

ORDINANCE NO. **00-5133**

AN ORDINANCE OF THE CITY OF BILLINGS, MONTANA, PROVIDING THAT THE BILLINGS CITY CODE OF ORDINANCES BE AMENDED TO REPEAL SECTIONS 7-1401 THROUGH 7-1403 OF SAID CODE AND REPLACING THOSE SECTIONS WITH SECTIONS 7-1401 THROUGH 7-1418; IN ORDER TO MANAGE THE USE OF THE PUBLIC RIGHTS-OF-WAY BY OWNERS AND OPERATORS OF COMMUNICATIONS AND UTILITIES FACILITIES, AND PROVIDERS OF TELECOMMUNICATIONS AND UTILITY SERVICES WITHIN THE CITY.

NOW THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

Section 1. That Sections 7-1401, 7-1402 and 7-1403 of the Billings, Montana City Code, are hereby repealed in their entirety and replaced as follows:

Section 2. That the Billings, Montana City Code be amended by adding Section 7-1401 to read as follows:

**"Sec. 7-1401. Title.**

This ordinance shall be known and cited as the "City of Billings Right-of-Way Management Ordinance."

Section 3. That the Billings, Montana City Code be amended by adding Section 7-1402 to read as follows:

**"Sec. 7-1402. Authority.**

This ordinance is adopted pursuant to the City's self-government powers including but not limited to those set forth in its Charter, Title XI of the Montana State Constitution, Title 7 of the Montana Code Annotated, and Section 253 of the Communications Act of 1934, as amended, 47 U.S.C. § 253."

Section 4. That the Billings, Montana City Code be amended by adding Section 7-1403 to read as follows:

**"Sec. 7-1403. Legislative Findings.**

The City Council hereby finds and declares:

- (a) that the City has strong self-government powers which the City may exercise to protect, manage, and steward development and use of the public rights-of-way; and
- (b) that the public rights-of-way within the City are used and useful for the travel of persons and the transport of goods and other tangibles in the business and social life of the community by all citizens; and
- (c) that the public rights-of-way within the City can be partially occupied by utilities and other public service entities for facilities used in the delivery, conveyance, and transmission of utility, telecommunications, and public services rendered for profit, to the enhancement of the health, welfare, and general economic well-being of the City and its citizens; and
- (d) that the public rights-of-way within the City are physically limited so that proper management by the City is necessary to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses, to prevent foreclosure of future uses through premature exhaustion of available right-of-way capacity, and to minimize the inconvenience to the public from such facilities' construction, emplacement, relocation, and maintenance in the rights-of-way; and
- (e) that the public rights-of-way within the City are valuable public property acquired and maintained by the state and the City at great expense to the taxpayers; and
- (f) that the City has a fiduciary duty not to give away public property for private use without just compensation; and
- (g) that the right to occupy portions of such public rights-of-way for limited times for the business of operating communications and utility facilities and providing telecommunications and utility services is a valuable economic asset, without which a user would be required to invest substantial capital, and that the public deserves fair and reasonable compensation for the property held by

the City and made available to private entities providing for-profit services.”

Section 5. That the Billings, Montana City Code be amended by adding Section 7-1404 to read as follows:

**“Sec. 7-1404. Purposes.**

The City Council adopts this article to better:

- (a) manage a limited resource to the long-term benefit of the public; and
- (b) protect the public rights-of-way from damage and unauthorized encroachment; and
- (c) minimize inconvenience of the public occasioned by the emplacement and maintenance of telecommunications and utilities facilities in the public rights-of-way; and
- (d) recover the burden imposed on taxpayers by occupation of the public rights-of-way by non-governmental businesses; and
- (e) recover fair compensation for those parts of the rights-of-way occupied by non-governmental entities in their respective businesses; and
- (f) prevent premature exhaustion of capacity in the public rights-of-way to accommodate telecommunications, utility, and other public services.”

Section 6. That the Billings, Montana City Code be amended by adding Section 7-1405 to read as follows:

**“Sec. 7-1405. Definitions.**

- (a) *“Affiliate”* when used in relation to any person, means another person who de facto or de jure owns or controls, is owned or controlled by, or is under common ownership or control with, such person.
- (b) *“City”* means the City of Billings, Montana.
- (c) *“City Administrator”* means the duly constituted City Administrator of Billings, Montana or his or her designee.

(d) *"Communications facility" or "communications facilities"* means equipment used to transmit telecommunications signals, whether or not in connection with the provision or offering of a "telecommunications service" as hereinafter defined. The term *communications facility* includes, without limitation, cable, wires, fiber optics, conduit, transmitters, power supplies, radio transmitting towers, other supporting structures, and associated facilities used to transmit telecommunications signals but does not include facilities used to provide cable service as defined in the Communications Act of 1934, as amended.

(e) *"Council"* means the City Council of Billings, Montana.

(f) *"Franchise"* means a legal authorization granted by the City to install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, operate communications facilities or utility facilities upon, across, beneath, over, or in any public right-of-way for the purpose of providing any telecommunications services or utility service to persons located in the City for such term, for such purpose, and upon such terms and conditions as are set forth in a franchise agreement. The term does not include any license or permit that may be required by this article or other laws, ordinances, or regulations of the City for the privilege of transacting and carrying on a business within the City generally, or a work permit which may be required as herein provided.

(g) *"Franchise agreement"* means a contract entered into between the City and a franchise-holder which sets forth the authority granted to the franchise-holder and the terms and conditions under which such authority may be exercised.

(h) *"Franchise-holder"* means a person that has been granted a franchise by the City.

(i) *"Lease"* means an agreement between the City and the owner or operator of a communications facility or utility facility which authorizes the owner or operator to locate a communications facility or utility facility in or upon property, other than the public rights-of-way, including but not limited to real estate, public buildings, supporting structures and/or conduits which are either owned or controlled by the City or located upon property owned or controlled by the City. A lease may be required in addition to a license or franchise to locate communications facilities or utility facilities on or in buildings, supporting structures and/or conduits owned or controlled by the city and located within the public rights-of-way. The term lease does not include any license or permit that may be required by this article or other laws, ordinances, or regulations of the City for the privilege of transacting and

carrying on a business within the City generally, or a work permit which may be required as herein provided.

(j) *"Lease agreement"* means a contract between the City and a lease-holder that sets forth the terms and conditions of a lease for a specified site or sites.

(k) *"Lease-holder"* means a person who has been granted a lease by the City.

(l) *"License"* means a legal authorization granted by the City to install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, and/or operate communications facilities or utility facilities upon, across, beneath, over or in any public right-of-way, for a purpose or purposes other than providing cable service or telecommunications service or utility service to persons located in this City, for such term, for such purpose, and upon such terms and conditions as are set forth in a license agreement. The term does not include any license or permit that may be required by this article or other laws, ordinances, or regulations of the City for the privilege of transacting and carrying on a business within the City generally, or a work permit which may be required as herein provided.

(m) *"License agreement"* means a contract entered between the City and a license-holder which sets forth the terms and conditions under which the license may be exercised.

(n) *"License-holder"* means a person that has been granted a license by the City.

(o) *"Mayor"* means the Mayor of the City of Billings, Montana.

(p) *"Owner or operator"* of a communications facility or utility facility means any person which has a possessory interest in such facility or which controls or is responsible for, through any arrangement, the management and operation of such facility.

(q) *"Person"* means any individual, corporation, partnership, association, joint-stock-company, trust, governmental entity, or any other legal entity, but not the City.

(r) *"Public property"* means any property that is owned or under the control of the City that is not a public right-of-way, including but not limited to, buildings, parks, structures such as utility poles and light poles, or similar facilities or property located in a public right-of-way or owned by or leased to the City.



(s) *"Public rights-of-way"* means the surface and space above, on, and below any public highway, avenue, street, lane, alley, boulevard, concourse, driveway, bridge, tunnel, park, parkway, waterway, dock, bulkhead, wharf, pier, public easement, right-of-way, or any other public ground or water as to which the City now or hereafter holds any property interest, or other right, obligation or privilege that entails the management and control of access to and occupation of such property, and which, consistent with the purposes for which it is held, managed or controlled by the City, may be used for the purpose of constructing, operating, and maintaining a communications facility or utility facility. No reference herein, or in any franchise or license agreement, to a public right-of-way shall be deemed to be a representation or warranty by the City that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and a franchise-holder or license-holder shall be deemed to acquire only such rights as the City may have the right and power to grant.

(t) *"Telecommunications"* means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(u) *"Telecommunications service"* means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(v) *"Utility facility"* or *"utility facilities"* means equipment used to transport electric power, manufactured or natural gas, or water, whether or not in connection with the provision or offering of a utility service as herein defined. The term utility facility includes, without limitation, cable, wires, poles, power supplies, transformers, conduits, pipes, pumps, and associated facilities and supporting structures, but does not include communication facilities as herein defined.

(w) *"Utility service"* is the offering of electric power, manufactured or natural gas, or water for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

(x) *"Work permit"* means an authorization issued by the City to enter upon the public rights-of-way at such times and places, for such duration, subject to such terms and conditions, and for such limited purposes as may be set forth therein, including but not limited to excavation and construction activities, the installation or emplacement of communications facilities or utility facilities, and the reconstruction,

repair, maintenance, relocation, operation, disconnection, removal or replacement of any communications facility or utility facilities located upon, across, beneath, or over any public right-of-way in this City, or located so proximate to such public right-of-way that access to such public right-of-way may be necessary or desirable to the person seeking such authority."

Section 7. That the Billings, Montana City Code be amended by adding Section 7-1406 to read as follows:

**"Sec. 7-1406. Franchise, License, or Lease Required.**

(a) No person shall install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, and/or operate any communications facility or utility facility upon, across, beneath, over or in any public right-of-way in the City or other City property to provide telecommunications service or utility service within the City without first obtaining a franchise pursuant to the terms of a franchise agreement that provides for fair and reasonable compensation to the City for the use of the public rights-of-way or other public property occupied by such facility.

(b) No person shall install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain, and/or operate any communications facility or utility facility upon, across, beneath, over or in any public right-of-way in the City, for purposes other than to provide telecommunications service or utility service within the City, without first obtaining a license pursuant to the terms of a license agreement that provides for fair and reasonable compensation to the City for the use of the public rights-of-way occupied by such facility.

(c) No person shall install, erect, hang, lay, bury, draw, emplace, construct, reconstruct, maintain and/or operate any communications facility or utility facility, nor attach any additional communications facility or utility facility to an authorized communications facility or utility facility owned and operated by another person, upon, across, beneath, over or in any public property in the City, improved or unimproved, which is not itself a public right-of-way, for any purpose without first obtaining a lease pursuant to the terms of a lease agreement that provides for fair and reasonable compensation to the City for the use of the property occupied by such facility.

(d) No person shall provide telecommunications service originating or terminating in the City or utility service to persons within the City by the use of communications or utility facilities located in a public right-of-way within the City, without first obtaining a franchise pursuant to the terms of a franchise agreement that provides for fair

and reasonable compensation to the City for such use of the public rights-of-way or public property; provided however, that a franchise shall not be required of a communications or utility service that does not own, operate or maintain any possessory interest in a communications facility or utility facility within the City, and that engages solely in the resale of communications service or utility service provided by a franchise-holder under this ordinance. For purposes of this ordinance, provision of unbundled network elements shall be deemed operation of communication facilities, and not provision of communications services.

(e) A franchise or license is required for any portion of any communications facility or utility facility that occupies any portion of the public rights-of-way. A lease is required for any portion of any communications or utility facility that occupies any portion of any City owned property which is not itself a public right-of-way, for example, City-owned poles, conduits or buildings, whether or not a franchise or license is also required because such property is located upon, across, beneath, over or in a public right-of-way; provided however, that a lease shall not be required for communications and utility facilities located on public property and dedicated exclusively to the provision of telecommunications service or utility service to the City. The requirements of this Ordinance apply to any communications facility or utility facility located upon, across, beneath, over or in any public right-of-way or public property in the City on the effective date of this Ordinance, subject to the provisions of Section 7-1414.

(f) Communications facilities and utility facilities authorized by franchise, license, or lease may be operated only for the purposes set forth in such franchise, license or lease, and the use or operation of such facilities for any other or additional purpose(s) shall require an additional or amended franchise, license or lease. For example, and without limitation, communications facilities constructed on the public rights-of-way under a license granted pursuant to this Ordinance may not be used to provide telecommunications service within the City, except upon authority of a franchise granted for that purpose under the terms of this Ordinance.

(g) The City may grant one or more franchises, licenses, or leases in accordance with this article. Each such franchise, license, or lease shall be nonexclusive."

Section 8. That the Billings, Montana City Code be amended by adding Section 7-1407 to read as follows:

**"Sec. 7-1407. Work Permit Required.**

No person, including a franchise-holder, license-holder or lease-



holder shall enter upon the public rights-of-way to engage in excavation and construction activities, the installation or emplacement, or the reconstruction, repair, maintenance, relocation, operation, disconnection, removal or replacement of any communications or utility facility, except upon the authority of a work permit, as hereinafter provided, which permit shall describe with particularity, or by reference to the application therefore, the activity authorized, the time or times during which such activity is permitted, and such further terms and conditions as the City Administrator may prescribe pursuant to the authority delegated herein and by Section 22-219 of the Billings Montana City Code."

Section 9. That the Billings, Montana City Code be amended by adding Section 7-1408 to read as follows:

**"Sec. 7-1408. Construction.**

(a) Each work permit granted hereunder shall specify, expressly or by reference to the application therefor, limitations prescribed by the City Administrator pursuant to Section 22-219 of the Billings Montana City Code.

(b) Except as expressly provided in a franchise, license or lease agreement, no franchise, license or lease granted hereunder shall be construed to authorize or permit the franchise-holder, license-holder or lease-holder to install, erect, hang, draw, emplace or construct any aerial communications facility or utility facility in, on or above a public right-of-way in which another telecommunications service or utility service provider, or a cable television service provider, has placed its lines underground; and in no event shall a franchise, license or lease granted hereunder authorize the franchise-holder, license-holder or lease-holder to install, erect, hang, draw, emplace or construct any aerial communications or utility facility which would impede or impair access to the underground equipment of any other authorized occupant of the public rights-of-way, or where the City by ordinance has forbidden any new aerial communications or utility facility except upon amendment, repeal or variance granted in respect of such ordinance. It shall be the responsibility of each franchise-holder, license-holder or lease-holder to identify in every application for a work permit each and every location covered by such work permit in which new aerial communications facilities or utility facilities may be prohibited, and the issuance of a work permit in violation of this section shall not be deemed a waiver of the prohibition.

(c) No work permit shall issue except upon demonstrated compliance with Montana Code Annotated, Section 69-4-502.

Section 10. That the Billings, Montana City Code be amended by adding Section 7-1409 to read as follows:

**"Sec. 7-1409. Administration.**

(a) In accordance with this article, Section 22-219 of the Billings, Montana City Code and such regulations as may be promulgated therefore, the City Administrator shall issue work permits to authorized franchise-holders, license-holders and lease-holders in accordance with the authority granted by such franchise, license or lease, and shall inspect the work authorized by each such work permit.

(b) In accordance with this article and regulations promulgated therefore, the City Administrator shall evaluate franchise and license applications; negotiate the terms and conditions of proposed franchise and license agreements; and recommend to the Council the grant or denial of franchises and licenses.

(c) In accordance with this article, Billings Charter Article III, Section 3.04C, the Mayor shall execute such franchise and license agreements as have been approved by the Council.

(d) In accordance with this article and regulations promulgated therefore, the City Administrator shall negotiate the terms and conditions of leases.

(e) In accordance with this article, Billings Charter Article III, Section 3.04C, the Mayor shall execute lease agreements on behalf of the City.

(f) In accordance with this article the City Administrator shall promulgate regulations and procedures which set forth the requirements of work permit applications; the fees for filing such applications; and the generally applicable terms and conditions upon which such permits shall be considered and issued or denied, which terms and conditions shall, withal, provide for the protection of existing structures and facilities located in the public rights-of-way; the restoration of such public rights-of-way and structures to their original condition; the protection of the public safety and convenience and the minimum disruption of pedestrian and vehicular traffic; the qualifications of contractors employed by or on behalf of franchise-holders, license-holder and lease-holders; and the reimbursement of costs and expenses incurred by the City in connection with the work authorized, including but not limited to inspection of the work and public safety and traffic management functions and facilities provided by the City; provided, however, that the City Administrator is further authorized to impose such additional terms and conditions upon the grant of

particular work permits as may be reasonably necessary to protect the public health, safety and convenience in particular circumstances notwithstanding that such terms and conditions are not generally applicable.

(g) In accordance with this article the City Administrator shall promulgate regulations and procedures which set forth the requirements of franchise, license and lease applications; the fees for filing such applications; the fees and procedures for conducting such public or administrative hearings in connection with the consideration, grant, denial, renewal and/or termination of franchises and licenses; and the generally applicable terms and conditions upon which such franchises, licenses and leases shall be considered, issued, denied, renewed or terminated; provided, however, that the City Administrator is further authorized to negotiate such additional terms and conditions in connection with the grant or recommendation of particular franchises, licenses, and leases as may be necessary to protect the public health, safety and convenience in particular circumstances, notwithstanding that such terms and conditions are not generally applicable.

(h) The City Administrator shall collect the annual fees authorized hereunder and shall audit compliance with the compensation provisions of franchises, licenses, and lease agreements.

(i) The City Administrator shall enforce the terms and conditions of permits, franchises, licenses, and leases."

Section 11. That the Billings, Montana City Code be amended by adding Section 7-1410 to read as follows:

**"Sec. 7-1410. Terms and conditions of Franchises, Licenses and Leases.**

(a) Except as otherwise expressly provided in a franchise, license or lease agreement, each franchise, license or lease hereunder shall be for a term of ten (10) years.

(b) Except as otherwise expressly provided in a franchise or license agreement, each franchise-holder and license-holder shall promptly commence to exercise the privileges and authority afforded by its franchise or license, and shall, six months from the effective date of such franchise or license, and annually thereafter, file with the City Administrator a report under oath describing the status of its authorized activities and/or activities in preparation therefore. If any such report or other available evidence fails to demonstrate occupation of the public rights-of-way substantially as authorized, and the active and ongoing utilization of the subject communications facilities or utility facilities, or

diligent preparation therefore, the City Administrator may direct the franchise-holder or license-holder to show cause within thirty (30) days, or such greater time as the City Administrator may by notice allow, why such franchise or license should not be revoked pursuant to Section 7-1417.

(c) Except as otherwise expressly provided in a franchise, license or lease agreement, each franchise-holder, license-holder, or lease-holder shall promptly relocate its communications or utility facilities, upon not less than thirty (30) days written notice from the City Administrator, to accommodate construction, reconstruction, improvement or repair of public streets, sidewalks, curbs, drains, sewers, and public improvements of any sort. In the event of a public emergency the City, after as much notice to the owner or operator as practicable, may move or remove the facilities at the risk and expense of the owner or operator.

(d) Except as otherwise expressly provided in a franchise, license or lease agreement, each franchise-holder, license-holder, or lease-holder shall provide access to poles, antennae and conduits, as available, for the installation, attachment or emplacement of compatible communications or utility facilities on reasonable and non-discriminatory terms and conditions; provided further that any franchise or license which authorizes the excavation of the public rights-of-way may be conditioned upon agreement by the franchise-holder or license-holder to install conduit with such excess capacity as the City may deem necessary or appropriate to minimize repeated excavation of the public rights-of-way and to address the present and reasonably foreseeable requirements of other franchise-holders and license-holders.

(e) Except as otherwise expressly provided in a franchise, license or lease agreement, the City shall have the right to co-locate proprietary communication facilities upon or within poles, antennae or conduits owned by a franchise-holder, license-holder or lease-holder without payment therefore, provided that such proprietary communication facilities do not interfere with the franchise-holder's, license-holder's or lease-holder's own use of such poles, antennae or conduits; and provided further that such proprietary communication facilities are not used to provide telecommunications service.

(f) A franchise-holder, license-holder or lease-holder shall notify the City Administrator when it enters into any agreement with a third party, including any affiliate, for use of any communications facility or utility facility located upon, across, beneath, over or in any public right-of-way or other public property, and provide copies of such agreement upon request. Except as otherwise expressly provided in a franchise, license or lease agreement, each franchise-holder, license-



holder and lease-holder, and the affiliates thereof wherever located, shall maintain books, records, and plant accounts sufficient to document compliance with the obligations of each franchise-holder, license-holder and lease-holder under the terms of its franchise, license or lease agreement and under this article. Such books, records, and accounts shall be maintained and available for inspection for a period of four years; provided, however, that such books, records, and accounts shall be maintained and available during the continuation of any audit by or on behalf of the City commenced during such four-year period or during any dispute or litigation with respect thereto.

(g) No franchise, license, lease, or work permit shall be construed to estop or limit the City in the full exercise of its governmental powers; and no provision of any franchise agreement, license agreement, or work permit shall be construed or deemed a waiver or relinquishment of the authority of the City to amend this article, or enact other legislation which may impair, impede or limit the authority granted under any franchise, license, lease, or permit, or modify the terms and conditions thereof, unless such provision makes specific reference to this Section of this article, and plainly waives or relinquishes such authority; and each such provision shall be narrowly construed to preserve the legislative authority of the City to the extent consistent with such provision.

(h) The failure of the City to insist on timely performance or compliance by any person holding a franchise, license, lease, or work permit shall not constitute a waiver of the City's right to later insist on timely performance or compliance by that person or any other person holding such a franchise, license, lease, or work permit."

Section 12. That the Billings, Montana City Code be amended by adding Section 7-1411 to read as follows:

**"Sec. 7-1411. Annual Fee.**

(a) The annual fee required for use of the public rights of way under a franchise shall be ~~five~~ four percent (~~5~~ 4%) of the franchise-holder's annual gross revenue. For purposes of this section, "gross revenue" means any and all compensation, directly or indirectly received by the franchise-holder, its affiliates, subsidiaries, parent companies, and any person in whom the franchise-holder has a financial interest, proceeding or accruing from the provision of telecommunications services or utility services within the City, or the provision of communication facilities or utility facilities located in the City for the use of another; provided however, that gross revenues shall not include taxes imposed directly upon users by the Federal, State, county, or other governmental unit and collected and remitted by the franchise-



holder; and provided, however, that gross revenues of a provider of communications facilities or utility facilities sold or leased in whole or in part to the holder of a valid franchise issued under this ordinance for sale or lease of communications services or utility services in whole or in part, shall not include revenues received by such other franchise-holder for sale or lease of communications services or utility services, upon submission to the City Administrator of evidence, in a form acceptable to the Council, that such other franchise-holder has separately remitted the annual fee required under this ordinance.

(b) The Council shall determine from time-to-time, by ordinance, resolution or other legislative act, the annual fee required for use of the public rights-of-way under a license, on a per linear-foot basis, for communications and utility facilities which occupy the public rights-of-way, which determination shall take into account:

(1) the market value of the property interest conveyed under a license based on what a purchaser willing but not obliged to buy the property interest would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the property is suited, including its value as a corridor;

(2) the cost of acquiring, improving and maintaining the public rights-of-way and the effect thereon of the use authorized by the license;

(3) the present and projected demand for uses of the property which may be impaired or impeded by the grant of a license; and

(4) the public interest in the use of the public rights-of-way.

(c) The City Administrator shall determine, case by case, the annual fee required for use of public property under a lease, which determination shall take into account:

(1) the market value of the property interest conveyed under the lease based on what a purchaser willing but not obliged to buy the property interest would pay to an owner willing but not obliged to sell it, taking into consideration all uses for which the property is suited;

(2) the cost of acquiring, improving and maintaining the public property and the effect thereon of the use authorized by the lease;

(3) the present and projected demand for uses of the property which may be impaired or impeded by the grant of the lease; and

(4) the public interest in the use of the public property.

Section 13. That the Billings, Montana City Code be amended by adding Section 7-1412 to read as follows:

**"Sec. 7-1412. Performance Bond; Insurance.**

(a) No franchise, license, or lease shall be valid until the franchise-holder, license-holder, or lease-holder, shall have filed with the City Administrator a bond or letter of credit to guarantee performance of the obligations of the franchise-holder, license-holder, or lease-holder under this article and under the franchise, license, or lease agreement. The amount of the bond or letter of credit shall be provided in the franchise, license, or lease agreement, or by reference to the application therefore, or as provided in separate title of this ordinance, but shall in no event be less than the cost of removal of the communications or utility facilities authorized by such franchise, license, or lease, and the restoration of the public rights-of-way to its original condition.

(b) Such bond or letter of credit shall be obtained at the sole expense of the franchise-holder, license-holder or lease-holder and remain in effect for the full term of the franchise, license or lease, and for six (6) months following its expiration or termination; provided, however, that the amount of such bond or letter of credit may be reduced upon application by the franchise-holder, license-holder, or lease-holder after substantial completion of the excavation and construction activities, and the installation or emplacement of communications facilities or utility facilities authorized by the franchise, license, or lease, to such amount as may be necessary or appropriate to guarantee the performance of the franchise-holder's, license-holder's, or lease-holder's future obligations under this ordinance and/or the franchise, license, or lease granted hereunder, as may be finally determined by the City Administrator, but in no event less than the cost of removal of the facilities authorized by such franchise, license, or lease, and the restoration of the public rights-of-way to its original condition.

(c) The franchise-holder, license-holder, or lease-holder and its surety or issuer shall be jointly and severally liable for any damages or loss suffered by the City, including statutory damages, or penalties assessed hereunder, as a result of a breach of a franchise, license, or lease agreement or violation of this article, including the full amount of

any compensation, indemnification or cost of removal of any property of the franchise-holder, license-holder, or lease-holder, and a reasonable allowance for attorneys' fees and costs, up to the full amount of the bond.

(d) The bond or letter of credit shall provide for not less than sixty (60) days' prior written notice to the City Administrator prior to cancellation, expiration, or material alteration of its terms.

(e) Recovery by the City under such bond or letter of credit shall not excuse a franchise-holder's, license-holder's, or lease-holder's obligation to cure a continuing breach of a franchise, license, or lease agreement, or violation of this article; nor excuse the future faithful performance by the franchise-holder, license-holder, or lease-holder under the terms of such franchise, license, or lease agreement, or this ordinance; nor limit the liability of the franchise-holder, license-holder or lease-holder for damages or loss, actual or statutory, or penalties assessed hereunder to the extent they satisfied by such bond or letter of credit.

(f) The rights of the City under any bond, letter of credit or other security fund are in addition to all other rights of the City whether reserved by this ordinance or authorized by other law or the franchise, license, or lease agreement, and no action, proceeding or exercise of a right with respect to such bond or letter of credit will affect any other right the City may have.

(g) Each franchise-holder, license-holder, and lease-holder shall maintain throughout the term of the franchise, license, or lease, any renewal thereof, and for six (6) months thereafter, comprehensive general liability insurance in such amount as may be required under the terms of the franchise, license, or lease agreement, or by reference to the application therefore, as determined necessary and appropriate by the City Administrator or Council to cover property damage and personal injury which may be foreseeable in connection with the activity authorized by the franchise, license, or lease. A certificate of such insurance shall be filed with the City Administrator in form satisfactory to the City Administrator.

(h) A franchise, license, or lease agreement may require that each insurance policy name as additional insureds the City, and/or any board, commission, agency, or other authority, and the members, officers, agents, and/or employees thereof.

(i) Each insurance policy required hereunder shall provide that coverage may not be cancelled or reduced except upon sixty (60) days prior written notice to the City Administrator. A franchise-holder,

license-holder, or lease-holder shall not cancel any insurance policy required hereunder without first securing a substitute policy in compliance with this ordinance.

(j) Neither the provisions of this section nor any recovery under the insurance policy hereby required shall be construed to limit the liability of a franchise-holder, license-holder, or lease-holder for damages arising out of its activities pursuant to any franchise, license, or lease granted hereunder.

(k) Qualifications of sureties. All insurance policies and bonds required hereunder shall be issued by sureties which are qualified to do business in this State and which are rated A-1 or better by Best's Key Rating Guide, Property/Casualty Edition; and in a form approved by the City Administrator."

Section 14. That the Billings, Montana City Code be amended by adding Section 7-1413 to read as follows:

**"Sec. 7-1413. Transfers and assignments.**

(a) A franchise or license is a special privilege that is held in the public trust and personal to the original franchise-holder or license-holder. Except as expressly provided in a franchise or license agreement, no franchise or license may be transferred, and no agreement thereon shall become effective, except upon application to and express approval by the Council, and upon assumption of ownership or control of communications facilities or utility facilities authorized under this article without such approval, the transferee shall have violated Section 7-1406 and be subject to sanctions and penalties therefore in addition to whatever sanctions penalties are imposed upon the authorized franchise-holder or license-holder for violation of this section.

(b) For purposes of this section a "transfer" is defined as including, but not limited to, the sale, assignment, hypothecation, pledge or other conveyance, direct or indirect, de jure or de facto, of a franchise or license, or any interest therein, or the ownership or operational control of communications facilities or utility facilities authorized thereunder, or the delegation of any right, authority, responsibility or duty attendant thereto; or the sale, assignment, hypothecation, pledge or other conveyance, direct or indirect, de jure or de facto, of an existing or newly created equity interest in the franchise-holder or license-holder which results in the creation or increase of 20 percentage points or more in the equity or voting interest of any person, or combination of persons acting in concert.

(c) At least 120 calendar days prior to the effective date of a transfer or delegation, or as otherwise provided in a franchise or license agreement, the franchise-holder or license-holder shall submit to the City Administrator an application for approval of the transfer or delegation, in such form as the City Administrator may require, disclosing the legal, financial, technical, and other qualifications of the transferee, and such further information as may be required under applicable regulations, or a particular franchise or license agreement."

Section 15. That the Billings, Montana City Code be amended by adding Section 7-1414 to read as follows:

**"Sec. 7-1414. Transitional provisions for existing facilities.**

(a) The owner or operator of any communications facility or utility facility which requires a franchise or license under this article, and which was located in the public right-of-way on the effective date of this article, shall have three months from the effective date of this article to file one or more applications for a franchise or a license under this article. Any owner or operator filing such an application shall not be subject to a penalty under Section 7-1418 for failure to have a franchise or license for that period during which said application remains pending; provided however, that the annual fee required by Section 7-1411 shall accrue from the effective date of this article and shall become immediately and payable upon grant of the franchise or license.

(b) Any express franchise, license, or lease granted by the City prior to the effective date of this article shall remain valid and enforceable according to its express provisions for the remainder of its current term, but not any renewal or extension thereof; provided, however, that such franchise-holder, license-holder or lease-holder may elect at any time to apply for a superseding franchise, license or lease under this article."

Section 16. That the Billings, Montana City Code be amended by adding Section 7-1415 to read as follows:

**"Sec. 7-1415. Application for Franchises or Licenses.**

(a) An application for a franchise or license under this article must be submitted to the City Administrator on a form supplied by the City and include at a minimum the following information:

(1) the name, address, and telephone number of the applicant; and



(2) the name, address, and telephone number of a responsible person whom the City may notify or contact at any time concerning the applicant's communications or utility facilities; and

(3) an engineering site plan, in format and medium approved by the City Administrator, showing the proposed locations of the applicant's communications or utility facilities, including any manholes or overhead poles, the size, type and proposed depth of any conduit or other enclosures, and the relationship of the system to all existing sidewalks, pavement, communication facilities, utility facilities, and other improvements within the public right-of-way; and

(4) the technical standards that the applicant proposes to follow in construction and operation of the communications facilities or utility facilities, to the extent that that such construction and operation may impact the public rights-of-way; and

(5) a description of the telecommunications services or utility services to be provided, to the extent that the nature or extent of such services may impact the public rights-of-way, if applicable; and

(6) any additional information related to public right-of-way use or occupation as the City may require.

(b) If the information in an application is incomplete or if the proposed use is inconsistent with the requirements of this Chapter, the application may be returned as unacceptable for filing.

(c) In evaluating an application, the City Administrator must consider, subject to limitations of applicable law:

(1) the applicant's technical, financial, and legal qualifications to construct and operate the proposed communications facilities or utility facilities in the public rights-of-way, subject to subparagraph (7) below; provided, however, that an applicant subject to the jurisdiction of the Montana Public Service Commission, proposing to construct and operate communications or utility facilities under authority of State law, including regulations or orders promulgated by the Montana Public Service Commission, shall be deemed presumptively qualified, but only to the extent that the communications facilities or utility facilities are to be used to provide services subject to the jurisdiction of the Montana Public Service Commission.

(2) the nature and extent of the proposed facilities and equipment to be located in the public rights-of-way, and the nature and extent of the proposed services to be provided through such facilities or equipment in the public rights-of-way; and

(3) the applicant's recent performance record of constructing, operating and maintaining communications facilities or utility facilities in the public rights-of-way in other communities, if any and any violations of statutes, regulations, and franchises, however denominated, pertaining to operations and facilities in public rights-of-way; and

(4) the ability of the applicant to make efficient use of the public right-of-way and justifying any inconvenience of the public attendant thereon; and

(5) the effects of a grant of a franchise or license on the present and future use of the public rights-of-way, including any foreclosure of future uses of the public rights-of-way; and

(6) the applicant's acceptance of such terms and conditions upon the grant of a franchise, license or lease as the City Administrator deems necessary and appropriate and consistent with the requirements and purposes of this article; and

(7) such other factors as the City Administrator may deem relevant, but the City Administrator must not consider, in evaluating the application: (i) the fact that the applicant, or a person with whom the applicant has been associated, is or was a debtor in a case under the United States Bankruptcy Code or former Bankruptcy Act; (ii) the fact that the applicant, or a person with whom the applicant has been associated, is or was insolvent before or during the applicant's or person's case under the United States Bankruptcy Code or former Bankruptcy Act before the time discharge is or was granted or denied; or (iii) the fact that the applicant, or a person with whom the applicant has been associated, has not paid a debt that is dischargeable in the applicant's or person's pending case under the United States Bankruptcy Code or discharged in the applicant's or person's prior case under the Bankruptcy Code or under the former Bankruptcy Act.

(d) The City Administrator shall submit to the Council a recommendation to grant a franchise or license, together with a proposed franchise or license agreement, or a recommendation not to grant the proposed franchise or license.

(e) No franchise or license shall become effective following approval by the Council until the franchise-holder or license-holder has demonstrated, to the satisfaction of the City Administrator, compliance with the bond, insurance, and similar provisions of the franchise or license agreement."

Section 17. That the Billings, Montana City Code be amended by adding Section 7-1416 to read as follows:

**"Sec. 7-1416. Leases.**

(a) Subject to the City's zoning regulations and procedures, the City Administrator may enter into with telecommunications service and utility service providers, and other radio users, leases for appropriate tower sites, antenna space on towers and other supporting structures, and for accessory buildings on City property. Such leases shall contain commercially reasonable provisions protecting the interests of the City and shall be for terms of not longer than five years.

(b) Each lease-holder shall be responsible for obtaining in a timely manner at its own expense any required approvals for its antenna or antenna structure from the Federal Aviation Administration or the Federal Communications Commission, or the successors of either, any required zoning from the City, and any building or electrical permits and inspections from the City, county, state, or federal governments.

(c) On any antenna structure which is not occupied by a City-owned antenna already subject to the tower registration, lighting, and aeronautical painting requirements of the Federal Aviation Administration or the Federal Communications Commission, or the successors of either, the lease-holder shall be financially responsible for the tower registration, lighting, and aeronautical painting requirements applicable to its antenna and/or supporting structure."

Section 18. That the Billings, Montana City Code be amended by adding Section 7-1417 to read as follows:

**"Sec. 7-1417. Revocation of Franchise or License;  
Termination of Lease.**

(a) A franchise or license may be revoked by the Council upon the grounds set forth in Sections 7-1410 and 7-1418.

(b) The City Administrator shall provide written notice to the franchise-holder or license-holder that the franchise or license is subject to revocation, which notice shall forth the basis for such revocation, provide the franchise-holder or license-holder not less than ten (10) days to show cause why such franchise or license should not be revoked, and advise the franchise-holder or license-holder of its right, within not less than ten (10) days, to demand an administrative hearing.

(c) The City Administrator shall preside over such administrative hearing as may be demanded by the franchise-holder or

license-holder, or deemed necessary and appropriate by the City Administrator, pursuant to such rules and procedures as may be promulgated by the Council, and shall take evidence and hear arguments on the grounds for revocation of the franchise or license.

(d) Following expiration of the time allowed for the franchise-holder or license-holder to show cause why the franchise or license should not be revoked, and such administrative hearing as may be conducted hereunder, the City Administrator shall determine whether to recommend to the Council the revocation of the franchise or license. A recommendation to revoke a franchise or license shall set forth the findings of fact and conclusions of law upon which the recommendation is based, and shall be transmitted to the Council, with a copy provided to the franchise-holder or license-holder.

(e) The Council shall give not less than fifteen (15) days notice of its intention to consider the recommended revocation at a special or regular meeting of the Council, and the franchise-holder or license-holder shall have ten (10) days, or such greater time as the Council may notice allow, to respond in writing, together with documentary evidence and affidavits, to the recommendation of the City Administrator.

(f) The recommended revocation shall be considered by the Council at the noticed meeting or any subsequent meeting to which the matter is by motion continued, and at such meeting the franchise-holder or license-holder may appear by representative to address the Council regarding the recommended revocation, and the Council may also recognize and hear the City Administrator and such members of the public as it deems useful, necessary or appropriate, and may thereafter determine, by written resolution or other form of decision, to revoke the franchise or license based on the recommendation of the City Administrator and other evidence in the record, and such resolution or other form of decision shall set forth the particulars of the breach of the franchise or license agreement or violations of the ordinance which is the basis for the revocation.

(g) Any franchise or license shall terminate automatically by operation of law upon an assignment for the benefit of creditors or the appointment of a receiver or trustee to take over the business of the franchise-holder or license-holder, whether in a receivership, reorganization, bankruptcy assignment for the benefit of creditors, or other action or proceeding, however denominated. Upon timely demand of the franchise-holder or license-holder or assignee, receiver, or trustees, as the case may be, the City Council shall hold a public hearing on retroactive reinstatement of a franchise or license

terminated under this subsection if, within the 120-day period following termination under this subsection:

(1) the assignment, receivership, or trusteeship is vacated; or

(2) the assignee, receiver, or trustee has fully complied with the terms and conditions of this article and the franchise or license agreement, and has executed an agreement, approved by the court having jurisdiction, assuming and agreeing to be bound by the terms, and conditions of the franchise or license, with any changes reasonably deemed necessary by the City.

(h) The City may revoke the franchise or license if there is a foreclosure or other judicial sale of any of the facilities, equipment or property of a franchise-holder or license-holder, including the franchise or license, by serving notice on the franchise-holder or license-holder and its successor-in-interest to such property. The franchise or license and all rights and privileges of the franchise or license will be revoked thirty days after the City serves notice under this subsection unless:

(1) the City has approved a transfer of the corresponding franchise or license; and

(2) the successful bidder has agreed with the City to assume and be bound by the terms and conditions of the franchise or license, with any changes reasonably deemed necessary by the City; and

(3) the provisions of Section 7-1413, to the extent applicable, have been complied with.

(i) Except as otherwise provided in a lease agreement, a lease may be terminated by the City Administrator for a material breach of the lease agreement after notice thereof and upon the lease-holder's failure to cure such breach within thirty (30) days or such greater time as the City Administrator may by notice allow.

(j) Each franchise, license, and lease agreement under this ordinance shall be deemed to be executory for the purposes of the bankruptcy and insolvency laws.

(k) Except as otherwise expressly provided in a franchise, license, or lease agreement, upon the revocation or termination of a franchise, license or lease, the City, by order of the Council, may seize the communications or utility facilities authorized under such franchise, license or lease in satisfaction of any damage or loss incurred or penalty assessed by the City in respect of the acts or omissions of the



franchise-holder, license-holder, or lease-holder, including, but not limited to, costs associated with the removal of such facilities, restoration of the public right-of-way to its original condition, and legal and administrative costs incurred in connection with the revocation or termination of the franchise, license or lease; or the City, by order of the Council, may order the removal of such facilities at the expense of the franchise-holder, license, lease-holder, or surety therefore."

Section 19. That the Billings, Montana City Code be amended by adding Section 7-1418 to read as follows:

**"Sec. 7-1418. Enforcement.**

(a) Any person, affiliate, franchise holder, lease holder, license holder or owner or operator who knowingly violates Section 7-1406 or 7-1407, or any material provision of the franchise, license, lease or work permit required by Sections 7-1406 to 7-1407 shall be guilty of a municipal infraction, punishable by a civil penalty, for each day that such violation occurs or continues, in accordance with Montana Code Annotated Title 7, Chapter 1, Part 41.

(b) Any Communications facility constructed, maintained, or operated in this City in violation of Section 7-1406 or Section 7-1407 is subject to forfeiture; and the City may seize, disable, remove, or destroy such facility upon thirty (30) days' advance notice in writing to the owner or operator thereof; provided, however, that where the safety of any person or property lawfully within the public rights-of-way is endangered thereby, such communications facility may be seized, disabled and removed without notice and the City shall have no liability for any damage to such communications facility which occurs when it is seized, disabled or removed.

(c) Except as otherwise provided in a franchise, license or lease agreement entered into pursuant to this article, upon the breach of a franchise, license or lease agreement and failure to cure such breach within ten (10) days after written notice thereof, the franchise-holder, license-holder or lease-holder shall be liable for and shall pay as a penalty the following amounts per day for each day that such violation remains uncured, which amount shall be paid within ten (10) days of demand therefore:

(1) For failure to commence operations in accordance with the requirements of the Franchise or License agreement: \$300 for the first day and \$500 for each day following the first day that such violation remains uncured;

(2) For failure to substantially complete construction in accordance with the requirements of a Franchise or License agreement: \$300 for the first day and \$500 for each day following the first day that such violation remains uncured;

(3) For transferring an Franchise or License without approval as required hereunder: \$300 for the first day and \$500 for each day following the first day that such violation remains uncured;

(4) For failure to make timely payment of compensation required under an Franchise or License agreement: \$300 for the first day and \$500 for each day following the first day that such violation remains uncured;

(5) For failure to tender payment of any penalty assessed hereunder within ten (10) days of demand therefore: \$300 for the first day and \$500 for each day following the first day that such violation remains uncured.

(d) In addition to any other remedies provided hereunder, the City shall be entitled to injunctive relief, or any other remedy available at law or in equity, to mitigate or terminate a violation of this article or to enforce compliance with a franchise, license or lease agreement.

(e) A franchise or license may be revoked by the City, as provided in Section 7-1417 upon a determination by the Council that a material breach of the franchise or license agreement, or violation of this article, remained uncured after thirty (30) days written notice thereof or such greater time as the City Administrator may by notice have allowed, or upon a determination that the franchise-holder or license-holder has evidenced a clear disregard for its obligations under a franchise or license agreement or this article by its persistent and repeated breach or violation of such obligations."

Section 20. That the Billings, Montana City Code be amended by adding Section 7-1419 to read as follows:

**"Sec. 7-1419. Review of ordinance.**

Four (4) years after the effective date of this ordinance, during November 2004, the City Administrator shall conduct a mandatory, one-time review of this ordinance to determine its past effect upon the community and upon the management of the City's rights-of-way. The City Administrator shall present these findings to the City Council. Thereafter, no further mandatory review shall be required."

Section 21. Severability.

In the event that any provision of this ordinance shall be held invalid or unenforceable by a court of competent jurisdiction, and such judgment shall not have been stayed or vacated within sixty (60) days, each franchise or license which incorporates such provision or was, absent such judgment, governed by such provision, shall be terminable at the election of City upon sixty (60) days notice.

Section 22. Repealer.

All resolutions, ordinances and sections of the City Code inconsistent herewith are hereby repealed.

Section 23. Effective Date.

This ordinance shall become effective thirty (30) days following second reading and final adoption as required by law.

PASSED by the City Council on first reading this 10<sup>th</sup> day of October, 2000.

PASSED, ADOPTED and APPROVED on second reading this 23<sup>rd</sup> day of October, 2000.

CITY OF BILLINGS:

BY:

Charles F. Tooley  
Charles F. Tooley MAYOR

ATTEST:

Colleen R. Schell-Berg  
Colleen Schell-Berg, DEPUTY CITY CLERK

