

ORDINANCE 1292

AN ORDINANCE OF THE CITY OF PAYETTE, IDAHO, CREATING A NEW SECTION IN TITLE 12 ESTABLISHING POLICY GOVERNING THE MANAGEMENT OF RIGHT-OF-WAY FOR THE PROVISION OF TELECOMMUNICATIONS SERVICES; PROVIDING FOR LICENSE APPLICATION PROCEDURES; SETTING AN EFFECTIVE DATE; ALLOWING PUBLICATION IN SUMMARY FORM; ESTABLISHING SEVERABILITY; ESTABLISHING A REPEALER:

WHEREAS, The purpose of this chapter is to establish policy governing the management of right of way for the provision of telecommunications services to enable the City to:

1. Issue licenses and franchises on a competitively neutral and non-discriminatory basis, to telecommunications corporations who use the public right of way to provide telecommunications services, except in cases where state law forbids establishment of a license or franchise requirement; and
2. Manage the streets, highways and public right of way in order to minimize the impact and cost to Payette citizens of the placement of telecommunications facilities within public right of way; and
3. Manage the right-of-way so as to maximize their efficient use, thereby minimizing the foreclosure of future additional uses of such rights-of-way; and
4. Minimize congestion, inconvenience, visual impact, and other adverse effects from such use on the City's highways, and;

WHEREAS, the City Council finds that the City's right-of-ways constitute a valuable public asset:

1. Having been acquired and maintained by the City over many years at great taxpayer expense;
2. Providing uniquely valuable property that private telecommunications providers may wish to use for profit-making purposes that may not necessarily benefit all the residents of the City and;
3. Comprising significant assets which the City must manage as a public fiduciary trust to enhance the public health, safety, and welfare; and,

NOW, THEREFORE, in this chapter the City Council intends:

1. To ensure that locally elected officials manage local highways consistent with their fiduciary trust obligations;
2. To ensure compliance with public health, safety, and welfare measures for right-of-ways;
3. To encourage public-private partnerships to provide telecommunications facilities needed for the most cost-effective delivery of public services, including schools, libraries, police and fire protection, as well as private services;
4. To conserve the limited physical capacity of the highways held in public trust by the City; and
5. To assure that the City's current and ongoing costs of granting and regulating private access to and use of the highways are fully paid by the persons seeking such access and causing such costs.

THEREFORE, BE IT ORDAINED BY THE MAYOR AND CITY COUNCIL OF PAYETTE, IDAHO:

Section 1. The Payette Municipal Code is amended by the addition of a new Chapter 12.05.110, entitled "Encroachment Permit for Fiber Optic Cable, Interstate Service and Other Communication, conduction or Transmission Facilities Excluded from Telecommunications and Telecommunications Services," which chapter shall read as follows:

CHAPTER 12.05

12.05 Encroachment Permits

Sections:

12.05.010 Definitions.

12.05.020 Actions requiring permit.

12.05.030 Permit application.

12.05.040 Action on permit application.

12.05.050 City standards.

12.05.060 Fees.

12.05.070 Bonding required.

12.05.080 Appeals.

12.05.090 Prohibited acts.

12.05.100 Violation—Penalties and remedies.

12.05.110 Encroachment Permit for Fiber Optic Cable, Interstate Services and Other Communication, Conduction or Transmission Facilities Excluded from Telecommunications and Telecommunications Services

12.05.110 Encroachment permit for fiber optic cable, interstate services and other communication, conduction or transmission facilities excluded from telecommunications and telecommunications services.

A fiber optics communication system is an interstate network of fiber optic cables and all related property including conduit, carrier pipe, cable fibers, repeaters, power sources and other attachments and appurtenances necessary for fiber optics communication but which is excluded from telecommunications and telecommunications services . The City shall determine through the application process whether this permit is appropriate for applicant's activities.

12.05.115. Fiber optic cable license.

No person shall place, install, construct, operate or maintain any fiber optic equipment, facilities or system for fiber optic communication services, any interstate services or other communication, conduction or transmission facilities excluded from the definition of telecommunications and telecommunications services as defined in Idaho Code Title 61 Chapter 1 and 63-3501, in, upon or under the surface of any highway, public place, street or right-of-way, unless a fiber optic cable license has first been obtained in accordance with the provisions of this chapter. In addition to obtaining the fiber optic cable license as provided herein, any person desiring to place, install, construct, operate or maintain such facilities in, upon or under any highway must also obtain a fiber optic cable, encroachment permit, as required herein.

A. The requirement to obtain a fiber optic cable license set forth in this section does not apply to those activities or operations of a telecommunications corporation which meets the requirements set forth in Idaho Code 62-618.

B. A fiber optic cable license pursuant to this chapter shall not authorize the use of the highways to provide any other service; nor shall the issuance of the same invalidate any franchise, license or permit that authorizes the use of the highways for such other services; nor shall the fact that a person holds a franchise, license or permit to make any other use of the highway or to provide or operate any other service, authorize installation, maintenance, construction or operation of fiber optic cable, interstate services or other facilities required to be licensed by this section in any highway in the City, or permit such licensee to provide fiber optic cable services by means of such facilities without obtaining a fiber optic cable license hereunder.

C. Any license granted pursuant to this section shall not be exclusive.

12.05.120. Application for fiber optic cable license.

A person desiring a fiber optic cable license shall file an application with the City Manager, in the form prescribed by the City Manager, together with that part of the non-refundable application processing fee established by Council resolution. The full fee shall be paid on demand from the City and shall be in an amount established by the City Manager as necessary to recover all reasonably related costs incurred by the City to review and process the application. At the discretion of the Department, an application for a fiber optic cable license may be processed simultaneously with the same applicant's application for an encroachment permit for the installation of the fiber optic cable or other facilities permitted under this section. It is anticipated the City will retain outside experts to assist in the review and processing of complex license and encroachment permit applications and all costs for such experts shall be recovered through the application processing fee.

12.05.125. Terms and conditions for a fiber optic cable license.

A. The applicant shall maintain insurance of the types and in the amounts specified by the City, and provide proof of insurance as required by the City; post performance bonds and security funds required; shall agree to fully indemnify the City, its officers, agents, boards and commissions, in a form satisfactory to the City; and shall agree that it shall have no recourse whatsoever against the City, its officers, agents, boards, commissions, agents or employees for any loss, costs, expense or damages arising out of any provision or requirement of the City because of the enforcement of the license or franchise or because of defects in this chapter; or the license or franchise issued or as a result of any damage that may result from the City's exercise of its rights under the license, or applicable provisions of law.

B. The initial license term shall be for a period of five (5) years and may be renewed for five-year terms.

C. A fiber optic cable license is personal to the licensee. Except as provided in the license, no transfer or change of control over the licensee, (including but not limited to, forced or voluntary sale, merger, consolidation, receivership, or any other means) shall occur unless prior application is made to the City and the City's prior written consent is obtained, which consent will not be unreasonably withheld or delayed.

D. Licensee shall produce books and records for the City's inspection and copying, prepare reports, respond to questions and permit the City to have access to its facilities as the City may request in order to determine whether licensee has complied with its obligations under the license or other applicable law or regulation.

E. The applicant shall agree to provide and maintain accurate maps showing the location of all its facilities including all the facilities it will use in the highways within the City, and to comply with such other mapping requirements that the City may establish from time to time.

F. The applicant shall agree to comply with right-of-way use requirements that the City may establish from time to time;

G. The applicant shall agree to comply with and be bound by the administrative and enforcement provisions as may be prescribed from time to time by the City.

H. The applicant must agree to abide by such other conditions and terms as required by the City Council upon consideration of the application.

I. In the event there is a conflict between the provisions of this chapter and the provisions contained in a franchise or license granted by the City to an applicant, the provisions of the franchise or license shall prevail.

12.05.130. Revocation.

A fiber optic cable license shall be subject to revocation for the same reasons and upon the same notice and hearing provisions as set forth hereinabove in section 12.05.125 except subparagraph C. is not a basis for revocation of the license regulated in this section.

- A. The licensee fails to comply with the terms and conditions of the license or other applicable law.
- B. The licensee fails to make the payments in the amounts and at the times specified in the license agreement or in this chapter.
- C. The licensee fails to provide current, accurate as built plans and maps showing the location of all facilities installed or constructed in the City.

Provided, however, a license shall not be revoked unless the licensee is given written notice of the defect in performance and fails to cure the defect within sixty (60) days of the notice, except where the City finds that the defection performance is due to intentional misconduct, is a violation of criminal law, or is part of a pattern of violations where the licensee has already had notice and opportunity to cure.

12.05.135. Permit application process.

A. Any person desiring an encroachment permit pursuant to this section shall file an application with the City, in the form prescribed by the City, together with that part of the non-refundable application processing fee established by Council resolution. The full fee shall be paid on demand from the City and shall be in an amount established by the Department as necessary to recover all reasonably related costs incurred by the City to review and process the application.

B. This encroachment permit shall not be construed to be a franchise or a license as that term is used in Idaho Statutes and the ordinances of the City of Payette, and is required in addition to the fiber optic license required herein.

12.05.140. Required information for both license and permit.

Applicants shall submit all of the applicable information listed hereinabove in section 12.05.125.

12.05.145. Special terms and conditions for the permit described in this section. In addition to the general terms and conditions for all encroachment permits listed above, permits issued pursuant to this section shall also comply with the following conditions:

A. At the option of the City, the permittee may be required to construct conduits, ducts and associated appurtenances such as pull boxes, which will become the property of the City upon completion of construction, in lieu of payment of annual and/or permit fees. It is intended that fees be computed as described in the fee resolution adopted by Council and waived only to the extent of equal value received by construction in kind. The City may, at its option, rent or sell to others the conduits, duct(s) and other appurtenances which are determined to be in excess of its needs.

B. The permittee shall, without cost to the City, allow the use by the City of space in the then existing conduits and subways for wires, fire alarms, police, traffic control and all other applicable municipal purposes as determined by the license agreement with the City.

C. In addition to the indemnification required in the general encroachment permit terms hereinabove, the permittee shall agree to indemnify, defend and save the City harmless from any losses, expenses or lost revenues incurred by the permittee other than the reasonable cost of repair to the permittee's cable and appurtenances damaged as the result of negligence by employees of the City.

12.05.150. Application approval.

Applications for an encroachment permit pursuant to this section shall be reviewed by such outside expert consultants and City staff as deemed necessary by the City who shall approve, deny or conditionally approve such applications unless the encroachment permit application was combined with an application for a fiber optic cable license, in which event the City Council may approve, deny or conditionally approve the two (2) applications together.

12.05.155. Fees.

In addition to the non-refundable encroachment permit application processing fee which covers the cost of reviewing and processing the application; the inspection fees which covers the cost of inspection of the construction, work or installation to insure it meets all City requirements; a fee to recover all of the reasonable costs associated with construction, maintenance and operation of permittee's facilities in the right-of-way, including but not limited to all reasonable costs associated with damage caused to the right-of-way; persons subject to this permit are also required to obtain a fiber optic cable license and thus will be required to pay the license application processing fee and shall also pay an annual license fee established by resolution of the City Council. This fee shall be based on one (1) of the following:

- A. On the gross income from the business;
- B. On the fair market value of the property to be used; or
- C. Any other basis which the Council determines is appropriate and in the best interests of the City.

The fee shall be paid annually in advance at the issuance of the permit and within thirty (30) days of the anniversary date of the issuance of the permit.

Section 2. This Ordinance may be published in summary form allowed by Idaho Code.

Section 3. This Ordinance shall be in full force and effect immediately upon passage and publication as required by the laws of the State of Idaho.

Section 4. Any ordinances or resolutions which are in conflict with this Ordinance are hereby repealed, but only insofar as the conflict exists.

Section 5. If any portion of this Ordinance should be found to be unconstitutional or unenforceable for any reason, the remainder of the Ordinance shall be applied to effectuate the purposes of this Ordinance.

Section 6. Any violation of this Ordinance shall be a misdemeanor punishable by up to a \$1,000.00 fine and six months in the Payette County Jail, or both.

PASSED and APPROVED by the Mayor and City Council of the City of Payette, Idaho this 17TH day of MARCH, 2008.

CITY OF PAYETTE, IDAHO

by _____
DOUGLAS E. HENDERSON, Mayor



ATTEST:



Mary Cordova, City Clerk