

ORDINANCE NO. 83

AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, ESTABLISHING MINIMUM REQUIREMENTS, PROCEDURES, AND APPLICATION INFORMATION FOR FRANCHISE AND RIGHT-OF-WAY USE AGREEMENTS WITHIN SHORELINE.

WHEREAS, the Council finds that the health, safety and welfare of residents of the Shoreline community require that the City maintain uniform control of access to the public right-of-way; and

WHEREAS, RCW 35A.11.020 grants the City broad authority to regulate the use of the public right-of-way; and

WHEREAS, RCW 35A.47.040 grants the City broad authority to grant nonexclusive franchise agreements; NOW, THEREFORE,

THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. Policy. It is the policy of the City of Shoreline to require all entities installing or maintaining facilities in, on, above or below the public right-of-way to comply with an orderly process for obtaining a franchise or right-of-way use agreement from the City.

Section 2. Definitions. The following terms contained herein, unless otherwise indicated, shall be defined as follows:

- (A) **Activities.** Shall include the installation or maintenance of any assets, structures, or facilities in the public right-of-way, but shall specifically not include activities authorized by a "Special Limited Use Permit" or a "Limited Right-Of-Way Permit."
- (B) **Applicant.** The entity requesting the grant of a franchise or right-of-way use agreement. The applicant shall identify itself as requested herein by providing the following information:
 - (1) Identification of a natural person shall include:
 - (a) Name
 - (b) Title if appropriate
 - (c) Business Address
 - (d) Phone Number
 - (e) Fax Number if available
 - (2) Identification of an entity that is not a natural person:
 - (a) Official Name (i.e., the name used to identify the entity in the records of the Washington Secretary of State, or under which the entity has been

granted a Federal Tax Identification Number if it is not required to file with the Secretary of State)

- (b) Name and Address of Agent registered with the Secretary of State for the acceptance of legal service if applicable
 - (c) Washington State Unified Business Identifier or, if that is not available, Federal Tax Identification Number
- (C) **Demonstration.** The presentation of any of the following as evidence tending to support the satisfaction of the enumerated requirement:
- (1) Verifiable historical data
 - (2) Studies or reports based upon disclosed data sources
 - (3) Other forms of demonstrations specifically enumerated in this ordinance
- (D) **Facility.** Shall include, but shall not be limited to, all structures, equipment, and assets for the operation of railroads and other routes for public conveyances, for poles, conduits, tunnels, towers and structures, pipes and wires and appurtenances thereof for transmission and distribution of electrical energy, signals and other methods of communication, for gas, steam and liquid fuels, for water, sewer and other private and publicly owned and operated systems for public service.
- (E) **Franchise.** A contractual agreement, under the authority of RCW 35A.47.040, between a Utility and the City setting forth the terms and conditions under which the City grants the Utility authority to install and maintain facilities in the public right-of-way.
- (F) **Grantee.** An applicant that has been granted a franchise or right-of-way use agreement.
- (G) **Right-Of-Way Use Agreement.** A contractual agreement between a Utility and the City setting forth the terms and conditions under which the City grants the Utility authority to install and maintain facilities in the public right-of-way.
- (H) **Utility.** Persons or private or municipal corporations owning or operating, or proposing to own or operate, facilities that comprise a system or systems for public service.

Section 3. Franchise or Right-Of-Way Use Agreement Required. It shall be unlawful to construct, install, maintain or operate any facility in, on, above or below the public right-of-way without a valid franchise or right-of-way use agreement obtained pursuant to the provisions of this ordinance and subsequent amendments. No utility shall be permitted to perform activities in the public right-of-way without first obtaining a permit pursuant to Shoreline City Ordinance No. 16, Adopting By Reference Title 14, Roads and Bridges, of the King County Code As An Interim Regulation of the City or pursuant to the City of Shoreline Development Code when adopted. No utility shall be granted a permit to perform any activities in, on, under, or above the public right-of-way without first obtaining and maintaining a valid franchise or right-of-way use agreement. All permits to work in, on, under, or above the public right-of-way will be restricted to those practices specifically enumerated in the applicant's franchise or right-of-way use agreement.

- (A) In regards to any entity exempted from municipal franchising authority by the operation of State or Federal law. Said entity must still comply with the permit requirements

established by Shoreline City Ordinance No. 16, and shall be eligible for permits as required by that Ordinance only if it has obtained from the City a valid "Right-of-way Use Agreement." The procedures for gaining a "Right-of-way Use Agreement" shall be those set out in this ordinance including any applicable fee.

- (B) The City Council may, by resolution, authorize the City Manager, or his/her designee, to execute a letter of agreement exempting entities operating in the City on the effective date of this ordinance from the franchise or right-of-way use agreement requirements of this Section for a period not greater than one (1) year from the effective date of this ordinance.

Section 4. Filing of Applications. Applications for a franchise or right-of-way use agreement will be considered pursuant to the procedures set forth in this ordinance and amendments hereto. For good cause the City Council may elect by resolution to waive any requirement set forth herein unless otherwise required by applicable law.

- (A) An application may be filed at any time or pursuant to a Request For Proposals ("RFP") issued by the City.
- (B) The City may request additional information from an applicant for a franchise or right-of-way use agreement at any time.
- (C) Applications shall be delivered to the City Clerk, and shall be accompanied by a deposit of \$1,500.00 or, if the application is in response to a RFP issued by the City, such other amount as set forth in the RFP. The City will apply the proceeds of the deposit, or any other filing fees received, against the costs associated with the City's evaluation of the pending application to the extent such is required by RCW 35.21.860. The applicant shall be liable to the City for all costs reasonably associated with the processing of its application. The City shall invoice the applicant for such costs at least on a quarterly basis. All invoiced costs must be paid in full prior to the effective date of any franchise or right-of-way use agreement or other agreement entered into pursuant to this ordinance. Nothing in this paragraph will have the effect of limiting the applicant's liability for application review costs to the amount of the deposit.
- (D) If required by RCW 35.21.860, the City shall prepare a statement of the amount of deposit funds applied to the costs of application review as of the date the franchise or right-of-way use agreement is granted, or otherwise ruled on, by the Shoreline City Council and refund any deposit amount in excess of costs as of that date within 30 days thereof. The refund shall be in the form of a check or other draft on City accounts and, unless otherwise requested in writing by the applicant, payable and mailed to the person or entity designated by the applicant.

Section 5. Content of Application. An application made pursuant to a RFP shall contain all the information required thereby. Where an application is not filed pursuant to an RFP, it shall contain, at a minimum, the following:

- (A) All applicants that are not fully owned by, or a division of, a governmental agency, whether municipal, state, or federal, shall provide the following:

- (1) Identification of the applicant and proposed system owner, and, if the applicant or proposed owner is not a natural person, a list of all partners or stockholders holding 10 percent or more ownership interest in a grantee and any parent corporation; provided, however, that when any parent corporation has in excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then a list of the 20 largest stockholders of the voting stock of such corporation shall be disclosed. An application shall also include, if applicable, the identification of all officers and directors and shall state any other primary business affiliation of each.
- (2) An affirmed statement of whether the applicant, or any person controlling the applicant, or any affiliate of said controlling person including any officer of a corporation or major stockholder thereof, has voluntarily filed for relief under any provision of the bankruptcy laws of the United States (Title 11 of the United States Code), had an involuntary petition filed against it pursuant to the bankruptcy code, been subject of any state law insolvency proceeding such as a transfer for the benefit of creditors, had a franchise or right-of-way use agreement revoked, or has been found guilty by any court or administrative agency in the United States of:

 - (a) A violation of a security or antitrust law; or
 - (b) A felony or any other crime involving moral turpitude.

If so, the application shall identify any such person and fully explain the circumstances.
- (3) A demonstration of the applicant's technical, legal and financial ability to construct and operate the proposed system, including, at the City's option:

 - (a) A detailed, complete, and audited financial statement of the applicant, duly certified as true and correct by an executive officer of the company, for the five fiscal years last preceding the date of the application hereunder (three years may be substituted if five years of data is not available); or
 - (b) A letter or other acceptable evidence in writing from a recognized lending institution or funding source, addressed to both the applicant and the City, setting forth the basis of a study performed by such lending institution or funding source, a statement of the criteria used to evaluate that basis, and a clear statement of its intent as a lending institution or funding source to provide whatever capital shall be required by the applicant to construct and operate the proposed system in the City; or
 - (c) A statement from an independent certified public accountant, certifying that the applicant has available sufficient free, net and uncommitted cash resources to construct and operate the proposed system in the City.
- (4) A complete list of all systems in which the applicant, controlling entity of applicant, subsidiary or affiliate of applicant or its controlling entity, or a principal

thereof, holds an equity interest. For each system listed, provide the following information as appropriate:

- (a) Name of the system operator and location of franchise.
 - (b) Relationship to the applicant.
 - (c) Franchise term.
 - (d) Date of expiration.
 - (e) Number of subscribers.
 - (f) Number of dwelling units passed.
 - (g) Number of route miles.
 - (h) Name of franchising authority, including the address, phone number, and name of the person responsible for oversight of the franchise or right-of-way use agreement.
- (B) A description of the physical facility proposed, the area to be served, a description of the technical characteristics of the existing service facilities and a map in a digital format acceptable to the City of the proposed and existing service system and distribution scheme.
- (C) A description of how any construction will be implemented, identification of areas having above-ground or below-ground facilities and the proposed construction schedule.
- (D) A description of the proposed services to be provided over the system.
- (E) Information as necessary to demonstrate compliance with all relevant requirements contained in this ordinance.
- (F) A demonstration of how the proposal is reasonable to meet current and future community needs and interests.
- (G) A demonstration that the proposal is designed to be consistent with all federal and state requirements.
- (H) An affidavit of the applicant, or duly authorized person, certifying, in a form acceptable to the City, the truth and accuracy of the information contained in the application and acknowledging the enforceability of application commitments.
- (I) In the case of an application by an existing grantee for a renewed franchise or right-of-way use agreement, a demonstration that said grantee has substantially complied with the material terms of the existing agreement and with applicable law.
- (J) Other information that the City, or its agents, may reasonably request of the applicant.

Section 6. Applicant Representatives. Any person or entity who submits an application under this ordinance shall have a continuing obligation to notify the City, in writing, of the names, addresses and occupations of all persons who are authorized to represent or act on behalf of the applicant in those matters pertaining to the application. The requirement to make such disclosure shall continue until the City has approved or disapproved an applicant's application or until an applicant withdraws its application.

Section 7. Consideration of Applications.

- (A) The City will consider each application for a new or renewed franchise or right-of-way use agreement where the application is found to be in substantial compliance with the requirements of this chapter and any applicable RFP. In evaluating an application, the City will consider, among other things;
- (1) the applicant's past service record in the City and in other communities,
 - (2) the nature of the proposed facilities and services,
 - (3) the proposed area of service,
 - (4) the proposed rates,
 - (5) and whether the proposal would adequately serve the public needs and the overall interests of the City residents.

In addition, where the application is for a renewed franchise or right-of-way use agreement, the City shall consider whether:

- (1) The applicant has substantially complied with the material terms of the existing franchise or right-of-way use agreement and with applicable law;
 - (2) The quality of the applicant's service, response to consumer complaints, and billing practices;
 - (3) The applicant has the financial, legal and technical ability to provide the services, facilities, and equipment as set forth in the application; and
 - (4) The applicant's proposal is reasonable to meet the future community needs and interests, taking into account the cost of meeting such needs and interests.
- (B) If the City determines that an applicant's proposal, including the proposed service area, would serve the public interest, it may grant a franchise or right-of-way use agreement to the applicant, subject to terms and conditions as agreed upon between the applicant and the City. No franchise or right-of-way use agreement shall be deemed granted unless and until an agreement has been fully executed by all parties. The franchise or right-of-way use agreement will constitute a contract, freely entered into, between the City and the grantee. Any such franchise or right-of-way use agreement must be approved by ordinance of the City Council in accordance with applicable law.
- (C) In the course of considering an application for a renewed franchise or right-of-way use agreement, the City Council shall adhere to all requirements of applicable state and federal law. Any denial of an application for a renewed franchise or right-of-way use agreement shall be based on one or more adverse findings made with respect to the factors described in subsection (A), above, pursuant to the requirements of then-applicable federal law. Neither grantee nor the City shall be deemed to have waived any right it may have under federal or state law by participating in a proceeding pursuant to this paragraph.

Section 8. Length of Agreement. The period of a franchise or right-of-way use agreement shall be as specified in the specific agreement, but it shall not exceed 15 years. If a grantee seeks authority to operate in the City beyond the term of its franchise or right-of-way use agreement, it shall file an application for a new agreement not earlier than 36 nor later than 30 months prior to the expiration of its term.

Section 9. Franchise Fee.

- (A) A grantee, in consideration of the privilege granted under a franchise for the use of public right-of-way and the privilege to construct and/or operate in the City, shall pay to the City an amount set forth in the franchise agreement, not to exceed the maximum allowed by law, for each year during the term of the franchise.
- (B) A grantee shall file, no later than May 30th of each year, the grantee's financial statements for the preceding year. If the City reasonably determines, after examination of the financial statements provided, that a material underpayment of franchise fees may exist, the City may require a grantee to submit a financial statement audited by an independent public accountant. If the City's determination of underpayment is ultimately correct, the grantee shall bear the cost of such audit.
- (C) The City shall have the right, upon reasonable notice and consistent with the provisions of Section 10 of this ordinance, to inspect a grantee's income records, to audit any and all relevant records, and to recompute any amounts determined to be payable under a franchise and this ordinance.
- (D) In the event that any franchise payment is not received by the City on or before the applicable due date, interest shall be charged from such date at the statutory rate for judgments.
- (E) In the event a franchise is revoked or otherwise terminated prior to its expiration date, a grantee shall file with the City, within 90 days of the date of revocation or termination, a verified or, if available, an audited financial statement showing the gross revenues received by the grantee since the end of the previous year and shall make adjustments at that time for the franchise fees due up to the date of revocation or termination.
- (F) Nothing in this ordinance shall limit the City's authority to tax a grantee, or to collect any fee or charge permitted by law, and no immunity from any such obligations shall attach to a grantee by virtue of this ordinance.

Section 10. Required Reports. To facilitate timely and effective enforcement of this ordinance and any franchise or right-of-way use agreement, and to develop a record for purposes of determining whether to renew any franchise or right-of-way use agreement, the City may, upon reasonable notice, require reports as specified in this section or as otherwise provided in the franchise or right-of-way use agreement.

- (A) **Annual Report.** Unless otherwise set forth in the franchise or right-of-way use agreement, no later than May 30th of each year, if requested by the City, a grantee shall file a written report with the City, which may include:
- (1) A summary of the previous calendar year's activities in development of its system.
 - (2) A verified or, if available, an audited financial statement, which may include at the City's request a statement of income, a statement of retained earnings, a balance sheet, a statement of sources and applications of funds, a fixed asset statement showing for each account or category, the original cost and accumulated depreciation balances and activity, and a depreciation statement showing the detailed calculation of depreciation expense for the year. The statement shall include notes that specify all significant accounting policies and practices upon which it is based (including, but not limited to, depreciation rates and methodology, overhead and intrasystem cost allocation methods, and basis for interest expense). A summary shall be provided comparing the current year with previous years since the beginning of a franchise or right-of-way use agreement. The statement shall contain a summary of franchise fee payments and any adjustment thereto. In any year the City requires an audited financial statement pursuant to this subsection, and an audited financial statement in compliance with this subsection is provided by a grantee, that grantee shall not be required to submit another audited financial statement for that year which otherwise may be required by Section 9 of this ordinance. If reasonably deemed necessary by the City, it may request additional financial information reviewed or prepared by an independent auditor approved by the City. If the City's determination of a financial error is ultimately correct, the grantee shall bear the cost of such audit.
 - (3) A current statement of cost of any construction by component category.
 - (4) Information reasonably requested by the City for the purpose of enforcing any consumer protection and customer service requirements applicable to grantees, including a summary of complaints by subscribers and users, identifying the number and nature of complaints and their disposition.
 - (5) If a grantee is a corporation, a list of officers and members of the board and the officers and board members of any parent corporation.
 - (6) A list of all partners or stockholders holding 10 percent or more ownership interest in a grantee and any parent corporation; provided, however, that when any parent corporation has in excess of 1,000 shareholders and its shares are publicly traded on a national stock exchange, then a list of the 20 largest stockholders of the voting stock of such corporation shall be disclosed.
 - (7) A copy of a grantee's written customer service rules and regulations, as well as technical requirements applicable to users of the system.
 - (8) Any additional information related to the operation of the grantee's system as reasonably requested by the City based on demonstrated legitimate need.

- (B) Unless otherwise set forth in the franchise or right-of-way use agreement, the City may specify the form and details of all reports, with grantee given an opportunity to comment in advance upon such forms and details. The City may change the filing dates for reports upon reasonable request of a grantee.
- (C) A grantee shall, annually, make available to the City for inspection a construction plan and schedule for the following 24 months.
- (D) Unless otherwise specified in the franchise or right-of-way use agreement, a grantee shall make available to the City for inspection and copying, as the City may request, a copy of all maps and charts of asset and system locations prepared by or for the grantee during the duration of the franchise or right-of-way use agreement.
- (E) The City shall have the right to inspect all construction and installation work performed by a grantee subject to this ordinance as it shall find necessary to insure compliance with governing ordinances and the franchise or right-of-way use agreement, and shall have the right to inspect a grantee's system during normal business hours and upon reasonable advance notice to the grantee.

Section 11. Franchise Or Right-Of-Way Use Agreement Revocation.

- (A) In addition to all other rights and powers retained by the City under this ordinance and any franchise or right-of-way use agreement issued pursuant thereto, the City council reserves the right to revoke and terminate a franchise or right-of-way use agreement and all rights and privileges of a grantee in the event of a substantial violation or breach of its terms and conditions. A substantial violation or breach by a grantee shall include, but shall not be limited to, the following:
 - (1) An uncured violation of any material provision of this ordinance or an uncured breach of any material provision of a franchise or right-of-way use agreement or other agreement issued thereunder, or any material rule, order or regulation of the City made pursuant to its power to protect the public health, safety and welfare;
 - (2) An intentional evasion or knowing attempt to evade any material provision of a franchise or right-of-way use agreement or practice of any fraud or deceit upon the system customers or upon the City;
 - (3) Failure to begin or substantially complete any system construction or system extension as set forth in a franchise or right-of-way use agreement;
 - (4) Failure to provide the services promised in the application or specified in a franchise or right-of-way use agreement, or a reasonable substitute therefor;
 - (5) Failure to restore service after 10 consecutive days of interrupted service, except when approval of such interruption is obtained from the City;
 - (6) Misrepresentation of material fact in the application for, or during negotiations relating to, a franchise or right-of-way use agreement;

- (7) A continuous and willful pattern of grossly inadequate service and failure to respond to legitimate customer complaints;
 - (8) An uncured failure to pay franchise or right-of-way use agreement fees as required by the franchise or right-of-way use agreement.
- (B) None of the foregoing shall constitute a substantial violation or breach if a violation or breach occurs which is without fault of a grantee or occurs as a result of circumstances beyond a grantee's reasonable control. A grantee shall not be excused by economic hardship nor by nonfeasance or malfeasance of its directors, officers, agents or employees; provided, however, that damage to equipment causing service interruption shall be deemed to be the result of circumstances beyond a grantee's control if it is caused by any negligent act or unintended omission of its employees (assuming proper training) or agents (assuming reasonable diligence in their selection), or sabotage or vandalism or malicious mischief by its employees or agents. A grantee shall bear the burden of proof in establishing the existence of such conditions.
- (C) Except in the case of termination pursuant to Paragraph (A)(5) of this section, prior to any termination or revocation, the City shall provide a grantee with detailed written notice of any substantial violation or material breach upon which it proposes to take action. A grantee shall have a period of 60 days following such written notice to cure the alleged violation or breach, demonstrate to the City's satisfaction that a violation or breach does not exist, or submit a plan satisfactory to the City to correct the violation or breach. If, at the end of said 60-day period, the City reasonably believes that a substantial violation or material breach is continuing and a grantee is not taking satisfactory corrective action, the City may declare a grantee in default, which declaration must be in writing. Within 20 days after receipt of a written declaration of default from the City, a grantee may request, in writing, a hearing before a "hearing examiner" as described in Shoreline City Ordinance No. 38. The hearing examiner shall conduct a full public proceeding in accordance with applicable procedures. The hearing examiner's decision may be appealed to any court of competent jurisdiction.

The City may, in its discretion, provide an additional opportunity for a grantee to remedy any violation or breach and come into compliance with this chapter so as to avoid the termination or revocation.

Section 12. Enforcement. Any violation of any provision, or failure to comply with any of the requirements of this ordinance, shall be a civil violation subjecting the offender to a civil penalty of up to \$100.00 for each of the first five days that a violation exists and up to \$500.00 for each subsequent day that a violation exists. Notice and Order and hearing procedures shall correspond to those established for the enforcement of land use regulations by Shoreline City Ordinance No. 16. Payment of any such monetary penalty shall not relieve any person of the duty to correct the violation as set forth in the applicable Notice and Order.

Any violation existing for a period greater than 30 days may be remedied by the City at the violator's expense.

Section 13. Notice. All notices required or permitted hereunder shall be in writing and shall either be delivered in person or sent by certified or registered mail, return receipt requested, and shall be deemed received on the date of personal delivery or five days after being deposited in the mail, postage prepaid.

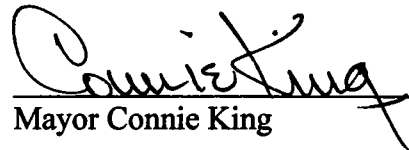
Section 14. Federal Preemption. Nothing in this ordinance shall authorize the City to impose burdens or apply standards on the applicant beyond those permitted by federal law.

Section 15. Severability. Should an section, paragraph, sentence, clause or phrase of this Ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this Ordinance be preempted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this Ordinance or its application to other persons or circumstances.

Section 16. Conflicts Of Law. This ordinance shall control over any conflicting provision of any ordinance passed prior to the effective date hereof. The Shoreline City Development Code, when adopted, shall control over any conflicting provision(s) of this ordinance.

Section 17. Effective Date. This ordinance shall take effect and be in full force five (5) days after the date of publication. The City Clerk is hereby directed to publish this ordinance in full.

PASSED BY THE CITY COUNCIL ON MAY 28, 1996.



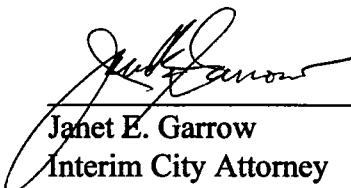
Mayor Connie King

ATTEST:



Sharon Mattioli, CMC
City Clerk

APPROVED AS TO FORM:



Janet E. Garrow
Interim City Attorney

Date of Publication: June 5, 1996
Effective Date: June 10, 1996