

RECORD OF ORDINANCES

BEAR GRAPHICS 800-325-8094 FORM NO. 30043

Ordinance No. 2018-09 Passed June 19, 2018

AN ORDINANCE ESTABLISHING REGULATIONS FOR USE OF PUBLIC RIGHT-OF-WAY BY UTILITY PROVIDERS IN THE CITY OF BROOKVILLE

WHEREAS, municipal corporations in the State of Ohio may adopt reasonable regulations for use of public right-of-way within the municipal corporation; and

WHEREAS, Council has determined that it is necessary and proper to adopt this Ordinance to provide regulations for the use of the public right-of-way by utility providers in the City of Brookville.

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF BROOKVILLE, OHIO THAT:

SECTION I: The Council of the City of Brookville hereby adopts regulations for use of public right of way by utility providers in the City of Brookville, Ohio, entitled USE OF PUBLIC RIGHT-OF-WAY BY UTILITY PROVIDERS, as set forth and described in Exhibit "A" attached hereto and incorporated herein by reference.

SECTION II: It is found and determined that all formal actions of this Council concerning and relating to the adoption of this Ordinance were adopted in an open meeting of this Council, and all deliberations of this Council were in meetings open to the public in compliance with all legal requirements including Section 121.22 of the Ohio Revised Code.

SECTION III: This Ordinance shall take effect thirty (30) days after passage of this Ordinance as provided by the Charter of the City of Brookville, Ohio.

PASSED this 19th day of June, 2018.

ATTEST:


Meghan Wheeler, Clerk


David E. Seagraves, Mayor

RECORD OF ORDINANCES

BEAR GRAPHICS 800-325-8094 FORM NO. 30043

Ordinance No. _____ Passed _____, 20____

CERTIFICATE

The undersigned, Clerk of the City of Brookville, does hereby certify that the foregoing is a true and correct copy of Ordinance No. 2018-09, passed by the Council of the City of Brookville, Ohio, on the 19th day of June, 2018.


Meghan Wheeler, Clerk

CERTIFICATE OF POSTING

The undersigned, Clerk of the City of Brookville, Ohio, hereby certifies that the foregoing Ordinance No. 2018-09 was posted at the City Building, US Post Office and the Brookville Branch of the Montgomery County Public Library, Brookville, Ohio, on the 29th day of June, 2018, to the 29TH day of July, 2018, both days inclusive.


Meghan Wheeler, Clerk

EXHIBIT "A"

CHAPTER 926

USE OF PUBLIC RIGHT OF WAY BY UTILITY PROVIDERS

926.01 FINDINGS AND PURPOSE

(a) The City of Brookville, Ohio is vitally concerned with the use of the various rights-of-way in the City, as such rights-of-way are a valuable and limited resource which must be utilized to promote the public health, safety and welfare, including the economic development of the City.

(b) Changes in the utilities and communication industries have increased the demand and need for access to public rights-of-way and placement of facilities and structures therein.

(c) It is necessary to comprehensively plan and manage access to, and structures and facilities in, the public rights-of-way to promote efficiency, lessen public inconvenience of uncoordinated work in the public rights-of-way, and promote public safety.

(d) In recognition of the limited space available in the City rights-of-way, the City shall promote the collocation of utilities to minimize intrusions into the public rights-of-way.

(e) While not a principal purpose of this chapter, an ingredient or component of this chapter is to protect the public welfare by protecting real estate from impairment and destruction of value by taking into account aesthetic considerations in the requirement by the City, when in the opinion of the City practical, the underground placement of any element of a public or private utility system located in the public rights-of-way.

(f) The City has rights under the laws and Constitution of the State of Ohio, including, but not limited to, Article 18, Sections 3,4, and 7, to regulate public and private entities which use the public rights-of-way.

926.02 APPLICATION OF CHAPTER; CONFLICTS OF LAWS

The provisions of this chapter shall apply to all users of the rights-of-way as provided herein, except as provided elsewhere in these Codified Ordinances. To the extent that any provision in this chapter conflicts with other provisions of these Codified Ordinances, or provisions of the Ohio Revised Code, the provisions of this chapter shall control.

926.03 DEFINITIONS

For the purpose of this chapter, the following terms, phrases, words, and their derivations shall have the same meanings as set forth herein. When not inconsistent with the context, words in the present tense include the future tense, words in the plural number include the singular number, and words in the singular number include the plural number. The words “shall” and “will” are mandatory and “may” is permissive. Words not defined shall be given their common and ordinary meanings. References hereafter to “sections” are, unless otherwise specified, references to sections in this chapter. Defined terms remain defined terms whether or not capitalized.

(a) “Certificate of registration” means a document issued by the City to a utility service provider which is required before any element of its utility system is permitted to be located in the City public right-of-way.

(b) “City” means the City of Brookville, Ohio.

(c) “City Council” means the elected legislative decision-making body for the City of Brookville, Ohio.

(d) “City Manager” means the administrative head of a municipal government known as the City of Brookville, Ohio, or the official designee appointed by the City Manager to implement all or some of the provisions of this chapter.

(e) “Codified Ordinances” means the Codified Ordinances of the City of Brookville, Ohio.

(f) “Element” means any tangible thing located in the public right-of-way that is part of a utility system. Electromagnetic radiation that is not visible to the human eye shall not be considered a tangible thing.

(g) “Equipment” means any element of a utility system.

(h) "Facility" or "facilities" means any tangible thing located in the public right-of-way that is part of a utility system. Electromagnetic radiation that is not visible to the human eye shall not be considered a tangible thing.

(i) "Law(s)" means any local, State, or Federal legislation, judicial or administrative order, certificate, statute, constitution, ordinance, resolution, regulation, rule, tariff, or other requirement in effect either at the time of execution of this chapter or at any time during the location of, and/or while a provider's facilities are located in the, public rights-of way.

(j) "Permit" means a revocable right of way privilege permit.

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

(l) "Provider" means a utility service provider.

(m) "Public right(s)-of-way" or "right(s)-of-way" means the surface and space in, on, above, within, over, below, under or through any real property in which the City has an interest in law or equity, whether held in fee, or other estate or interest, or as a trustee for the public, including, but not limited to, any public street, boulevard, road, highway, freeway, lane, alley, court, sidewalk, parkway, river, tunnel, viaduct, bridge, conduit or any other place, area, or real property owned by or under the legal or equitable control of the City that, consistent with the purposes for which it was dedicated, may be used for the purposes of constructing, operating, repairing or replacing a public or private utility system. "Public rights-of-way" shall not include a public building, public park, or other public property or easement that has not been dedicated to a compatible use, except to the extent the use or occupation of such property is specifically granted in a permit or approved by law.

(n) "Revocable right-of-way privilege permit" means the permit for special licenses and privileges that must be obtained from the City Manager pursuant to this chapter of the Codified Ordinances.

(o) "System" means a utility system.

(p) "Title" means this chapter of the Codified Ordinances of the City of Brookville, Ohio.

(q) "Utility service provider" means a person who owns, operates, or controls a utility system.

(r) "Utility system" means a functionally related group of facilities or elements that delivers a service, such as, but not limited to, water, sanitary sewage collection, storm water collection, gas, fuel, heat, steam, electricity, electric powered trolley bus, electric powered light or heavy

rail transit, telephone, integrated service digital network(ISDN), cellular telephone, small cell facilities, personal communication services (PCS), competitive access providers (CAPs) or competitive local exchange carriers (CLECS) that provide telephone service, paging and signaling systems, satellite phone service, radio, television, cable television, digital television (DTV), video, open video services (OVS), wireless television systems, direct broadcast satellite (DBS) video systems, telecommunications, data transmission, fiber optic network information transmission, private fiber optic data transmission lines between buildings, compute interconnection, roadway traffic signal interconnection, internet computer access, including e-mail communications, rail transportation, or water transportation.

926.04 AUTHORITY OF CITY MANAGER

The City Manager shall be the principal City official responsible for the administration of this chapter except as otherwise provided herein. The City Manager may delegate any or all of the duties hereunder to an official designee.

926.05 CERTIFICATE OF REGISTRATION REQUIRED

No utility service provider shall occupy or use the City public rights-of-way without having a valid certificate of registration issued by the City pursuant to this chapter. Use shall include construction, maintenance, or the performance of any work on a utility system.

926.06 UTILITY SYSTEM IN PLACE WITHOUT A VALID CERTIFICATE OF REGISTRATION; DECLARATION OF NUISANCE; REMEDIES OF CITY.

Any utility system or element of a utility system located in a public right-of-way in the City for which a valid certificate of registration for the utility service provider is required and has not been obtained from the City shall be deemed to be a nuisance and an unauthorized use of the public right-of-way. The City may exercise any remedies or rights it has, including, but not limited to, abating the nuisance, taking possession of the utility system or any element of the utility system, and/or prosecuting the violator.

926.07 CONSENT OF CITY REQUIRED

(a) If the location or proposed location of any element of a public or private utility system is in a public right-of-way, then the consent of the City, evidenced by the issuance by the City of a revocable street privilege permit in accordance with Section 926.23, must be obtained by that utility service provider before the construction, demolition or removal of any element of the utility system is permitted or any excavation by that utility service provider in the public right of way is permitted.

(b) This chapter does not required any utility service provider that, as of the effective date of this chapter, occupies, or has obtained the consent of the City to occupy, a public right-of-way in the City, to apply for additional or continued consent of the City as to any existing lines, poles, pipes, conduits, ducts, equipment, and related appurtenances and facilities that are in place on the effective date of this chapter.

926.08 PROVIDER NOT EXEMPT FROM PERMIT REQUIREMENTS OR REVOCATION

No language or provisions set forth in this chapter shall be interpreted as exempting a utility service provider from the requirement of obtaining a revocable street privilege permit or providing a utility service provider an exception to the power of the City Manager to revoke any such permit issued.

926.09 CITY-OWNED UTILITY SERVICES; FRANCHISES

(a) The City shall not be required to obtain a certificate of registration for any utility system for which the City is the utility service provider.

(b) In the case where a utility service provider has a valid franchise agreement with the City and the City Manager is of the opinion that one or more of the requirements of this chapter are adequately addressed in that franchise agreement, then the City Manager, at his or her sole discretion, may exempt such a utility service provider from one or more of the requirements of this chapter.

926.10 RESERVATION OF REGULATORY AND POLICE POWERS TO CITY

The City, by the granting of a permit, or by issuing a certificate of registration under this chapter, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights which it has or may hereafter have, which are vested in the City under the Constitution and laws of the United States, the State of Ohio, and under the Charter of the City of Brookville, to regulate the use of the rights-of-way. The provider, by its acceptance of a permit, or by applying for and being issued a certificate of registration, agrees that all lawful powers and rights, regulatory power, or police power, or otherwise as the same are or may be, from time to time, vested in or reserved to the City, shall be in full force and effect and subject to the exercise thereof by the City at any time. A provider is deemed to acknowledge that its rights are subject to the regulatory and police powers of the City to adopt and enforce general ordinances necessary to the safety and welfare of the public and is deemed to agree to comply with all general laws enacted by the City pursuant to such powers.

926.11 METHOD OF SERVICE OF NOTICES

Any notice or order of the City or the City Manager shall be deemed to be properly served if a copy thereof is delivered personally; successfully transmitted via facsimile transmission or email to the last known fax number or email of the person to be served; left at the usual place of

business of the person to whom it is to be served upon and with someone who is eighteen years of age or older; or sent by certified, pre-paid U.S. mail to the last known address. If the notice is attempted to be served by certified, pre-paid U.S. mail and then returned showing that the letter was not delivered, or the certified letter is not returned within fourteen days after the date of mailing, then notice may be sent by regular, pre-paid, first class U.S. mail. If the notice is attempted to be served by regular, first class U.S. mail, postage prepaid, and the letter is then returned showing that the letter was not delivered, or is not returned within fourteen days after the date of mailing, then notice shall be posted in a conspicuous place in or about the structure, building, premises or property affected by such notice.

926.12 CHAPTER APPLICABLE TO ALL PROVIDERS

This chapter shall apply to all providers unless expressly exempted.

926.13 COMPLIANCE WITH ZONING AND LAND USE ORDINANCES REQUIRED

A person's rights are subject to the police powers of the City to adopt and enforce ordinances necessary to protect the health, safety, and welfare of the public. All persons shall comply with all applicable laws enacted by the City pursuant to its police or other powers. In particular, all persons shall comply with City zoning and other land use requirements pertaining to the placement and specifications of facilities unless zoning regulation of the facilities is prohibited or preempted by state or federal law.

926.14 COMPLIANCE WITH CHAPTER REQUIRED

No person shall be relieved of his or her obligation to comply with any of the provisions of this chapter by reason of any failure of the City to enforce prompt compliance.

926.15 CHOICE OF LAW AND FORUM

This chapter and the terms and conditions of any certificate of registration or permit shall be construed and enforced in accordance with the substantive laws of the State of Ohio. All providers, as a condition of the grant of any permit or issuance of any certificate of registration, agree that all disputes shall be resolved in a court of competent jurisdiction in Montgomery County, Ohio, or as otherwise agreed to in writing by the City.

926.16 FORCE MAJEURE

In the event any person's performance of any of the terms, conditions, or obligations required by this chapter is prevented by a cause or event not within such person's control, such inability to perform shall be deemed excused and no penalties or sanctions shall be imposed as a result thereof. For the purposes of this chapter, causes or events not within the control of a provider shall include, without limitation, acts of God, strikes, sabotage, riots or civil disturbances,

explosions, acts of public enemies, and natural disasters, such as floods, earthquakes, landslides, and fires.

926.17 NO WARRANTY

The City makes no representation or warranty regarding its right to authorize the construction of facilities on any particular rights-of-way. The burden and responsibility for making such determination shall be upon the person constructing facilities in the rights-of-way.

926.18 CONTINUING OBLIGATIONS AND HOLDOVER

In the event a provider continues to operate all or any part of the facilities after the term of a certificate of registration, such provider shall continue to comply with all applicable provisions of this chapter and other laws throughout the period of such continued operation, provided that any such continued operation shall in no way be construed as a renewal or other extension of the certificate of registration, nor as a limitation on the remedies, if any, available to the City as a result of such continued operation after a term of a certificate of registration, including, but not limited to, damages and restitution. Any conflict between the issuance of a certificate of registration or of a permit and any other present or future lawful exercise of the City's regulatory or police powers shall be resolved in favor of the latter.

926.19 APPEALS

All appeals provided for by this chapter and any notification to the City required by this chapter shall be in writing and sent via certified mail to the City Manager as specified in Section 926.25 of this chapter.

926.20 INSTALLATION OF FACILITIES BY CITY

As part of City required standards wherever rights-of-way are under construction, if deemed advisable and practicable by the City Manager, the City may install all such facilities deemed necessary to accommodate future provider needs. Any such installed facilities shall be City property and may be conveyed to any person under such terms and conditions as are deemed advisable by the City Manager.

926.21 CERTIFICATE OF REGISTRATION

(a) Application.

(1) Unless exempted under this chapter, a valid certificate of registration shall be required for such utility service provider with any element of a utility system located in a public right-of-way in the City. Any utility system or element of a utility system located in a public right-of-way in the City for which a valid certificate of registration for the utility service provider is required and

has not been obtained from the City shall be deemed to be a nuisance and an unauthorized use of the public right-of-way. The City may exercise any remedies or rights it has, including, but not limited to, abating the nuisance, taking possession of the utility system or any element of the utility system, and/or prosecuting the violator.

(2) The utility service provider shall apply to the City Manager for a certificate of registration or the renewal of a certificate of registration. The City Manager shall determine the form of the application. An application shall include the following information and fee:

A. Detailed identification information about the utility service provider; a copy of the current incorporation certificate of the applicant, if applicable, both regular and emergency contact information for the utility service provider; a brief description of each utility service provided or proposed to be provided; a copy of each approval required by law, by any applicable authority, to provide any utility service described in the application, evidence of reasonable insurance coverage by the utility service provider; and any other relevant information the City Manager deems necessary to determine the fitness of the utility service provider.

B. If requested by the City Manager or the applicant, the applicant utility service provider and the City must meet to coordinate future plans for the public right-of-way between the utility service provider and the City.

C. An application fee of Five Hundred Dollars (\$500.00) shall be paid to the City at the time an application for a certificate of registration is filed with the City. No part of an application fee is returnable to the applicant.

(b) Decision by City Manager. Unless the applicant agrees to an extension of the maximum decision time, the City shall have a maximum time period of ninety (90) consecutive calendar days from the date a complete application for a certificate of registration by a utility service provider is received by the City to make a decision on an application for a certificate of registration. Unless the applicant agrees to an extension of the maximum decision time, failure of the City to make a decision on an application for a certificate of registration shall be considered the same as an approval of the application by the City.

(c) Criteria for Issuance. In deciding whether to issue a certificate of registration, the City Manager shall consider: whether the issuance of the certificate of registration will contribute to the health, safety, and welfare of the City and its citizens; whether the issuance of the certificate of registration will be consistent with this chapter; whether the applicant has submitted a complete application and has secured all certificates and other authorizations required by law in order to construct and operate a system in the manner proposed by the applicant; whether the applicant is delinquent on any taxes or other obligations owed to the City, to Montgomery County, Ohio, or to the State of Ohio; whether the applicant has the requisite financial, managerial, and technical ability to fulfill all the obligations under this chapter and the issuance of a certificate of registration, and any other applicable law.

(d) Denial of Application. The City Manager shall have the right to deny an application for a certificate of registration for adequate cause. If requested in writing by the applicant, the City Manager must provide to the applicant in written form specific factual findings in support of the decision by the City Manager to deny the application for a certificate of registration. Any decision by the City Manager to deny an application for a certificate of registration is appealable by the applicant to the City Council in the manner set forth in Section 926.25.

(e) Expiration of Certificate. Unless terminated by the City at an earlier date, a certificate of registration shall expire one year from the date of issuance by the City.

(f) Responsibilities of Provider.

(1) When required by these Codified Ordinances, a utility service provider with a valid certificate of registration must obtain a revocable right of way privilege permit

(2) The provider must keep all the information required in the application by the City current.

(3) When requested by the City, a public or private utility service provider, with a utility system element located or proposed to be located in a public right-of-way in the City, must meet with the City to coordinate future plans for the public right-of-way between the utility service provider and the City.

(4) A utility service provider with any utility system element located or proposed to be located in a right-of-way in the City must provide the City with up-to-date accurate plans in sufficient detail and in a format acceptable to the City showing the location of all elements of the utility system located in the right-of-way in the City.

(5) In addition to a certificate of registration, providers shall obtain any and all regulatory approvals, permits, authorizations, or licenses necessary for the offering or provision of such services from the appropriate Federal, State, and local authorities and, upon the City's reasonable request, shall provide copies of such documents to the City.

(6) A certificate of registration issued pursuant to this chapter shall not entitle a provider to use, alter, convert to, or interfere with, the facilities, easements, poles, conduits, lines, pipelines, wires, fiber, cable, or any other real or personal property of any kind whatsoever under the management or control of the City or under the management and control of another utility provider that is legally occupying the city right-of-way.

(g) Limitation on Rights of Provider. A certificate of registration shall not convey equitable or legal title in the rights-of-way. A certificate of registration is only the nonexclusive, limited right to occupy rights-of-way in the City for the limited purpose and for the limited period stated in the certificate of registration and in accordance with this chapter and any associated permit.

For those providers with a valid gas or electric franchise, the provisions of a certificate of registration shall be deemed regulatory in nature and shall not be interpreted to limit the right to occupy the rights-of-way which may have been granted by such franchise. The rights to occupy the right-of-way itself may not be subdivided or subleased, provided, however, that two or more providers may collocate facilities in the same area of the rights-of-way so long as each provider complies with the provisions of this chapter. A certificate of registration does not excuse a provider from obtaining appropriate access or pole attachment agreements before collocating its facilities on facilities of others, including the City's facilities. A certificate of registration does not prevent a provider from leasing space in or on the provider's system, so long as the sharing of facilities does not cause a violation of law, including the provisions of this chapter. A certificate of registration does not excuse a provider from complying with any provisions of this chapter and other applicable laws.

(h) Relocation of Equipment.

(1) A provider must promptly and at its own expense, with due regard for seasonal working conditions, permanently remove and relocate its equipment and facilities in the right-of-way whenever the City Manager requests such removal and relocation, and shall restore the right-of-way to the same condition it was prior to said removal or relocation. The City Manager may make such request to prevent interference by the company's equipment or facilities with:

- A. A present or future City use of the right-of-way,
- B. A public improvement undertaken by the City,
- C. An economic development project in which the City has an interest or investment,
- D. When the public health, safety and welfare require it, or
- E. When necessary to prevent interference with the safety and convenience of ordinary travel over the right-of-way.

(2) Notwithstanding the foregoing, no person shall be required to remove or relocate its equipment from any right-of-way which has been vacated in favor of a non-city entity unless and until the reasonable costs thereof are first paid to the person therefor.

(i) Location of Equipment Prior to Excavation.

Before the start date of any right-of-way excavation, each provider who has equipment in the area to be excavated shall contact the Ohio Utilities Protection Service (OUPS) and shall mark the horizontal and approximate vertical placement of all said equipment. Any provider whose equipment is estimated to be less than twenty inches below a concrete or asphalt surface shall

notify and work closely with the excavation contractor to establish the exact location of its equipment and the best procedure for excavation.

(j) Work by City in Right of Way; Removal of Provider's Equipment; Damage to Equipment in Right of Way; Costs.

(1) When the City does or causes to be done work in the right-of-way and finds it necessary to maintain, support, or move a provider's equipment to protect it, the City Manager shall notify the provider's local representative as early as is reasonably possible. The costs associated therewith will be billed to that provider and must be paid within thirty (30) days from the date of billing.

(2) Each provider shall be responsible for the cost of repairing any equipment in the right-of-way which it or its equipment damages. Each provider shall be responsible for the costs of repairing any damage to the equipment of another provider caused during the City's response to an emergency occasioned by that provider's equipment.

(k) Vacating of Right-of Way.

(1) If the City vacates a right-of-way which contains the equipment of a provider, and if the vacation does not require the relocation of the provider's equipment, the City shall reserve, to and for itself and all providers having equipment in the vacated right-of-way, the right to install, maintain and operate any equipment in the vacated right-of-way and to enter upon such right-of-way at any time for the purpose of reconstructing, inspecting, maintaining or repairing the same.

(2) If the vacation requires the relocation of the provider's equipment, and

A. If the vacation proceedings are initiated by the provider, the provider must pay the relocation costs; or

B. If the vacation proceedings are initiated by the City, the provider must pay the relocation costs unless otherwise agreed to by the City and the provider; or

C. If the vacation proceedings are initiated by a person or persons other than the provider, such other person or persons must pay the relocation costs.

(l) Discontinued Operations; Abandoned Equipment.

(1) A provider who has determined to discontinue its operations in the City must either:

A. Provide information satisfactory to the City Manager that the provider's obligations for its equipment in the right-of-way under this chapter have been lawfully assumed by another provider; or

B. Submit to the City Manager a proposal and instruments for transferring ownership of its equipment to the City. If a provider proceeds under this paragraph, the City may, at its option, purchase the equipment, require the provider, at its own expense, to remove it, or require the provider to post a bond in an amount sufficient to reimburse the City for reasonably anticipated costs to be incurred in removing the equipment.

(2) The equipment of a provider who fails to comply with the discontinued operations provisions of this chapter and which remains unused shall be deemed to be abandoned. Unused equipment means facilities located in the rights-of-way which have remained unused for a period of two years and for which the provider is unable to:

A. Provide the City with a credible plan detailing the procedure by which the provider intends to begin actively using such facilities within the next twelve months; or

B. That it has a potential purchaser or user of the facilities who will be actively using the facilities within the next twelve months; or

C. That the availability of such facilities is required by the provider to adequately and efficiently operate its system. Abandoned equipment is deemed to be a nuisance. The City may exercise any remedies or rights it has at law or in equity, including, but not limited to:

i. Abating the nuisance;

ii. Taking possession of the equipment and restoring it to a useable condition;

iii. Requiring removal of the equipment by the provider, or the provider's successor in interest.

(3) Any provider who has unused and abandoned equipment in any right-of-way shall remove it from that right-of-way during the next scheduled excavation, or at such different time as designated by the City Manager, unless this requirement is waived by the City Manager.

(4) In the event of any conflict with the provisions of this subsection with the provisions of federal law, the provisions of the federal law shall control.

926.22 TERMINATION OF CERTIFICATE OF REGISTRATION

(a) Written Notice of Violation. The City Manager shall give written notice of violation to a provider if it is determined that a provider has violated any material provision or requirement of the issuance or acceptance of a certificate of registration or any law of the City, State, or Federal government; attempted to evade any provision or requirement of the issuance of a certificate of registration or the acceptance of it; practiced any fraud or deceit upon the City; or made a material misrepresentation of fact in its application for a certificate of registration.

(b) Failure to Cure Violation. If a provider fails to cure a violation within thirty calendar days after a violation notice is served by the City, then such violation shall be a material breach and the City may exercise any remedies or rights it has at law or in equity to terminate the certificate of registration. If the City Manager decides there is cause or reason to terminate, the following procedure shall be followed:

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

(2) If the provider fails to cure within ten calendar days, the City Manager may declare the certificate of registration terminated.

(3) The determination of the City Manager shall be final.

926.23 REVOCABLE RIGHT-OF-WAY PERMITS

(a) Application. An application for a revocable right-of-way privilege permit shall be in accordance with Section 926.21, including any additional requirements contained in this chapter.

(b) Requirements. The requirements in this section shall be in addition to any requirement set forth in Section 926.21, et seq.

(1) A utility service provider must have a valid certificate of registration on file with the City, or be exempt under Section 926.09, before the City may issue a revocable right-of-way privilege permit.

(2) When practical, in the opinion of the City, the policy of the City is to require the underground location of a new utility system element in the public right-of-way.

(3) The construction, demolition or removal of any element of a utility system in a public right-of-way by a utility service provider must be accomplished in a practical manner which, in the opinion of the City, results in the least potential amount of damage and disruption of the public right-of-way.

(4) The applicant shall provide a specific timetable for the permit work to be accomplished within, detailed plans, accurate scale drawings, and specifications in sufficient detail acceptable to the City to describe the area of work covered in the permit application. In addition, the City may require the applicant to provide up-to-date, accurate, comprehensive master plans of the existing and proposed utility system. The master plans are intended to allow the City to consider the broader context of the utility service provider's plans upon which the permit application is based.

(c) Limitation on Placement of New System or Additional Elements; Denial of Permit.

(1) To protect the public health, safety, and welfare in recognition of the limitation of space in the public right-of-way, the City Manager shall have the power to prohibit or limit the placement of a new utility system or additional elements of an existing utility system within a public right-of-way if there is insufficient space to accommodate all of the requests of persons to occupy and use the public right-of-way. In making such decisions, the City Manager shall strive to the extent possible to accommodate all existing and potential users of the public right-of-way, but shall be guided primarily by considerations of the public interest, the public's need for the particular utility service, the condition of the public right-of-way, the time of year with respect to essential utilities, the protection of existing elements of utility systems in the public right-of-way, and future City plans for public improvements and development projects which have been determined to be in the public interest.

(2) The City Manager may deny a permit to protect the public health, safety and welfare, to prevent interference with the safety and convenience of ordinary travel over the public right-of-way, or when necessary to protect the public right-of-way and its users. The City Manager, in his or her discretion, may consider one or more of the following factors: the extent to which the public right-of-way space where the permit is sought is available; the competing demands for the particular space in the right-of-way; the availability of other locations in the public right-of-way or in other public rights-of-way for the utility system elements of the permit applicant; the applicability of ordinances or other regulations of the right-of-way that affect the location of the utility system elements in the right-of-way; the degree of compliance of the applicant with the terms and conditions of its franchise, this chapter, and other applicable ordinances and regulations; the degree of disruption to surrounding communities and businesses that will result from the use of that part of the public right-of-way; the condition and age of the public right-of-way, and whether and when it is scheduled for total or partial reconstruction; the balancing of the costs of disruption to the public and damage to the public right-of-way against the benefits to that part of the public served by the expansion into additional parts of the public right of way; and the feasibility of accomplishing the desired goal outside of the public right-of-way.

926.24 NONLIABILITY OF CITY; INDEMNIFICATION

(a) By reason of the acceptance of an application or the grant of a permit, the City does not assume any liability for injuries to person, damage to property, or loss of service claims, or for claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of facilities.

(b) By applying for and being issued a certificate of registration with the City, a provider agrees, or by accepting a permit a provider is required and agrees, to defend, indemnify, and hold harmless the City's agents, elected officials, officers, employees, volunteers and subcontractors

from all costs, liabilities, claims, and suits for damages of any kind arising out of the construction, presence, installation, maintenance, repair or operation of its facilities, or out of any activity undertaken in or near a right-of-way, where any act or omission complained of is authorize, allowed, or prohibited by a permit, excepting only negligent acts or omissions that are willful and wanton or intentional torts and for which immunity is not provided by the Ohio Revised Code for such acts, omissions, or intentional torts. This exception shall not extend to acts, omissions, or intentional torts occurring as a result of or in response to an emergency. A provider further agrees that it will not bring, or cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the City's agents, elected officials, officers, employees, volunteers and subcontractors or any claim nor any award arising out of the presence, installation, maintenance or operation of its facilities, or any activity undertaken in or near a right-of-way, whether the act or omission complained of is authorized, allowed or prohibited by a permit. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the provider or to the City, and the provider, in defending any action on behalf of the City, if allowable by law, shall be entitled to assert in any action every defense or immunity that the City could assert of its own behalf. Any and all exercises of the above shall be consistent with, but not limited to, the following:

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

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

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

C. The provider's failure to comply with the provisions of any law applicable to the provider.

(2) The following indemnification is conditioned upon the City:

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

B. Affording the provider the opportunity to fully participate in any discussions concerning any compromise, settlement, or other resolution or disposition of any claim or proceeding subject to indemnification, as well as the sole right to approve any compromise or settlement or financial commitment, which approval shall not be unreasonably withheld; and

C. Cooperating in the defense of such claim and making available to the provider all pertinent information under the City's control.

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

926.25 APPEALS

(a) Authorization. The following decisions of the City Manager pursuant to this chapter are appealable to the City Council:

(1) The decision of the City Manager with respect to the issuance of an exemption to the requirement of a certificate of registration under Section 926.09(b);

(2) The denial of an application for a certificate of registration under Section 926.09(d); and

(3) Denial of a permit under Section 926.23(c)(2); and

(4) Denial of an exception under Section 926.09.

An appeal from the decision of the City Manager with respect to any of these decisions may be taken to the City Council by any aggrieved provider.

(b) Filing Fee. The filing fee for any appeal under this chapter shall be one hundred dollars (\$100.00)

(c) Time Limitation. Appeals to the City Council shall be filed within thirty days from the decision of the City Manager by filing a written notice of appeal with the Clerk of Council. The notice of appeal shall specify the grounds for such appeal, and shall be on the form prescribed by the Clerk of Council. Upon receipt of an appropriately completed notice of appeal and filing fee, the Clerk of the City Council shall transmit to the members of the City Council all papers constituting the record upon which the decision being appealed were based.

(d) Hearing. The City Council shall schedule the hearing for the appeal within a reasonable period of time at a regularly-scheduled City Council meeting. Written notice of the hearing shall be sent to the aggrieved provider at least ten days prior to the hearing. The failure of delivery of such notice, however, shall not invalidate any subsequent proceedings. The aggrieved provider

or its representative may appear and be heard at the hearing, and present any evidence the provider desires in support of its position.

(e) Decision. The City Council may affirm, reverse, or modify, in whole or in part, the decision appealed from, and to that end, the City Council shall have all the powers of the City Manager with respect to such decision. The concurring vote of a majority of the members of City Council shall be necessary to reverse or modify any decision of the City Manager under this chapter. The City Council shall render a written decision on the appeal without unreasonable delay after the close of the hearing, and in all cases within thirty days after the close of the hearing.

(f) Records. The Clerk of the City Council shall maintain complete records of all actions of the City Council with respect to appeals.

926.26 SEPARABILITY

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

926.99 PENALTY; EQUITABLE REMEDIES

(a) It shall be unlawful to violate any provisions of this chapter. Violation of any provision of this chapter, or failure to comply with any requirement of this chapter (including a violation of a condition or safeguard established in connection with a certificate of registration, permit, or any other City approval), shall constitute a misdemeanor of the second degree. Each and every failure to comply shall be considered a distinct and separate offense. Each day a violation continues shall be considered a distinct and separate offense.

(b) The remedies provided in this chapter are not exclusive or in lieu of other rights and remedies that the City may have. The City is hereby authorized at any time to seek legal and equitable relief for actual or threatened injury to the rights-of-way, including damage to the rights-of-way, whether caused by a violation of any of the provisions of this chapter or other provisions of applicable law.

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