ORDINANCE NO. 4304

AN ORDINANCE of the City Council of the City of Kent, Washington, amending Title 6 of the Kent City Code by adopting a new chapter 6.15 establishing franchise application requirements for use of City right-of-way, except that this new chapter does not apply to cable operators or special purpose sewer, water or combined sewer/water districts.

RECITALS

A. Utility and telecommunication service providers often utilize city rights-of-way to deploy the facilities necessary to provide various services to the general public.

B. The city has the authority pursuant to RCW 35A.47.040 to set conditions under which to grant nonexclusive franchises for the use of public rights-of-way for these purposes.

C. The city currently regulates the use of its rights-of-way for such purposes by granting franchise and limited license agreements tailored to the particular circumstances of the utility or service provider. However, the city did not have a formalized or codified process for utility and telecommunication service providers to request and obtain these agreements. Franchises for cable operators are addressed in chapter 7.12 of the Kent City Code and accordingly this new chapter does not apply to these operators.

D. As wireless communication technology has continued to advance, requests from telecommunication service providers to utilize the

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city rights-of-way to install, construct and maintain facilities in new and different ways have increased.

E. This new chapter will help to better manage these requests for authorization to use city rights-of-ways, by establishing a formal, codified process with clear requirements, while at the same time providing the flexibility to modify application requirements as necessary.

F. This new chapter also differentiates between a franchise agreement and a limited license agreement. A franchise agreement allows the use of the rights-of-way within a franchise area, which may be defined to include the entire city. In contrast, a limited license agreement is limited to specific locations. The same application process will apply to both agreements.

G. The detailed application requirements also require applicants applying for a franchise or limited license to demonstrate at the outset what services they intend to provide, how they will be provided and what exactly their use of the rights-of-way will be.

H. Although RCW 35.21.860 prohibits the City from imposing a fee for use of the rights-of-way upon providers for light and power, gas distribution or telecommunication service providers, the city may charge a fee to recover actual administrative expenses incurred by the city that are directly related to receiving and approving a license or franchise. Processing these requests and negotiating terms of these agreements requires the devotion of considerable time and resources. This new application process imposes an initial administrative review fee.

I. Recently, the Federal Communications Commission adopted a Declaratory Ruling and Third Report and Order (FCC 18-133) that establishes new compressed timeframes or “shot clocks” for the processing of all applications relating to the deployment of “small wireless facilities,” referred to in the Kent City Code as “small cell equipment.” This Order goes into effect on January 14, 2019.

J. This Order requires the City to complete review of an application to collocate a small wireless facility using an existing structure,
such as a Puget Sound Energy utility pole, in 60 days and an application to deploy a small wireless facility on a new structure in 90 days. These shot clocks include the franchise as well as any individual permits. The Order declares that a failure to meet these deadlines will be considered a presumptive violation of federal law, 47 U.S.C. § 332(c)(7)(B)(ii) and that applicants are entitled to expedited review of such a violation in federal court.

K. The installation of small cell equipment raises public health and safety concerns and also impacts public property. City staff will need to carefully review specified information to ensure that these deployments do not threaten public health, safety or damage public property. To do so in these compressed timeframes, the City needs to immediately establish a specific application process, track specific dates and specify the information necessary to adequately review the application. Because these shot clocks go into effect on January 14, 2019, City staff members need to be able to process applications immediately under the new time frames and stop the shot clocks when applications are incomplete. It is also important for applicants to be aware of the application requirements and criteria for an application to deploy facilities within the rights-of-way.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF KENT, WASHINGTON, DOES HEREBY ORDAIN AS FOLLOWS:

ORDINANCE

SECTION 1. – New Chapter. Title 6 of the Kent City Code is amended by adding a new chapter 6.15, entitled “Franchise Applications for Use of Right-of-Way,” to read as follows:

Adopt Chapter 6.15 KCC – Re: Franchise for Use of Right-of-Way
CHAPTER 6.15
FRANCHISE APPLICATIONS FOR USE OF RIGHT OF WAY

Sec. 6.15.010. Purpose. This chapter establishes application requirements for a franchise or limited license agreement for the use of the public right-of-way, an initial review fee and requirements for determining the completeness of applications for a franchise. This chapter does not apply to the operation of cable systems and cable operators and their use of city right-of-way. In addition, this chapter does not apply to the use of city right-of-way by special purpose water, sewer or combination water-sewer districts.

Sec. 6.15.020. Conflicting provisions. In the event of a conflict between the provisions of this chapter, the terms of any issued franchise, limited license agreement, or any federal law or federal regulation, it is intended that the stricter standard shall apply unless the context clearly evidences a contrary intent, or unless the city is preempted on the issue by applicable law. Should any franchise, limited license agreement or other applicable law be silent on the issue of conflict, this section shall control.

Sec. 6.15.030. Definitions. The following words, terms, and phrases, when used in this chapter, shall have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning:

A. Director means the city of Kent Economic and Community Development Director, or his or her designee.

B. Franchise refers to the authorization granted by the city to a utility or other service provider for the nonexclusive right to occupy city rights-of-way to provide service within a designated franchise area. A franchise shall be authorized by ordinance and must be accepted by the franchisee to become effective. A franchise shall not include or be a substitute for:
1. Any other permit or authorization required for the privilege of transacting and carrying on business within the city, including without limitation a business license; or

2. Any permit, agreement, or authorization required in connection with operations on or in public streets or property, including without limitation, a street cut permit, a street use permit, or other construction permit or approval; or

3. Any permits or agreements for occupying any other property in the city for which access is not specifically granted by the franchise, including without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the city or any other public or private entity, or for providing any service.

C. **Franchise area** means the geographical area of the city that a franchisee is authorized to serve by the terms of its franchise or by operation of law.

D. **Limited License Agreement** means the authorization granted by the city to a utility or other service provider for the nonexclusive right to occupy specified city rights-of-way. A limited license agreement shall not grant the authority to use or occupy rights-of-way within the entire city. A limited license agreement shall not include or be a substitute for:

1. Any other permit or authorization required for the privilege of transacting and carrying on business within the city, including without limitation a business license; or

2. Any permit, agreement, or authorization required in connection with operations on or in public streets or property, including without limitation, a street cut permit, a street use permit, or other construction permit or approval; or
3. Any permits or agreements for occupying any other property in the city for which access is not specifically granted by the limited license agreement, including without limitation, permits and agreements for placing devices on or in poles, conduits, other structures, or railroad easements, whether owned by the city or any other public or private entity, or for providing any service.

E. Rights-of-Way (singular Right-of-Way) as used in this Franchise, means the surface of, and the space above and below, any public street, highway, freeway, bridge, land path, alley, court, boulevard, sidewalk, way, lane, public way, drive, circle, pathway, space, or other public right-of-way, and over which the City has authority to grant permits, licenses or franchises for use thereof, or has regulatory authority thereover. Rights-of-Way for the purpose of this chapter do not include railroad rights-of-way, airports, harbor areas, buildings, parks, poles, conduits, open spaces, nature trails, dedicated but un-opened right-of-way, undedicated streets and/or right-of-way, environmentally sensitive areas and any land, facilities, or property owned, maintained, or leased by the City in its governmental or proprietary capacity or as an operator of a utility.

Sec. 6.15.040. Applications – Process. Any utility or service provider who desires a franchise or limited license agreement pursuant to this chapter, shall file an application with the City in accordance with this chapter.

A. A franchise application shall be filed by any utility or other service provider for the nonexclusive right to occupy city rights-of-way to provide service within a designated franchise area.

B. A limited license agreement application shall be filed in accordance with the provisions of this chapter for the authorization granted by the city to a utility or other service provider for the nonexclusive right to occupy specified city rights-of-way for the sole purpose of providing service to persons or areas outside the City.
Sec. 6.15.050. Applications – Contents. The Director is authorized to establish an application form or forms appropriate for public utilities and other qualified service providers to apply for a franchise or limited license agreement. The form shall contain at a minimum:

A. Information identifying the applicant, its corporate or other organizational structure, and the contact agent.

B. Property and facility information including, but not limited to:

   1. The nature of the request -- as an application for a new franchise, an application for renewal or amendment or an application for the transfer of a franchise.

   2. A description of the specific services that the applicant expects to provide within the City including whether the services will be provided to the general public, to commercial and/or residential customers or to other utilities and service providers.

   3. A description of the facilities to be located in the right-of-way including, but not limited to, telecommunications service facilities, small cell equipment, conduits, fiber, pipelines, and other facilities appropriate to the specific utility or service providers' utilization of the right-of-way. Small cell equipment designs shall be submitted with the application. The Director may require designs of other facilities.

   4. A statement that the necessary pole attachment or lease agreements with the owners of other facilities located in the right-of-way have been obtained.

   5. Estimated beginning and end dates for construction.

   6. A statement that any licenses, certificates or authorizations required from the Federal Communications Commission, the Washington Utilities and Transportation Commission and any other federal or state
agency with jurisdiction over the proposed activities to be conducted in the right-of-way have been obtained.

7. A description of the services provided and any and all state and local taxes which may apply.

8. The service area for which the franchise is requested, including a map of the area to be covered by the franchise and specific locations of the initial build out and, if known, proposed future build out locations including which proposed facilities will be underground, ground based and/or aerial.

9. Upon request from the City, financial statements prepared in accordance with generally accepted accounting principles demonstrating the applicant’s financial ability to construct, operate, maintain, relocate and remove its telecommunications facilities. This provision shall not apply when prohibited by the federal Telecommunications Act.

10. A detailed description of the applicant’s previous experience in providing the intended service which includes a list identifying, by place and date, other franchises obtained by the applicant, its parent or subsidiary.

11. Such other information as the Director determines would be relevant in considering the application.

Sec. 6.15.060. Applicant representatives. Any person or entity who submits an application under this chapter shall have a continuing obligation to notify the city, in writing, of the names, addresses and occupations of all persons who are authorized to represent or act on behalf of the applicant in those matters pertaining to the application. The requirement to make such disclosure shall continue until the city has approved or disapproved an applicant’s application or until an applicant withdraws its application.
Sec. 6.15.070. Administrative Application Review Fee. An initial administrative application review fee of $500.00 shall be paid by the applicant at the time the application is submitted to the City.

Sec. 6.15.080. Completeness.

A. Completeness of the application shall be determined in accordance with this section KCC 6.15.080 and the requirements of KCC 6.15.050, Applications - Contents.
B. The Director shall notify the applicant within 10 days of submission if the application is materially incomplete; provided, however, that an applicant may consent to a different completeness review period.
C. The notification that an application is incomplete shall be in writing, specifically identifying the missing documents or information and shall refer to the code section creating the obligation to submit the documentation.
D. A service provider may submit information required to complete the application within 60 days of notice by the Director. Failure to provide such information in a timely manner shall be deemed a withdrawal of that application.

Sec. 6.15.090. Obligation to cure as a condition of renewal.
No franchise shall be renewed until any ongoing violations or defaults in the franchisee’s performance of the franchise agreement, or of the requirements of this chapter, have been cured, or a plan detailing the corrective action to be taken by the franchisee has been approved in writing by the city.

Sec. 6.15.100. Public Comment. The City shall provide notice of a complete application for a franchise on the City’s website with a link to the franchise application. The applicant is encouraged to host informational meetings for the public regarding the deployment. These meetings are for the public's information and are neither hearings nor part of any land use appeal process.
Sec. 6.15.110. Subject to authority. A grantee shall, at all times during the term of a franchise or limited license agreement, be subject to all lawful exercise of the police power by the city and to such lawful regulations as the city shall hereafter enact. A grantee shall construct, operate and maintain all equipment, facilities or other improvements in full compliance with all other applicable rules and regulations now in effect or hereafter adopted by the United States, the state of Washington, the city or any agency of these governments with jurisdiction over these activities.

Sec. 6.15.130. Enforcement. The requirements of this chapter shall be enforced by the Director in accordance with Sections 6.15.080 through 6.15.090. The penalty provisions set forth in KCC 1.01.140 shall not apply. This shall not limit the city’s ability to pursue other remedies at law or in equity.

SECTION 2. - Severability. If any one or more section, subsection, or sentence of this ordinance is held to be unconstitutional or invalid, such decision shall not affect the validity of the remaining portion of this ordinance and the same shall remain in full force and effect.

SECTION 3. - Corrections by City Clerk or Code Reviser. Upon approval of the city attorney, the city clerk and the code reviser are authorized to make necessary corrections to this ordinance, including the correction of clerical errors; ordinance, section, or subsection numbering; or references to other local, state, or federal laws, codes, rules, or regulations.

SECTION 4. - Effective Date. The city council hereby declares the existence of a public emergency and in order to protect the public health, safety, property, and peace, this ordinance shall be effective upon adoption by a majority plus one of the whole membership of the council. The city clerk is directed to publish a summary of this ordinance at the earliest possible publication date.
ATTEST:

KIMBERLEY A. KOMOTO, CITY CLERK

APPROVED AS TO FORM:

ARTHUR "PAT" FITZPATRICK, CITY ATTORNEY

January 15, 2019
Date Approved

January 15, 2019
Date Adopted

January 18, 2019
Date Published

DANA RALPH, MAYOR

January 15, 2019
Date Approved