

ORDINANCE NO. 7,083–N.S.

REPEALING BMC CHAPTERS 16.10, 16.11 AND 9.56, AND ADOPTING NEW BMC CHAPTER 16.10 REGULATING EXCAVATIONS IN THE PUBLIC RIGHT OF WAY FOR VIDEO AND TELECOMMUNICATIONS SYSTEMS

BE IT ORDAINED by the City Council of the City of Berkeley as follows:

Section 1. Chapter 16.10 of the Berkeley Municipal Code is hereby repealed.

Section 2. Chapter 16.11 of the Berkeley Municipal Code is hereby repealed.

Section 3. Chapter 9.56 of the Berkeley Municipal Code is hereby repealed.

Section 4. A new Chapter 16.10 is added to the Berkeley Municipal Code to read as follows:

**Sections:**

- 16.10.010 Purpose**
- 16.10.020 Definitions**
- 16.10.030 PROW Permit Required – Applicability**
- 16.10.040 PROW Permit Application**
- 16.10.050 Design, Installation, and Construction of Cable and Telecommunications Systems**
- 16.10.060 Issuance of PROW Permits**
- 16.10.070 Construction Activities**
- 16.10.080 Excavation**
- 16.10.090 Remedies during construction**
- 16.10.100 Maintenance of facilities – Continuing obligations**
- 16.10.110 Emergency repairs**
- 16.10.120 Duty to Remove Facilities from PROW and Public Property – Abandonment in Place**
- 16.10.130 City Vacation or Abandonment**
- 16.10.140 System Location Data**
- 16.10.150 Appeals**
- 16.10.160 Indemnity and Liability Insurance**
- 16.10.170 Revocation and termination**
- 16.10.180 Possessory interest**
- 16.10.190 Violations**
- 16.10.200 Interpretation and severability**

**16.10.010 Purpose**

The purpose of this Chapter is to establish policies and procedures for use of the public rights-of-way by Video Service Providers and Telephone Corporations, in order to minimize the inconvenience to and negative effects on the public their use of the public rights-of-way, and to eliminate the cost to taxpayers that results from installation,

maintenance and removal of the Facilities needed Video and Telecommunication Systems while ensuring that all users of the public rights of way are treated in an equivalent manner. It is also the policy of City to promote undergrounding of Facilities, whether related to Video Services, Telecommunications Services, or any other utility or service, whenever Feasible, in order to ensure optimal pedestrian accessibility and traffic safety.

#### **16.10.020 Definitions**

A. For the purposes of this Chapter, the following words, terms, phrases, and their derivations shall have the meanings set forth herein unless a different meaning is clearly intended by the use and context of the word, term or phrase. When not inconsistent with the context, words used in the present tense include the future tense, and words in the singular number include the plural number.

1. "Above Ground Facility" or "AGF" means all structures, poles, pedestals, cabinets, electric meters, equipment, and any other Facility installed on or at the immediately surrounding grade in the Public Right Of Way ("PROW") but excludes any items installed on existing structures, poles, pedestals, cabinets, electric meters, equipment or other Facilities.

2. "City" means City of Berkeley, California, acting by and through its City Council, or a representative as the governing body may designate to act on cable matters on its behalf.

3. "City Manager" means the City Manager of the City or his her designee.

4. "Company" means any Video Service Provider or Telephone Corporation that is authorized, by any governmental entity or law to provide Video or Telecommunications Services in Berkeley.

5. "Construction Plan" means information regarding the design, potential locations, and estimated time schedule for the construction and/or installation of a Facility, as further specified in Section 16.10.070.

6. "Department" means City Department of Public Works.

7. "Director" means the Director of the City's Department of Public Works or his or her designee.

8. "Excess Capacity" means the volume or capacity in any existing or future duct, conduit, manhole, hand hole or Facility that is or will be made available by the owner for use by third party Facilities.

9. "Facility" or "Facilities" means any cable or other wire or line, pipeline, pipes, duct, conduit, converter, cabinet, pedestal, meter, tunnel, vault, equipment, drain, manhole, splice box, surface location marker, pole, structure, utility, or other appurtenance, structure, property, or tangible thing owned, leased, operated, or licensed by a Company to provide or aid in the provision of Cable or Telecommunications Services, excluding antennas, that are located or are proposed to be located on the PROW.

10. "Feasible" means capable of being accomplished in a successful manner within a reasonable period of time, taking into account appropriate environmental, physical, legal, economic and technological factors.

11. "Franchise" means a written legal undertaking or action issued by any level of government, which authorizes a specific Company to utilize the City's PROW for the

purpose of installing, operating, maintaining, or reconstructing a Telecommunications System or providing Video Services.

12. "Person" means any person, corporation, partnership, proprietorship, individual, organization, or other entity.

13. "PROW Permit" means a permit issued pursuant to this Chapter.

14. "Public rights-of-way" ("PROW") means any street, public way, public place or rights-of-way, now laid out or dedicated, and the space on, above or below it, and all extensions thereof and additions thereto, owned, operated and/or controlled by the City or subject to an easement owned by the City, and any privately-owned area within the City's jurisdiction which is not yet, but is designated as a proposed public place on a tentative subdivision map approved by the City.

15. "Telephone Corporation" is defined as set forth in Section 234 of the California Public Utilities Code.

16. "Telecommunications System" means the Facilities necessary or convenient for a Telecommunications Carrier to provide Telecommunications Service.

17. "Traffic Control Plan" means a plan describing the manner in which Company will manage vehicle, bicycle, and pedestrian traffic along affected Streets that have a speed limit greater than 35 miles per hour when installing or maintaining Facilities.

18. "Video Service" is defined as set forth in Section 5830(s) of the California Public Utilities Code.

19. "Video Service Provider" is defined as set forth in Section 5830(t) of the California Public Utilities Code.

20. "Video System" means the Facilities necessary or convenient for a Video Service Provider to provide Video Service.

B. Terms Not Defined. Words, terms, or phrases not defined herein shall first have the meaning as defined in the California Digital Infrastructure and Video Competition Act (DIVCA) of 2006 (AB2987), codified at Section 5800 *et seq.* of the California Public Utility Code) and then the special meanings or connotations used in any industry, business, trade, or profession where they commonly carry special meanings. If there are no such special meanings, they will have the standard definitions as set forth in commonly used and accepted dictionaries of the English language.

#### **16.10.030 PROW Permit Required – Applicability**

A. Except as provided in subdivision B, in addition to any agreement, license, permit or Franchise required by this Code or any other local, state or federal law, no Company may undertake any project involving excavation in the PROW for a Facility or installation of an AGF, in order to construct, install, or repair a Telecommunications or Video System, or a portion thereof, without first obtaining a PROW permit pursuant to this Chapter and paying all lawful fees required by this Code. The Director shall have the authority to determine whether a proposed Facility is an AGF as defined in Section 16.10.020.A.1.

B. Notwithstanding anything stated herein, a PROW Permit shall not be required if the Director makes a written determination that a proposed Facility described in subdivision A relates to the maintenance, replacement or insubstantial modification of existing Facilities, except that replacement of an AGF shall require a PROW Permit.

C. In addition to the requirements of this Chapter, a Company shall obtain all otherwise necessary City permits including, without limitation, encroachment permits, building permits, electrical permits, and other permits that may be lawfully required by this Code or other applicable laws or regulations.

#### **16.10.040 PROW Permit Application**

No fewer than 30 days prior to a Company's intended Construction start date, a written application for a PROW Permit, along with payment of any fees or deposit required by the City, shall be filed with the Director, in the form and manner required by the Director, and shall contain, at a minimum, all of the following information:

A. General information regarding any Facilities that the Company plans to apply for permits to install within the PROW in the next six (6) months, regardless of whether a permit is currently sought for those Facilities.

B. Site plan of the Facilities proposed to be located within the PROW, including a map in electronic and/or other form required by the City. The plans and specifications shall show:

1. The location and dimensions of all existing street trees of at least 6" in diameter, AGFs, and improvements in the PROW where the new Facilities are proposed.

2. Photographs with superimposed images showing any proposed AGFs.

3. A description of the proposed Facilities; including, if such information has not previously been provided to the City, a general description of the facilities, including whether the facility will contain any electronic components, natural gas generator, electrical fans, and or emergency backup equipment.

4. The specific landscaping, structures, improvements, Facilities and obstructions, if any, that the Company proposes to temporarily or permanently remove or relocate.

5. A detailed description or plan showing any proposed screening and/or landscaping associated with any proposed AGFs.

C. If the Company is proposing new underground installation of Facilities within the PROW, it shall provide, upon request of the Director, information regarding any Excess Capacity that will exist in such Facilities after the installation of Company's Facilities.

D. Estimated Construction Start and Completion dates.

E. A Traffic Control Plan, if required, that complies with guidelines established by the Director.

F. An application for an AGF shall include proof of written public notification by first class mail to property owners and residents within 500 feet of the proposed AGF.

G. To the extent practicable, proof that the Company has obtained any other governmental approvals and permits required to construct the Facilities in question. If a Company has not previously provided information sufficient to show that it is a Telephone Corporation or Video Service Provider, the City may also require that the Company provide such information.

#### **16.10.050 Design, Installation, and Construction of Video and Telecommunications Systems**

A. All Facilities shall be so located, constructed, installed and maintained so as not to incommode the public use of the road or highway or interrupt navigation of the waters, including access to and from the PROW from private property.

B. In the event a Company creates a hazardous or unsafe condition on either public or private property, or unreasonably interferes with access between the PROW and private property, the Company shall remove or modify that part of the Facility to eliminate such condition.

C. No Facility may be located or installed in such a manner that it will unreasonably interfere with existing or adopted City plans to use the PROW, with the access rights of private property owners, with existing gas, electric, sewer or telephone fixtures, with existing water hydrants and mains, with existing sewers, storm drains or v-ditches, or any existing wastewater stations, with any existing traffic control System.

D. Construction, installation, maintenance and repair of Facilities shall not substantially affect the integrity of any affected structures, and shall, to the extent reasonably feasible, be installed either perpendicular or parallel to property lines or the sides of structures.

E. All underground taps shall, to the extent reasonably possible, follow property lines, and cross property at right angles unless otherwise required due to the physical characteristics of the subsurface, or required under applicable law.

F. All construction of new and replacement Facilities shall be accomplished between the hours reasonably specified by the City in the approved permit or ordinances. Construction shall seek to minimize any adverse impact on services of the City or third parties.

G. Whenever existing Facilities or electric utility facilities are located underground along a particular street or public way, new Facilities shall be installed underground along that street or public way to the extent Feasible.

H. Whenever any new or existing Facilities or electric utility lines are relocated underground along a particular street or public way, a Company shall relocate its Facilities underground to the extent Feasible concurrently with the other lines at its sole expense, in accordance with existing legal and regulatory requirements.

I. Companies shall advise and coordinate major construction efforts with other utility companies through city-sponsored utility coordination meetings, and, to the extent reasonably possible, coordinate their construction work with other utilities installing infrastructure in the PROW. In new developments, a Company shall contact the developer to determine whether any surplus conduit is available in the areas that the Company plans to install facilities, and whether any joint trenching or boring projects are feasible.

J. Overhead facilities may be installed only if sufficient space is available on existing utility poles consistent with applicable regulations, as determined by the Director.

K. If proposed new Facilities would require excavation, involves excavation for installation of new facilities, those Facilities shall be installed within existing Facilities whenever sufficient Excess Capacity is available on commercially reasonable terms and conditions.

L. All proposed AGFs shall be installed underground or in flush mounted vaults or low profile waterproof pedestals, unless the Director determines that it would be infeasible to do so or the proposed AGF would not result in significant detriment to the PROW or the environment surrounding it. In making these determinations, the Director shall consider information provided by the Company.

M. Companies shall coordinate with affected property owners to locate AGFs so as to reasonably minimize inconvenience and disruption to residents, consistent with installation of permitted Facilities.

#### **16.10.060 Issuance of PROW Permits**

A. Each PROW Permit shall be subject to the criteria and provisions of this Chapter. The PROW Permit shall be promptly issued upon review of a completed application and a determination by the Director that a Company has filed a complete application and has complied with all applicable requirements of this Chapter.

B. Criteria. In determining whether to grant or deny a PROW Permit, the Director shall consider factors permitted under Section 7901 and 7901.1 of the California Public Utility Code and this Chapter. In particular, the Director shall consider:

1. The capacity of the PROW to accommodate all proposed Facilities.
2. The capacity of the PROW to accommodate the City's planned uses of the PROW.
3. The damage or disruption, if any, to the PROW or any public or private facilities, improvements adjacent to it, pedestrian or vehicle travel, and landscaping, if the permit is granted.
4. The availability of technically compatible existing Facilities or Excess Capacity, or alternate routes and/or locations for the proposed Facilities, which would be less disruptive or which better protects the PROW for its dedicated use, and the Feasibility of using such Facilities, Excess Capacity or alternate routes and/or locations.
5. The effect of any Above Ground Facilities on traffic or pedestrian safety or access.
6. Completion of any environmental review under the California Environmental Quality Act (CEQA) that may be required by law.
7. Whether the Company has the legal entitlement to provide the services for which the Facilities will be used.

C. The Director may require modifications to the proposed excavation or installation of AGFs based on the factors set forth above. However no such modifications may make it infeasible to undertake install the Facilities in the PROW to provide the service they are intended to provide.

D. Where the Director has information that there is a substantial risk that a Company may not fulfill its obligations under the permit, the Director may require that the Company provide satisfactory financial security in an amount not to exceed 110% of the total estimated cost of all work to be performed under the PROW Permit, as determined by the Director, and as necessary and appropriate to compensate the City for any costs that may be required to ensure full compliance with all of the requirements of this Chapter. Such security shall consist of an irrevocable letter of credit, cash deposit, or performance bond as determined by the Director. The security shall be maintained in full force and effect until the permitted work in the PROW is completed to the satisfaction of the Director, at which time the security shall be reduced to ten percent (10%) of the actual cost of the work. The reduced security shall be maintained by the Company for a period of one year as a guarantee that the work is of good quality and free from any defective or faulty material or workmanship. Any surety supplying a performance bond must be an "admitted surety insurer," as defined in Section 995.120

of the Code of Civil Procedure, and authorized to do business in the state of California. Return of the security shall be conditioned upon the Company's faithful performance of all work in the PROW specified in the applicable permit. In the event the Company fails to comply with any provision of this Chapter related to such work, or any provision of any applicable permit, or other approval related to such work, any damages or loss suffered by the City as a result thereof shall be recoverable from the security, including but not limited to the full amount of any compensation, indemnification, cost of removal, or abandonment of any property of the Company, plus reasonable attorneys' fees and costs up to the full amount of the security. Neither the provisions of this section nor any damages recovered by the City hereunder shall be construed to limit liability or damages of licensee under this Chapter, either to the full amount of the security or otherwise. In addition to its rights to take action under the security, the City may pursue any other remedy provided by law.

E. Fees. As a condition of the issuance of any permit, a Company shall pay all applicable cost-based fees assessed by resolution of the City Council; provided, however, that such payments and submittals shall not be deemed waiver of any right the Company may have to challenge the legality of such permit fees if the Company specifies in writing the basis of any objection to such fees and pays under protest.

F. Right to Inspect. The City may inspect any work performed pursuant to a PROW Permit at any reasonable time during normal business hours that the City deems appropriate, upon reasonable notice to the Company performing that work, when necessary. In addition, the City shall inspect a Company's work reasonably promptly upon notice from the Company that the work has been completed.

G. Duration and Validity. Work should begin within one hundred and eighty (180) calendar days of the start date specified in the permit and should be prosecuted diligently to completion, including restoration. If the start of work is unreasonably delayed beyond 180 days and it is necessary and prudent for the city to conduct an entirely new review of the proposed installation, the Director, may, void the permit and require resubmission.

#### **16.10.070 Construction Activities**

A. Not less than 10 business days prior to the intended start of construction, the Company shall provide written public notification by door hanger to residents within 500 feet of the proposed construction.

B. All work in or affecting the PROW shall be performed in accordance with this Chapter, the Construction Plan, and with the standard plans and specifications of the Department and any Department orders or regulations, except where the Director, at his or her discretion, grants prior written approval to deviate from the standard plans and specifications, orders, or regulations. The Director shall develop written guidelines to implement the granting of waivers authorized pursuant to this Chapter.

C. A Company shall provide reasonable advance notification, but in any case not less than 3 business days, to the City of the initiation of any construction activities pursuant to a PROW Permit issued under this Chapter.

D. A Company shall make its best efforts to complete any work authorized by a permit under this Chapter no later than the date specified in the permit. E. A Company shall post and maintain notice at the site of the excavation or installation

during the construction period. The notice shall include the name, telephone number, and address of the Company, a description of the excavation or installation to be performed, and the duration of the excavation or installation. The notice shall be posted along all Streets in the area where the excavation or installation is to take place.

F. If a Company requires additional time to complete work, it shall so notify Director and Director may, upon a written demonstration of good cause, grant a work completion extension. In addition, Company shall provide the Director with a telephone contact number, answered twenty-four (24) hours a day during the construction period, to enable the Director to report any concerns regarding construction of the Facilities.

#### **16.10.080 Excavation**

A. A Company that excavates or causes to be made an excavation in the PROW shall maintain, repair, or reconstruct the site of the excavation as specified by the City until such time as the site of the excavation is repaved or resurfaced by the Department, or by another party pursuant to a subsequently issued PROW permit.

B. If a Company excavates in the PROW, it shall comply with the requirements of Underground Service Alert North ("USAN") regarding notification of excavation or installation and marking of subsurface Facilities. The Company shall provide USAN with the assigned number of the permit to excavate or other information as may be necessary to properly identify the proposed excavation or installation.

C. Limits on Work in the Public Right-of-Way:

1. Scope. It is unlawful for a Company to make, cause, or permit to be made, any excavation in the PROW outside the boundaries, times, and description set forth in the PROW Permit.

2. Trenching. Trenching in the PROW shall be by the "direct buried method," as defined by the Director. Use of a rock wheel or other trenchless technology to excavate in the PROW is prohibited without prior written approval of the Director.

3. Single Excavation Maximum. No single excavation site shall be longer than one thousand two hundred (1,200) feet at any time except with the prior written approval of the Director.

4. A Company may not excavate any Street that has been reconstructed or resurfaced by the Department or at its direction in the preceding five-year period and shall participate in City efforts to coordinate excavation activities. However, subject to Section 16.12.030, the Director may, in his or her discretion, grant a waiver of this subsection for good cause. Good cause shall include the fact that the need to excavate arose in spite of a Company's full compliance with the coordination of excavation provisions. The Director is authorized to grant a waiver for an excavation that facilitates the deployment of new technology or new Service as directed pursuant to official City policy. The Director shall issue his or her decision on a waiver within a reasonable period after receipt of a written request for a waiver.

D. Companies shall be subject to the following requirements for excavation sites:

1. Companies shall cover open excavation with non-skid steel plates ramped to the elevation of the contiguous Street, pavement, or other PROW, or otherwise protected in accordance with guidelines prescribed by the Department.

2. Companies shall keep the area surrounding the excavation clean and free of loose dirt or other debris. Excavation sites shall be cleaned at the completion of each



workday. In addition, Permittees shall remove all excavated material from the site of the excavation no later than the end of each workday.

3. Materials and equipment to be used for the excavation within 7 calendar days may be stored at the site of the excavation, except that fill material, sand, aggregate, and asphalt-coated material may be stored at the site only if it is stored in covered, locked containers.

4. Companies shall comply with all federal, state, and local laws regarding hazardous materials, including with respect to (a) data collection; (b) disposal, handling, release, and treatment of hazardous material; site remediation; and (c) worker safety and training. Hazardous material means any gas, material, substance, or waste which, because of its quantity, concentration, or physical or chemical characteristics, is deemed by any federal, state, or local authority to pose a present or potential hazard to human health or safety or to the environment.

5. Companies shall develop and implement a Water Quality Management Plan and/or Stormwater Pollution Prevention Plan for any excavation project as required by law.

E. If the Director determines that a Company has violated this Chapter or that an excavation poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to public health, safety, or welfare, the Director may issue a stop work order, impose new conditions upon a permit, or suspend or revoke a permit by notifying the Permittee company of such action in a written, electronic, or facsimile communication.

F. 1. In any case in which a Company causes a sidewalk, Street, or other PROW to be excavated or disturbed by an excavation, the Company shall restore the sidewalk, Street or other PROW in the manner prescribed by the orders, regulations, and standard plans and specifications of the Director.

2. Activities concerning backfilling, replacement of pavement base, and finished pavement shall be performed in a manner specified by the orders, regulations, and standard plans and specifications of the Director. In addition, these activities shall subject to the following requirements:

a. Each excavation shall be backfilled and compacted within seventy-two (72) hours from the time the construction related to the excavation is completed.

b. Replacement of the pavement base shall be completed within seventy-two (72) hours from the time the excavation is backfilled.

c. Finished pavement restoration shall be completed within ten days after completion of the substructure installation or sooner as directed by the Director.

3. Upon written request from a Company, the Director may grant written approval for modifications to the requirements of this section.

4. In any case where an excavation is not completed or restored in the time and manner specified in the permit, this Chapter, or the orders, regulations, and standard plans and specifications of the Department, the Director shall order the Company to complete the excavation as directed within twenty-four (24) hours. If the Company fails, neglects, or refuses to comply with the order, the Director may complete or cause to be completed such excavation and/or restoration in such manner as the Director deems expedient and appropriate. The Company shall compensate the City for any reasonable costs, including but not limited to administration, construction, consultants, equipment,

inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the City or other agencies, boards, commissions, departments of the City, that were made necessary by such excavation and/or restoration. The cost of such work also may be deducted from Company's security fund.

5. Subject to the limitation set forth in this Chapter, completion of an excavation or restoration by the Department in accordance with this Chapter shall not relieve the Company from liability for future pavement failures at the excavation site.

G. In order to verify that a Company has constructed the Telecommunications or Video System in the manner required by this Chapter, the City reserves the right to inspect the construction, as well as to inspect all necessary documents related to said construction.

H. A Company, at its own expense, shall temporarily disconnect or relocate any of its Facilities when necessitated by reason of:

1. Traffic conditions;
2. Public safety;
3. Temporary or permanent street closing not for the benefit of a private party;
4. Street constructions or resurfacing;
5. A change or establishment of street grade; and
6. Installation of sewers, drains, water pipes, storm drains, lift stations, force mains, Street light Facilities, traffic signal Facilities, tracks, or any other public use of the PROW.

#### **16.10.090 Remedies during construction**

A. Whenever construction is being performed in a manner contrary to the provisions of this chapter, the City Manager, or an inspection official representing the City, may order the work stopped by notice in writing served on any person or Company engaged in, or causing the construction. Any work stopped shall not resume until authorized in writing by the Director or his or her designated representative.

B. Upon the failure, refusal or neglect of a Company to cause any construction, repair, or comply with a permit under this Chapter City may cause such work to be completed in whole or in part, and recover its costs of doing so, as set forth in this Section.

C. Upon knowledge of a Company's failure, refusal or neglect under subdivision A, the City shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

D. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

E. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

**16.10.100 Maintenance of facilities – Continuing obligations**

A. Construction, installation, maintenance and repair of any Facilities shall comply with the provisions of the most current editions of the City's Zoning Ordinance, Building Code, Plumbing Code, Electrical Code, any applicable City-adopted Public Works Construction Standards, Specifications and Plans, and the Municipal Code, as they are modified from time to time, and any applicable Federal, State or local statutes, regulations, guidelines, or requirements.

B. The exterior of any newly installed AGF shall be manufactured or treated so as to resist graffiti and be maintained in good condition.

C. Each AGF installed in the PROW shall be clearly identified with the name of the owner of the AGF and a toll-free telephone number for the Company for which it was that installed. The Director may adopt orders or regulations to specify other appropriate methods for identification.

D. A Company shall be responsible for maintaining all AGFs in good condition, well painted and free of graffiti and other markings; provided, however, that Companies shall not be responsible for maintenance of any plantings or vegetative screening materials, whether preexisting installation of the Proposed Facilities or installed by the Company during installation. A Company assumes all responsibility for damage or injury resulting from placement or maintenance of any AGF. If a Company fails to comply with any written City demand relating thereto, the City may perform said work and withdraw its costs and expenses from the security fund.

E. Companies shall be required to monitor and abate graffiti on Facilities installed pursuant to permits issued under this Chapter. In addition, Companies shall provide the City with a method or contact information to report graffiti on their facilities and other Facility maintenance. Companies shall make reasonable commercial efforts to remove graffiti within seventy-two (72) hours of such notification.

F. By applying for and accepting a PROW Permit under this Chapter, a Company assumes all responsibility for damage or injury resulting from the presence of any AGF in the PROW. If a Company fails to comply with any written Director's demand relating thereto, the City may perform said work, or pay for such damage or injury, and withdraw its costs and expenses from the security fund or other security provided by the Company. However remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

1. In the event that subsurface material or pavement over or immediately adjacent to any excavation becomes depressed, broken, or fails in any way at any time after the work has been completed, the Director shall notify the responsible Company, if any, of the condition, its location, and the required remedy. The Director shall give the Company notice of default and a reasonable time, but not less than 20 days, to cure the default. If the Company does not cure the default or make substantial good faith efforts to do so within that period, the City may perform the work itself. Upon completion of that

work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing.

2. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from the Company's security fund.

#### **16.10.110 Emergency repairs**

A. Notwithstanding anything to the contrary in this Chapter, if the site of an excavation, whether during installation of Facilities or at any time thereafter, is or becomes hazardous, or constitutes a public nuisance, public emergency, or other imminent threat to the public health, safety, or welfare, such that it requires immediate action, the Director may order the responsible Company, by a written, electronic, or facsimile communication, to remedy the condition within a specified period of time.

B. If the responsible Company or its designated representative party is inaccessible or fails, neglects, or refuses to take prompt action to remedy the condition as specified in the communication, the Director may remedy the condition or cause the condition to be remedied.

C. Upon completion of that work, the City shall submit to the Company an itemized statement of costs, which shall be due no later than 30 days of billing. Amounts not timely paid may be deducted from the performance bonds or security fund. Costs that may be recovered include, but are not limited to, administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other actual costs incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the emergency remediation undertaken by the Department. The cost of such work also may be deducted from Company's security fund.

D. Remediation by the City in accordance with this section shall not relieve the Company from responsibility or liability for subsequent conditions necessitating remediation.

#### **16.10.120 Duty to Remove Facilities from PROW and Public Property – Abandonment in Place**

A. The Director may order a Company to remove its Facilities from public property or PROW at its own expense whenever a Company materially breaches its PROW Permit, ceases to operate substantially all of its Video or Telecommunications System for a continuous period of six (6) months, fails to complete construction of the Video or Telecommunications System outlined in its PROW Permit, or its PROW Permit is revoked. No such order may be issued without first giving the Company a reasonable opportunity to cure.

B. If a Company does not remove Facilities subject to a removal by the deadline specified therein, the City may remove the Facilities at the Company's expense. The security fund shall be available to pay for such work.

C. If officials or representatives of the City remove Facilities, and if the Company for which they were installed does not claim the property within thirty (30) days of its removal, the City may take whatever steps are available under State law to declare the property surplus, and sell it, with the proceeds of such sale going to the City.

D. A Company that removes its Facilities from the PROW shall, at its own expense, replace and restore such PROW to a condition comparable to that which existed before the work causing the disturbance was done. If the Company does not do so after a reasonable period, the City may do so at Company's expense. The security fund shall be available to pay for such work.

E. The City may, upon written application by a Company, approve the abandonment of any property in place by the telecommunications carrier under such terms and conditions as the City may approve. Upon City-approved abandonment of any property in place, the Company shall cause to be executed, acknowledged, and delivered to City such instruments as the City shall prescribe and approve transferring and conveying the ownership of such property to the City.

#### **16.10.130 City Vacation or Abandonment**

In the event any PROW or portion thereof used by a Company is vacated by the City consistent with state law, upon 180 days prior notice, the Company shall forthwith remove its Facilities from the PROW unless specifically authorized in writing to continue. As a part of the removal, the Company shall restore, repair or reconstruct the area where the removal has occurred, consistent with Section 16.10.080, or to a lesser standard as may be specified by the Director. In the event of any failure, neglect or refusal of Company, after 30 days notice by the Director, to do such work, Director may cause it to be done, and the Company shall, within 45 days of billing, pay any reasonable costs, including but not limited to administration, construction, consultants, equipment, inspection, notification, remediation, repair, restoration, or any other costs actually incurred by the Department or other agencies, boards, commissions, departments of the City, that were made necessary by reason of the failure, neglect, or refusal to perform the work. The security fund shall be available to pay for such work.

#### **16.10.140 System Location Data**

Annually, each Company shall provide the Director with data in a digital or other format specified by the Director which details and documents all the geographic locations of Facilities located in PROW. The computer disk or other record shall be updated whenever there have been significant changes in the location of the Facilities. In addition, Company shall maintain in its local office a complete, fully-dimensioned, and up-to-date set of as-built system maps and drawings upon completion of construction. As-built drawings shall show all Facilities. The scale of maps and drawings shall be sufficient to show the required details in easily readable form and size.

#### **16.10.150 Appeals**

A. An applicant for a PROW permit under this Chapter may appeal the decision of the Director to issue or deny that permit to the City Manager by filing with the City Clerk a statement addressed to the City Manager setting forth the facts and circumstances

regarding the Director's decision and the basis for the appeal. The appeal shall be accompanied by a fee as established by resolution of the City Council.

B. The right to such an appeal shall terminate upon the expiration of 10 days following the deposit of the Director's decision in the United States mail to the Company. A decision by the Director shall inform the Company of its right to appeal to the City Manager.

C. The City Manager shall hear the appeal not less than 10 days from the date on which it has been filed with the City Clerk, or such later date as the Company and City may agree to. The City Clerk shall provide written notification of the time and place set for hearing the appeal. The City Manager may sustain, overrule or modify the action of the Director.

D. An applicant may appeal a decision of the City Manager to the City Council by filing with the City Clerk a statement addressed to the City Council setting forth the facts and circumstances regarding the City Manager's decision and the basis for the appeal. The right to such an appeal shall terminate upon the expiration of 10 days following the deposit of the City Manager's decision in the United States mail to the Company. A decision by the City Manager shall inform the Company of its right to appeal to the City Council.

E. The City Council shall hear the appeal at the next opportunity consistent with its agenda procedures and timelines. The City Council may sustain, overrule or modify the action of the City manager, and its decision shall be final.

F. Appeals shall be accompanied by such fees as are established by resolution of the City Council.

#### **16.10.160 Indemnity and Liability Insurance**

A. To the maximum extent permitted by applicable law, a Company shall at all times defend, indemnify, protect, save harmless, and exempt the City, the City Council, its officers, agents, servants, attorneys and employees, from any and all, penalties, damages or charges arising out of claims, suits, demands, causes of action, award of damages, imposition of fines and penalties, whether compensatory or punitive, or expenses arising therefrom, either at law or in equity, which arise out of, or are caused by, the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City based upon any act or omission of a Company, its agents or employees, contractors, subcontractors, independent contractors, or representatives except for that which is attributable to the negligence or willful misconduct of the City, the City Council, its officers, agents, servants, attorneys and employees. With respect to the penalties, damages or charges referenced herein, reasonable attorneys' fees, consultants' fees, expert witness fees, and other litigation expenses are included as those costs which shall be recovered by the City. City shall provide reasonable notice to a Company of any claim or lawsuit with which it has been served that is based on the construction, erection, location, performance, operation, maintenance, repair, installation, replacement, removal or restoration of Facilities within the City by a Company.

B. Except as provided in or as supplemented by any PROW Permit, a Company shall secure and maintain commercial general liability insurance, including bodily injury and property damage with limits of \$7,000,000 per occurrence and \$7,000,000 in the

aggregate, and shall have coverage at least as broad as the Insurance Service Office (ISO) Form No. CG 0001 or its successor, so long as any Facility of Company remains in the PROW.

C. The commercial general liability insurance policy shall include the City, the City Council, its employees, and agents as additional insureds.

D. The commercial general liability insurance policy shall be issued by an agent or representative of an insurance Company licensed to do business in the State and rated A- VII or higher by A.M. Best Key Rating Guide for Property and Casualty Insurance Companies.

E. The certificate of insurance evidencing the required commercial general liability policy and additional insureds shall state that the insurer shall endeavor to furnish the Director with at least thirty (30) days written notice in advance of the cancellation of the policy.

F. Renewal or replacement policies or certificates shall be delivered to the Director within five (5) days of the expiration of the insurance which such policies are to renew or be replaced.

G. Before a Company commences any construction, the Company shall deliver the policies or certificates representing the insurance to the Director as required herein.

H. The Director may reasonably adjust the coverage amounts specified in subsection B of this section provided that the adjustments result in the Company meeting or exceeding the coverage specified in this section, and provided the Company is given thirty days in which to procure such adjusted coverage amounts and provide evidence of same to the Director.

#### **16.10.170 Revocation and termination**

In addition to all other rights and powers retained by the City, the City shall have the right to revoke any permit granted hereunder and to terminate all rights and privileges of the permit hereunder in the event of a substantial breach of the terms and conditions of said permit. A substantial breach shall include, but shall not be limited to, the following:

A. Violation of any material provision of this chapter or of any material provision of a permit granted pursuant to this chapter;

B. Any attempt to evade any material provision of a permit granted under this Chapter or to practice any fraud or deceit or deception upon the City;

C. The failure to obtain permits for, or to begin or complete construction as provided under this Chapter or a permit granted under this Chapter;

D. Material misrepresentation of fact in the application for or negotiation of a permit under this Chapter;

E. Failure to pay any fee or other payment required by this Chapter or a permit granted hereunder when due. Failure to pay said fee shall also require the telecommunications carrier to pay interest on any past-due fee or compensation to the City at the rate of 1.5% per month on the unpaid amount.

#### **16.10.180 Possessory interest**

By accepting a permit under to this chapter, a Company acknowledges that notice is and was hereby given to it pursuant to California Revenue and Taxation Code Section 107.6 that use or occupancy of any public property may cause certain taxes to be levied

upon such interest. A Company shall be solely liable for, and shall pay and discharge prior to delinquency, any and all possessory interest taxes or other taxes levied against its right to possession, occupancy or use of any PROW or public property pursuant to any right of possession, occupancy or use created by any permit.

#### **16.10.190 Violations**

A. Violation of this Chapter will constitute a public nuisance that may be abated by the City or, shall, upon application by the City, be enjoined by a court of competent jurisdiction.

B. The foregoing remedies shall be deemed non-exclusive, cumulative remedies and in addition to any other remedy the City may have at law or in equity.

#### **16.10.200 Interpretation and severability**

A. The City recognizes that pending further judicial interpretation or legislative amendment, Public Utilities Code Sections 7901 and 7901.1 currently limit the City's power to control use of the public rights-of-way by telephone companies as that term is used therein, and Cable Operators subject to the Digital Infrastructure and Video Competition Act of 2006 (Public Utilities Code sections 5800 *et seq.*), to reasonable time, place and manner regulations. Accordingly, this Chapter shall be interpreted and applied in a manner consistent with Public Utilities Code Sections 7901 and 7901.1.

B. If any word, phrase, sentence, part, section, subsection, or other portion of this chapter, or any application thereof to any person or circumstance is declared void, unconstitutional, or invalid for any reason, then such word, phrase, sentence, part, section, subsection, or other portion, or the proscribed application thereof, shall be severable, and the remaining provisions of this chapter, and all applications thereof not having been declared void, unconstitutional or invalid, shall remain in full force and effect.

Section 5. Copies of this Ordinance shall be posted for two days prior to adoption in the display case located near the walkway in front of Council Chambers, 2134 Martin Luther King Jr. Way. Within 15 days of adoption, copies of this Ordinance shall be filed at each branch of the Berkeley Public Library and the title shall be published in a newspaper of general circulation.

At a regular meeting of the Council of the City of Berkeley held on May 5, 2009, this Ordinance was passed to print and ordered published by posting by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Maio, Moore, Wengraf, Worthington,  
Wozniak and Bates.

Noes: None.

Absent: None.

\* \* \* \* \*



At a regular meeting of the Council of the City of Berkeley held on May 19, 2009, this Ordinance was adopted by the following vote:

Ayes: Anderson, Arreguin, Capitelli, Maio, Moore, Wengraf, Worthington, Wozniak and Bates.

Noes: None.

Absent: None.

ATTEST:

  
Deanna Despain, CMC, City Clerk

  
Tom Bates, Mayor

Date signed: 28 May 09