit, shall be replaced or restored to the condition existing prior to performance of the work. Significant trees removed shall be replaced. Significant Trees are defined as: An existing healthy tree which, when measured four feet above grade, has a minimum diameter of: (A) Six (6) inches for Evergreens, except as provided under B or D below, or (B) Eight (8) inches for Douglas Fir and Hemlock trees, or (C) Twelve (12) inches for deciduous trees, or (D) a tree that, because of its unique species, environment or location is determined by the Public Works Director to be a significant tree.
- b. All restoration work within the Rights-of-Way shall be done in accordance with landscape plans approved by the Public Works Director.

Section 26.28.170 Location of Facilities. Unless otherwise required in current or future City ordinances regarding underground construction requirements, all facilities shall be constructed, installed and located in accordance with the following terms and conditions:

- a. Telecommunications Facilities shall be installed within an existing underground duct or conduit whenever excess capacity exists within such utility facility.

- b. A franchisee with written authorization to install overhead facilities shall install its Telecommunications Facilities on pole attachments to existing utility poles only, and then only if surplus space is available.
- c. Whenever all existing telephone, electric utilities, cable facilities or Telecommunications Facilities are located underground within Rights-of-Way, a franchisee with written authorization to occupy the same Rights-of-Way must also locate its Telecommunications Facilities underground.
- d. Whenever all new or existing telephone, electric utilities, cable facilities or Telecommunications Facilities are located or relocated underground within Rights-of-Way, a franchisee that currently occupies the same Rights-of-Way shall concurrently relocate its facilities underground at its expense.

Section 26.28.180 Conduit Occupancy. In furtherance of the public purpose of reduction of Right-of-Way excavation, it is the goal of the City to encourage both the shared occupancy of underground conduit as well as the construction, whenever possible, of excess conduit capacity for occupancy of future Right-of-Way occupants. Therefore, if a franchisee or licensee is constructing underground conduit for its own Telecommunications Facility, and the City reasonably determines such construction is in an area in which another Telecommunications Provider(s) may also construct Telecommunications Facilities in the future, the City may require the franchisee or licensee to construct excess conduit capacity in the Rights-of-Way, provided the expense of such excess capacity shall be borne by the City (calculated as the difference between what Grantee would have paid for the construction of its conduit and the additional cost only of the excess conduit). Grantee may either lease the excess conduit to the City at a rate of one dollar (\$1.00) for the term of the franchise or license (in which case the City will be permitted to sublease the excess conduit at its sole discretion), or Grantee may manage the excess conduit itself and be permitted to charge a reasonable market lease rate for occupancy of the additional conduit space, provided such lease revenues shall be first applied to reimburse the City for its actual contribution to the construction of the excess conduit (plus interest compounded at the rate the City invested its funds during the time in question).

Section 26.28.190 Occupancy of City Owned Conduit. In furtherance of the same objectives of Section 26.28.180, above, if the City owns or leases conduit in the path of Grantee's proposed Telecommunications Facilities, and provided it is technologically feasible for Grantee to occupy the conduit owned or leased by the City, Grantee shall be required to occupy the conduit owned or leased by the City in order to reduce the necessity to excavate the Rights-of-Way. Grantee shall pay to the City a fee for such occupancy which shall be the cost Grantee would have expended to construct its own conduit from the outset, as certified by the Grantee's engineer and approved by the City Engineer. The City and Grantee may agree to amortize the fee through annual payments to the City over the term of the license or franchise, including the time value of money.

Section 26.28.200 Construction Surety. Prior to issuance of a construction permit, the permittee shall provide a construction bond, as provided in this Title.

Chapter 26.32 Fees

Section 26.32.010 Registration Fee. Each application for registration as a Telecommunications Carrier or Provider shall be accompanied by a fee in such amount as the City Finance Director determines is required to cover all direct and indirect costs.

Section 26.32.020 Preapplication Conference and Application Fee. Prior to the acceptance of an application by the City, applicants shall participate in a pre-application conference for the purpose of establishing the application fee. The purpose of establishing the application fee is to ensure the recovery of City direct and indirect costs and expenses associated with the review of the application including, but not limited to, actual costs of City staff time and resources as well as any outside consultation expenses which the City reasonably determines are necessary to adequately review and analyze the application. The application fee shall be established by the Finance Director and shall be a minimum of up to Two Thousand Five Hundred Dollars (\$2,500.00) and with the maximum fee established depending upon estimated reasonable City costs and expenditures in review of the application. All disputes in the amount required shall be resolved by an appeal to a Hearing Examiner. All franchisee and licensee applicants shall deposit the application fee with the City. This application fee shall be applied towards actual expenses and costs of the City. Any unencumbered application fees shall be refunded to the applicant upon written request of the applicant, but in no event earlier than sixty (60) days after granting or denial of the permit.

Section 26.32.030 Refund. An applicant whose license or franchise application has been withdrawn, abandoned or denied shall, within sixty (60) days of its application and review fee payment, be refunded the balance of its deposit under this section, less:

- a. The registration fee; and
- b. All ascertainable costs and expenses incurred by the City in connection with the application.

Section 26.32.040 Other City Costs. To the extent allowed by law, all Grantees shall, within thirty (30) days after written demand therefore, reimburse the City for all direct and indirect costs and expenses incurred by the City in connection with any modification, amendment, renewal or transfer of a license or franchise.

Section 26.32.050 **Reserved Compensation for Rights-of-Way.** To the extent permitted by law, the City reserves its right to fix a fair and reasonable compensation to be paid for the authorization granted to a Grantee. Nothing in this Title shall prohibit the City and a Grantee from agreeing upon the compensation.

Section 26.32.060 **Compensation for City Property.** If the right is granted, by lease, license, franchise or other manner, to use and occupy City Property for the installation or use of Telecommunications Facilities, the compensation to be paid shall be fixed by the City (to the extent permitted by law) or as otherwise agreed between the City and Grantee.

Section 26.32.070 **Construction Permit Fee.** Prior to issuance of a construction permit, the permittee shall pay a permit fee equal to \$1,000 or .75 percent of the estimated cost of constructing the Telecommunications Facilities, as certified by the applicant's engineer and approved by the City Engineer, whichever is greater. The purpose of the construction permit fee shall be to recover the City's actual attributable direct and indirect construction plan review costs and expenses, as well as damage or Rights-of-Way value diminution as a result of permittee's occupancy of the Right-of-Way. The City hereby finds that it must at this time attribute damage and diminution of value to permittee until such time as actual costs can be ascertained. This results from the complexity of the City to ascertain the number and type of all right-of-way permittees hereunder as well as the extent and nature of all future such occupancy. Therefore, the City may, within six (6) months of the effective date of this ordinance, institute a program to further analyze the value of City Rights-of-Way, after which the City shall review the fees of this Section 26.32.070, and adjust them to the extent the City determines in its sole discretion is necessary, if any, to more accurately represent ascertainable actual costs associated with future permittee's occupancy. In no event shall construction permit fees received prior to such study and analysis be refunded or increased. A permittee may request review of the fees required herein by initiation of the fee review process of Section 26.32.100 herein.

Section 26.32.080 **Annual Fees.** Each Grantee shall pay an annual fee (if any) to the City equal to the City's direct and indirect costs in connection with reviewing, inspecting and supervising the use and occupancy of the Rights-of-Way.

Section 26.32.090 **Regulatory Fees and Compensation Not a Tax.** The regulatory fees and costs provided for in this Title, and any compensation charged and paid for the Rights-of-Way provided for herein, are separate from, and additional to, any and all federal, state, local and City taxes as may be levied, imposed or due from a Telecommunications Carrier or Provider, its customers or subscribers, or on account of the lease, sale, delivery or transmission of Telecommunications Services.

Section 26.32.100 **Fee Review Process, Finance Director and Hearing Examiner.** Any applicant or permittee may initiate a review of the fees established in Sections 26.32.020 or

26.32.090, above. Within ten (10) days of notice of the fee determined by the Finance Director, applicant or permittee may appeal to the Hearing Examiner.

Pursuant to the provisions of the Kirkland Municipal Code, Chapter 3.34, the Hearing Examiner is authorized to review and make determinations as provided herein.

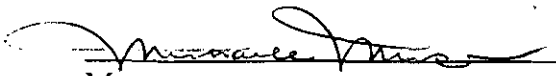
Chapter 26.36 Miscellaneous

Section 26.36.010 Context. When not inconsistent with the context, words used 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.

Section 2 Severability. If any provision of this Ordinance or its application to any person or circumstance is held invalid, the remainder of the Ordinance, or the application of the provision to other persons or circumstances is not affected.

Section 3 Summary Publication. This Ordinance shall be in force and effect five days from and after its passage by the Kirkland City Council and publication pursuant to Section 1.08.107, Kirkland Municipal Code in the summary form attached to the original of this Ordinance and by this reference approved by the City Council.

PASSED BY MAJORITY VOTE OF THE KIRKLAND CITY COUNCIL IN REGULAR, OPEN MEETING THIS 21st DAY OF July, 1998.

Signed 
Mayor

Attest


City Clerk