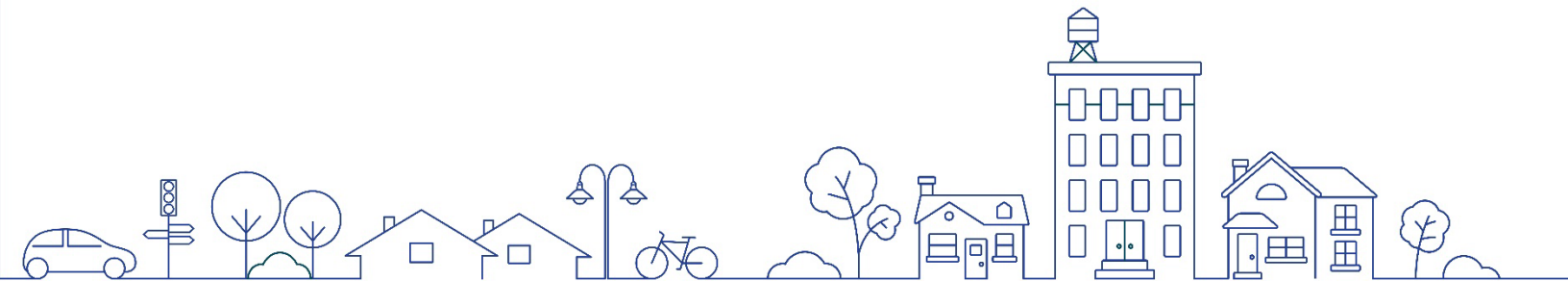


# — Oregon Municipal Handbook —

## **CHAPTER 17: PUBLIC WORKS AND UTILITIES**



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# Chapter 17: Public Works and Utilities

The state of Oregon granted cities the right to regulate the city right-of-way.

Cities deliver public services through the management of city right-of-way. A city right-of-way is not only used to create a transportation system of streets, sidewalks, and bike lanes, but also the right-of-way contains the infrastructure to allow cities to provide utility services. These utilities can include wastewater treatment, drinking water services, telecommunication utilities, and electric power.

Cities also manage the right-of-way to allow other entities to provide services such as phone lines, cable and data lines, power, garbage and recycling collection, and natural gas. Cities often have agreements with third parties providing utility services to adjacent properties, in exchange for a fee to use the right-of-way.

This chapter will define rights-of-way, the creation and extinguishment of right-of-way, who manages the right-of-way, and who maintains the right-of-way.

City-operated utilities such as wastewater, water, and power are discussed below. For each utility, this chapter will discuss the basic operations, the regulatory authority overseeing the utility, the rate setting, and billing customers.

Lastly, this chapter will describe the agreements granted to businesses or investor-owned utilities to operate in the city rights-of-way. Agreements allow companies to use the public right-of-way for a fee or a tax. Businesses operating in the city rights-of-way include telecommunications companies, investor-owned, or consumer-owned utility companies such as gas, electric, water, and sewer.

## I. PUBLIC RIGHTS-OF-WAY

Most people are aware that city streets serve transportation purposes, providing streets for motor vehicles use, pedestrian movement and bicycle use. Historically, streets were built in newly established settlements when adjoining landowners “‘dedicated’ land for public thoroughfares as a convenient means of transportation and communication.”<sup>1</sup> As described below, rights-of-way are generally larger than the travel surface and contain other public uses.

Cities are required to plan for the location and development of a street system.<sup>2</sup> Most

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<sup>1</sup> *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291 (1985).

<sup>2</sup> See OAR 660-012-0000 *et seq.* (Statewide Planning Goal requires transportation planning by all local governments); see also ORS 197.250 (requiring all local governments adopt regulations to carry out the State’s land use planning goals).

cities designate streets as one of three service types or functional classes: (1) arterials, which are mainly for through traffic; (2) collectors, which connect internal traffic to arterials, and (3) local access streets, which serve traffic to and from adjacent properties.<sup>3</sup>

City streets are public roads controlled by cities are described in the county road section of the Oregon Revised Statutes.<sup>4</sup> The term *public road* means “means a road over which the public has a right of use that is a matter of public record.”<sup>5</sup> Further, the term *road* “means the entire right-of-way of any public or private way that provides ingress to or egress from property by means of vehicles or other means or that provides travel between places by means of vehicles.”<sup>6</sup> The term *road* also includes, “[w]ays described as streets, highways, throughways or alleys[,]” “[r]oad related structures that are in the right-of-way such as tunnels, culverts or similar structures[,]” and “[s]tructures that provide for continuity of the right-of-way such as bridges.”<sup>7</sup>

This chapter will use the term *right-of-way* rather than *road* or *street* to describe the entire dedicated area of land to accurately describe the multiple uses of property dedicated to the public.

## A. City Authority to Manage Right-of-way

Local governments’ regulatory authority over their rights-of-way usually emanates from state constitutional or statutory authority granted to cities.<sup>8</sup> The state itself initially has title and authority to regulate the public streets and rights-of-way, as the property is dedicated for public use.<sup>9</sup>

Rather than delegating the authority to cities directly, Oregon’s Constitution leave it to the city voters to decide what their city governments can do.<sup>10</sup> City charters grant broad powers such as “all powers that that this state expressly or impliedly grant or allow cities” and this power allows cities to manage the right-of-way.<sup>11</sup>

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<sup>3</sup> See, e.g., City of Eugene, *Eugene 2035 Transportation System Plan*, available at: <https://www.eugene-or.gov/DocumentCenter/View/37739/2035-Transportation-System-Plan-Volume-Two-with-Appendices-?bidId=> (last accessed on March 28, 2024).

<sup>4</sup> ORS chapter 368; ORS chapter 223; Association of Oregon Counties, *County Road Manual*, available at: <https://oregoncounties.org/roads/#manual> (last accessed on February 10, 2025). Although the focus of ORS chapter 368 is on county roads, many of the defined terms are applicable to city streets.

<sup>5</sup> ORS 368.001(5).

<sup>6</sup> ORS 368.001(6).

<sup>7</sup> *Id.*

<sup>8</sup> West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-Of-Way*, 1 MICH.TEL.TECH.L.REV. 2 (1995), available at: <http://www.umich.edu/~mttlr/VolOne/West.html> (last accessed on March 28, 2024).

<sup>9</sup> *Id.*

<sup>10</sup> OR Const Art XI § 2; OR Const Art IV § 1(5) (granting the power to “enact . . . any charter”); See also League of Oregon Cities, *Chapter 2: Home Rule and Its Limits*, MUNICIPAL HANDBOOK, available at: [https://www.orcities.org/application/files/3715/9917/4968/Handbook\\_-\\_Chapter\\_2\\_Home\\_Rule\\_and\\_Its\\_Limits.pdf](https://www.orcities.org/application/files/3715/9917/4968/Handbook_-_Chapter_2_Home_Rule_and_Its_Limits.pdf) (last accessed on March 28, 2024).

<sup>11</sup> *Id.*

Although a city has broad authority to regulate its right-of-way, the Oregon Legislature limited a city’s authority in a few areas relating to city rights-of-way. These limits include:

- Requires public bodies to coordinate with utilities when planning highway projects.<sup>12</sup>
- Limits on local government authority under the Oregon Vehicle Code.<sup>13</sup>
- Limits the designation of truck routes on state highways or county roads within city limits.<sup>14</sup>
- Requires public information campaign and report from cities operating photo red light cameras.<sup>15</sup>
- Preemption of authority to regulate the idling of primary engines in commercial vehicles.<sup>16</sup>

While the federal government may preempt state and local governments’ regulatory role in the interstate telecommunications industry, Congress cannot, without compensation, appropriate or “give” the local public rights-of-way to telecommunications service providers without reasonable compensation for the use of the local public rights-of-way.<sup>17</sup>

## **B. What Are Rights-of-Way?**

Right-of-way is the area of land dedicated for public infrastructure, such as bridges, streets, alleys, trails, bike lanes, park strips, sidewalks, sewer lines, water lines, electric lines, and gas lines.<sup>18</sup> Right-of-ways are available for use by the public at large and as discussed below, are administered by the jurisdiction (city, state, or county) in which they lie.<sup>19</sup>

Typically, the legal right-of-way is 50 to 100 feet wide, wider than the width of the road.<sup>20</sup> The right-of-way is wider than the road to provide room for:

- Proper drainage
- Maintenance
- Public utilities
- Sidewalks and bike lanes
- A landscaped terrace

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<sup>12</sup> ORS 758.025.

<sup>13</sup> ORS 801.040.

<sup>14</sup> *Id.*

<sup>15</sup> ORS 810.434.

<sup>16</sup> ORS 825.615.

<sup>17</sup> US Const Amend V (“nor shall private property be taken for public use, without just compensation”).

<sup>18</sup> *Id.*; See also City of Dallas, *Right-of-way Information*, available at:

<https://www.dallasor.gov/publicworks/page/right-way-information> (last accessed on March 28, 2024).

<sup>19</sup> *Id.*

<sup>20</sup> See City of Tualatin, *Franchise Permits*, available at: <https://www.tualatinoregon.gov/engineering/franchise-permits-frch> (last accessed on March 28, 2024).

- Future improvement
- Traffic control<sup>21</sup>

Rights-of-way are different than easements. Right-of-way is the right to pass over, through, or across another’s land.<sup>22</sup> Unlike an easement, the public holds the right to pass over the right-of-way.<sup>23</sup> An easement is a nonpossessory interest in the land of another that entitles the easement holder to limited use of another’s land without interference.<sup>24</sup> An easement holder is an identified person(s) with a legal right to use the easement.<sup>25</sup> Easements can be used for building pipelines or constructing pipelines rather than using a right-of-way.<sup>26</sup>

In rights-of-way, fee ownership remains in the original landowner.<sup>27</sup> The public is granted an easement for the use of the streets and the municipality retains the power to improve, grade, pave, and regulate those streets.<sup>28</sup>

### C. How Are Rights-of-Way Created?

Most city local streets come into existence when a property developer dedicates street right-of-way to provide for public street access to every lot. These dedications are established by either dedication deed or subdivision (or partition) plats.<sup>29</sup> Developers may be required to dedicate land to the public as a condition of land use approval, but the dedication of land as a development permit condition must be roughly proportional to the need created by the proposed development.<sup>30</sup>

To dedicate a right-of-way to the public by plat, the plat must state that the land is dedicated to the public and the plat must bear the approval of the city or county accepting the dedication.<sup>31</sup> After the plat is recorded, when the lots are conveyed lots by reference to the plat, the purchaser of the lot acquires by implication an easement in all streets, parks, or other open

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<sup>21</sup> *Id.*

<sup>22</sup> See *Cappelli v. Justice*, 262 Or 120 (1972) (document of conveyance designated as a warranty deed granted a right-of-way, not fee-simple title).

<sup>23</sup> *Id.*

<sup>24</sup> ORS 105.170(1).

<sup>25</sup> *Id.*

<sup>26</sup> For easements to benefit the public, the easement holder is the local government such as the city of Tualatin.

<sup>27</sup> *Northwest Natural Gas Co. v. City of Portland*, 300 Or 291 (1985) (citing *Sharkey v. City of Portland*, 58 Or 353, 362, 106 P 331 (1910), 114 P 933 (1911)).

<sup>28</sup> *Id.* (citing *Huddleston v. City of Eugene*, 34 Or 343, 351 (1899); *Lankin v. Terwilliger*, 22 Or 97, 99 (1892); 3 Dillon, Commentaries on the Law of Municipal Corporations 1766 § 1120 (5th ed.1911)).

<sup>29</sup> ORS 92.175; Association of Oregon Counties, *County Road Manual*, available at: <https://oregoncounties.org/roads/#manual> (last accessed on February 10, 2025).

<sup>30</sup> *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (when a government authority attaches a condition to a building permit, the burden on the property owner must be roughly proportionate to the benefit for the government).

<sup>31</sup> ORS 92.014(2); ORS 92.175(1).

areas shown on the plat.<sup>32</sup>

To dedicate a right-of-way to the public by dedication deed, the deed must adequately describe the land for the dedication, express the intent to dedicate the property, and the city must expressly accept the dedication.<sup>33</sup> Oregon courts have recognized implied dedications where the intention is “clearly and unequivocally manifested.”<sup>34</sup>

Rights-of-way can also be established by prescriptive use by establishing the elements for a prescriptive easement plus demonstrate use by the public.<sup>35</sup> A prescriptive easement requires that the claimant establish by clear and convincing evidence that the use was: (1) 10 years; (2) open, notorious, and adverse to the rights of the servient owner; and (3) continuous and uninterrupted according to the nature of the use.<sup>36</sup> One downside to a prescriptive easement is that it requires a court to declare that the public has obtained the easement.<sup>37</sup>

An alternative method to a prescriptive easement is to use legalization when there is a defect in the legal documentation of a public right-of-way.<sup>38</sup> Legalization is available when there is a defect or omission if the location cannot be accurately determined or if the road has been used for 10 years or more, and the road location does not conform to city records.<sup>39</sup> To legalize a road, the governing body provides notice to abutting property owners, holds a hearing to consider whether the legalization of the road is in the public interest, and to order compensation for property owners affected by the road legalization.<sup>40</sup>

Lastly, for property owners who are not willing to grant right-of-way, cities may use the condemnation process to acquire property for public use for compensation to the property owner.<sup>41</sup> The condemnation process is set forth in ORS chapter 25, General Condemnation Procedure Act.<sup>42</sup> Cities interested in using the condemnation procedure are strongly advised to contact their city attorney to consider issues such as compensation and attorney fees in acquiring properties.

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<sup>32</sup> *Carter v. City of Portland*, 4 Or 339 (1873); *Christian v. City of Eugene*, 49 Or 170 (1907); WILLIAM B. STOEUBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* § 8.6 at 449–50 (3d ed 2000).

<sup>33</sup> ORS 92.175; *Mid-Valley Res., Inc. v. Foxglove Props., LLP*, 280 Or App 784, 791 (2016).

<sup>34</sup> *Id.* (quoting *Muzzy v. Wilson*, 259 Or 512, 519 (1971)).

<sup>35</sup> 1 OREGON REAL ESTATE DESKBOOK § 11.2-2(c) (OSB Legal Pubs 2015); *Huggett v. Moran*, 201 Or 105 (1954) (public road created by adverse use for prescriptive period); *Muzzy v. Wilson*, 259 Or 512 (1971); *Williams v. Harrsch*, 297 Or 1 (1984).

<sup>36</sup> 1 OREGON REAL ESTATE DESKBOOK § 11.2-2(c) (OSB Legal Pubs 2015); *Thompson v. Scott*, 270 Or 542, 546, (1974); *but see* ORS 105.692 (land used for “recreational purposes, gardening, woodcutting or the harvest of special forest products” does not give rise to a prescriptive easement).

<sup>37</sup> *Multnomah County v. Union Pacific Railroad*, 297 Or 341 (1984).

<sup>38</sup> ORS 223.935 to 223.950.

<sup>39</sup> ORS 223.935.

<sup>40</sup> ORS 223.940 to 223.950.

<sup>41</sup> ORS 223.005; ORS 223.930; ORS 226.380.

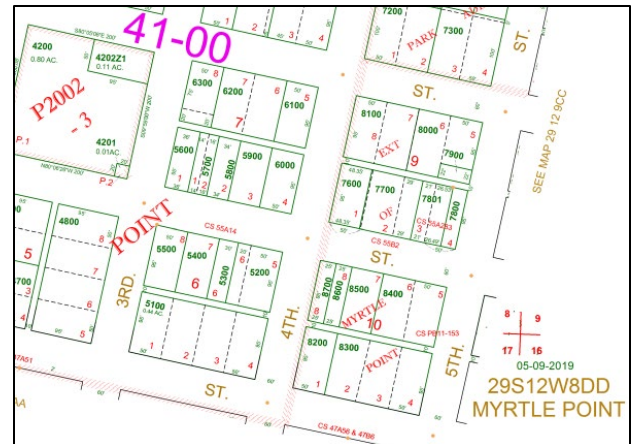
<sup>42</sup> ORS 223.005 to 223.105.

## D. Where Are the Rights-of-Way?

Dedications are illustrated on the county assessor’s maps.<sup>43</sup> To the right is an example of the Coos County Assessor’s Maps demonstrating the city of Myrtle Point’s right-of-way for Third, Fourth, and Fifth streets.<sup>44</sup>

It is common that the legal right-of-way overlaps with property that the abutting property owner uses as private property.<sup>45</sup>

Although the county assessor maps give a good idea where the right-of-way is located, the best way to determine where the right-of-way on the ground is to have the property surveyed.<sup>46</sup> Sometimes there are “right-of-way markers” or an iron rod in the ground to mark the location.<sup>47</sup> In some places, a sidewalk is placed about a foot from the right-of-way edge with all of the sidewalk in the right-of-way area.<sup>48</sup>



## E. Who Controls the Right-of-Way?

All public streets and roads, regardless of the entity that controls what is allowed in a right-of-way, are part of a larger transportation system. The state of Oregon manages and maintains the thoroughfares known as *state highways*.<sup>49</sup> The counties manage the roads dedicated to the public in the unincorporated area of a county and maintains those roads accepted by the county as part of its maintenance system (also known as a *county road*).<sup>50</sup>

Most streets located in incorporated cities, known as *local access roads* in Oregon Revised Statutes, are generally in the jurisdiction of the city.<sup>51</sup> The exception is for county roads or highways unless the city has accepted the jurisdiction after proper notice and a hearing.<sup>52</sup> Cities generally do not accept county roads into their maintenance system because county roads

<sup>43</sup> See State of Oregon’s statewide digital cadastral base map available at: <https://ormap.net/> (last accessed on March 28, 2024).

<sup>44</sup> <https://ormap.net/Services/OrMap/api/assessormaps/0629.00S12.00W08DD--0000/map> (last accessed on March 28, 2024).

<sup>45</sup> See Oskar Rey, *Understanding Municipal Rights-of-Way: From Centerline to Edge (Part 2)*, Municipal Research and Services Center of Washington, available at: <https://mrsc.org/stay-informed/mrsc-insight/november-2017/understanding-municipal-rights-of-way-from-center> (last accessed on March 28, 2024).

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> ORS 366.005(8); ORS 373.010 to 373.060; ORS 374.015.

<sup>50</sup> ORS 368.001(1); ORS 368.062; ORS 368.031.

<sup>51</sup> ORS 368.001(3); 368.016(2)(b).

<sup>52</sup> ORS 373.270.



are usually less developed than city streets.

Unlike the State and counties, cities do not have the same express statutory authority to regulate their right-of-way. Rather, cities have home rule authority to regulate city right-of-way.<sup>53</sup> The handful of Oregon statutes touching on city right-of-way are to provide the State or county to connect to city right-of-way.<sup>54</sup>

Each entity that maintains streets or roads maintains their own standards for development and maintenance. These standards can include minimum widths, landscaping, lighting, access, types of sidewalks, curbs and gutters, storm drainage, and must include design standards that meet the Americans with Disabilities Act.<sup>55</sup> Many cities have ordinances that prohibit structures in the right-of-way unless approval from the entity with jurisdiction has been granted.<sup>56</sup> For example, in the city of Dallas, the city prohibits buildings or permanent structures in the right-of-way and the construction of fences or retaining walls in the right-of-way without a permit.<sup>57</sup>

## F. Signs

Cities control whether signs are allowed in the city right-of-way. Many cities have adopted sign regulations to provide standards for residents and businesses to provide signage on their property or within the right-of-way.<sup>58</sup> City regulations should not consider the content of the sign to regulate the sign such as “for sale” or any social, or political commentary.<sup>59</sup>

For signs in the city right-of-way, cities may require persons seeking to place signs in the right to obtain permits.<sup>60</sup> These signs can include sandwich signs located the sidewalk, banners

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<sup>53</sup> See League of Oregon Cities, *Chapter 2: Home Rule and Its Limits*, MUNICIPAL HANDBOOK, available at: [https://www.orcities.org/download\\_file/1168/1852](https://www.orcities.org/download_file/1168/1852) (last accessed on March 28, 2024).

<sup>54</sup> ORS 373.210 to ORS 373.215; ORS 223.930; ORS 376.705 (allows cities to designate streets as pedestrian malls).

<sup>55</sup> See ORS 368.036; Americans with Disabilities Act of 1990, 42 USC § 12101 *et seq.* (1990); see City of Portland, *City Standards*, available at: <https://www.portland.gov/transportation/permitting/city-standards-guidelines-requirements-impact-space-right-way> (last accessed on March 28, 2024) ; City of Ashland, *2006 Engineering Design Standards*, available at: <https://www.ashland.or.us/Page.asp?NavID=9098> (last accessed on March 28, 2024).

<sup>56</sup> See City of Sandy, *Right-of-way Permits*, available at: <https://www.ci.sandy.or.us/publicworks/page/right-way-permits> (last accessed on March 28, 2024); City of Sherwood, *Right-of-way Permits*, <https://www.sherwoodoregon.gov/engineering/page/right-way-permits> (last accessed on March 28, 2024); see also ORS 374.305 *et seq.* (stating that permission is needed to build on right-of-way of any state highway or county road).

<sup>57</sup> See City of Dallas, *Right-of-way Information*, available at: <https://www.dallasor.gov/publicworks/page/right-way-information> (last accessed on March 28, 2024).

<sup>58</sup> See City of Ranier, City Code Section 18.110.090 (prohibiting signs in the public right-of-way), available at: <https://www.codepublishing.com/OR/Rainier/html/Rainier18/Rainier18110.html> (last accessed on March 28, 2024).

<sup>59</sup> See League of Oregon Cities, *A Guide to Drafting a Sign Code* (March 2018), available at: [https://www.orcities.org/download\\_file/431/1852](https://www.orcities.org/download_file/431/1852) (last accessed February 19, 2025).

<sup>60</sup> See City of Springfield, City Code Section 3.223, available at: [https://library.qcode.us/lib/springfield\\_or/pub/municipal\\_code/item/chapter\\_3-streets-3\\_223](https://library.qcode.us/lib/springfield_or/pub/municipal_code/item/chapter_3-streets-3_223) (last accessed on March 28, 2024).

that cross the street, and banners on street light poles.<sup>61</sup>

State highways can be located in city limits, and thus, the State’s highway regulations apply to state highways, even if within city limits. Even if the State transfers jurisdiction to a county or city, the State may be required to continue to regulate signs.<sup>62</sup> This jurisdiction distinction is important because the State prohibits all signs in state highway right-of-way, even if temporary.<sup>63</sup> Further, even on private property, signs that are visible from state highways are subject to regulation for driver safety to reduce the visual safety distractions.<sup>64</sup>

## **G. Who Is Responsible for Maintenance Within the Right-of-Way?**

Since cities control the city right-of-way, for most cities in Oregon, cities have adopted an ordinance stating that the homes and business abutting the street and within the city right-of-way are responsible for the maintenance to the curb of the street or along the edge of pavement along their street frontage.<sup>65</sup> This abutting property owner maintenance requirement extends to sidewalks, planting strips, parking strips and vegetation within the right-of-way.<sup>66</sup> Abutting landowners may be responsible to mow the grass or maintain the landscaping in the right-of-way.<sup>67</sup> Cities may have requirements on the type of trees that may be planted in the right-of-way or other landscaping specifications to keep the area attractive.<sup>68</sup>

To maintain the structures in the right-of-way, abutting property owners may be required to obtain a permit from the city.<sup>69</sup> The purpose of the permit is to require the property owners to repair the work in accordance with the city specifications.<sup>70</sup>

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<sup>61</sup> *Id.*

<sup>62</sup> Oregon’s Outdoor Motorist Information Act, ORS 377.780 *et seq.*; OAR 734-059-0015 to OAR 734-060-0190 (requiring a permit when compensation is exchanged for posting the sign and the sign is not located at a place of business or location open to the public).

<sup>63</sup> *Id.*

<sup>64</sup> Highway Beautification Act of 1965, 23 USC § 131 (j).

<sup>65</sup> See Oskar Rey, *Understanding Municipal Rights-of-Way: From Centerline to Edge (Part 2)*, Municipal Research and Services Center of Washington, available at: <https://mrsc.org/stay-informed/mrsc-insight/november-2017/understanding-municipal-rights-of-way-from-center> (last accessed on March 28, 2024); see City of Dallas, City Code Section 3.505 Duty To Repair, available at [https://dallasor.municipalcodeonline.com/book?type=ordinances#name=SIDEWALKS\\_AND\\_DRIVEWAY\\_REPAIR](https://dallasor.municipalcodeonline.com/book?type=ordinances#name=SIDEWALKS_AND_DRIVEWAY_REPAIR) (last accessed on March 28, 2024).

<sup>66</sup> See City of Tigard, City Code Section, 15.12.010 Maintenance and Repair of Public Sidewalks, available at: <https://ecode360.com/TI5024> (last accessed on March 28, 2024).

<sup>67</sup> See City of Corvallis, *Vegetation Obstructions*, available at: <https://www.corvallisoregon.gov/publicworks/page/vegetation-obstructions> (last accessed on March 28, 2024).

<sup>68</sup> See City of Salem, *Tree Care Resources*, available at: <https://www.cityofsalem.net/community/natural-environment-climate/trees-and-plants/tree-care-and-resources> (last accessed on March 28, 2024).

<sup>69</sup> See e.g., City of Bend, City Code Chapter 3.40 (requiring permits for work in the right-of-way), available at: <https://bend.municipal.codes/BC/3.40> (last accessed on March 28, 2024).

<sup>70</sup> See City of Fairview, *Sidewalk and Tree Maintenance Handbook* (2016), available at: <https://fairvieworegon.gov/305/Forms> (last accessed on March 28, 2024).

Trees in the right-of-way may be city property or otherwise regulated by the city.<sup>71</sup> If tree roots are causing damage to the sidewalk or nearby structures, abutting property owners are advised to call the city to determine mitigation and responsibility for repairs.

Shifting the maintenance to the abutting property owner does not necessarily relieve cities of responsibility to maintain the right-of-way.<sup>72</sup> However, a properly adopted ordinance can create liability on the abutting property for failing to maintain the improvements in the right-of-way.<sup>73</sup> Check with your city attorney about your city's responsibility to maintain the right-of-way.

## H. How Are Rights-of-Way Extinguished?

A street vacation extinguishes the public's interest in the right-of-way.<sup>74</sup> Street vacations are usually requested by an abutting property owner through a petition document.<sup>75</sup> Cities may adopt a fee to cover the cost of processing the petition including publication of notice and hearing.<sup>76</sup> In a hearing, city governing bodies determine whether the vacation is in the public interest.<sup>77</sup> Generally, city councils will consider whether the right-of-way is needed for future development of public services such as transportation, utilities, viewpoints, and community or commercial uses.<sup>78</sup>

If a city vacates a right-of-way, control is passed to the underlying fee owner.<sup>79</sup> This underlying fee owner is most often the abutting property owner but not always.<sup>80</sup> The city may reserve or condition the vacation on actions such as granting any existing utilities an easement, moving the existing utilities at the petitioner's expense, dedication of areas in lieu of the area to be vacated.<sup>81</sup>

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<sup>71</sup> See Oregon City, *Trees in Oregon City*, available at: <https://www.oregoncity.org/1206/Trees-in-Oregon-City> (last accessed on March 28, 2024).

<sup>72</sup> See e.g., *Landis v. Limbaugh*, 282 Or App 284 (2016) (citing *Papen v. Karpow*, 56 Or App 673 (1982) (city liable for icy sidewalk even though it had required abutting landowner to maintain sidewalk)); *Pritchard v. City of Portland*, 310 Or 235 (1990) (city could be liable for negligent maintenance at common law even though city required abutting landowner to maintain foliage in the right-of-way).

<sup>73</sup> *Papen v. Karpow*, 56 Or App 673 (1982); *Ramirez v. Hawaii T & S Enterprises, Inc.*, 179 Or App 416 (2002).

<sup>74</sup> ORS 271.080 to 271.230; for more information, see League of Oregon Cities, *FAQ: Vacating a Public Right-of-Way* (April 2019), available at: [https://www.oregoncities.org/download\\_file/3f9951a8-654d-42be-b496-75b818854586/1852](https://www.oregoncities.org/download_file/3f9951a8-654d-42be-b496-75b818854586/1852) (last accessed on March 29, 2024).

<sup>75</sup> ORS 271.080; see also ORS 271.130 (allowing street vacation on city governing body's own motion).

<sup>76</sup> ORS 271.110(3).

<sup>77</sup> ORS 271.120.

<sup>78</sup> See e.g., City of Portland, Oregon City Code Section 17.84.025 (Approval Criteria for Vacating Streets), available at: <https://www.portland.gov/code/17/84#toc--17-84-025-approval-criteria-for-vacating-streets-> (last accessed on March 28, 2024).

<sup>79</sup> ORS 271.140.

<sup>80</sup> *Id.*

<sup>81</sup> See e.g. ORS 271.180 (allowing conditions as the city governing body may deem reasonable and for the public good).

## II. CITY UTILITIES

Most cities in Oregon own and operate one or more types of municipal utilities. The authority to operate a municipal utility is derived from state law, city charter, or both.<sup>82</sup> Charter authority may be expressed in the form of a "general grant of power" or a "specific grant of power."<sup>83</sup> Cities lacking charter authority may rely upon statutory law that grants those cities organized under the 1893 Incorporation Act for the authority to "provide for lighting the streets and furnishing such city and its inhabitants with gas or other lights, and with pure and wholesome water."<sup>84</sup> Likewise, cities incorporated under the 1941 Incorporation Act, now codified at ORS 221.410 provides, "[e]xcept as limited by express provision or necessary implication of general law, a city shall have power to take all action necessary or convenient for the government of its local affairs."<sup>85</sup>

Once a city has authority to operate a utility, a city may build, own, operate, and maintain waterworks, water systems, railways and railroads, electric light and power plants, both inside and outside of its boundaries for profit.<sup>86</sup> A city may operate a telephone system, irrigation, and fire protection system.<sup>87</sup> A city may also create a sewer system, also known as wastewater system.<sup>88</sup> For cities that own or operate a water or electric utility, cities may provide such services outside its city limits.<sup>89</sup> Cities may "purchase, own, operate and maintain" such utilities in an adjoining state, if permitted by the adjoining state.<sup>90</sup>

Cities also have power to acquire private real property for any public or municipal use, or for the general use and benefit of the people.<sup>91</sup> Cities may acquire all, or part, of an existing private utility, but if the acquisition cost exceeds \$10,000 the Public Utility Commissioner must approve the acquisition.<sup>92</sup>

In dealing with public ownership of utilities, the Oregon Constitution prohibits a city from becoming a "stockholder in any joint company, corporation or association whatever, or [raising] money or [loaning] its credit to, or in aid of any such company, corporation, or association."<sup>93</sup> This provision, however, has been construed to not preclude a city from raising money through revenue bonds to assist in planning, constructing, and operating a nuclear generating plant that it

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<sup>82</sup> ORS 221.916(1).

<sup>83</sup> 36 Op Atty Gen 521 (Or 1973) (general grant of power authorizes city to own and operate utilities).

<sup>84</sup> ORS 221.916(1).

<sup>85</sup> See also Etter, *General Grants of Municipal Power in Oregon*, 26 OR L REV 141, 143 (1947).

<sup>86</sup> ORS 225.020.

<sup>87</sup> ORS 225.110; ORS 225.320.

<sup>88</sup> ORS 224.020.

<sup>89</sup> ORS 225.030.

<sup>90</sup> ORS 225.060.

<sup>91</sup> ORS 223.005; ORS 225.020(1)(c).

<sup>92</sup> ORS 757.480.

<sup>93</sup> OR Const Art XI §9.

would own jointly with a private corporation.<sup>94</sup>

## A. Water Utilities

Water utilities are formed for furnishing water to the public for household or drinking purposes. Cities distribute water to customers through the city water distribution system.<sup>95</sup> The source of the water can be from wells or surface water. Groundwater supplied water systems are rare, but tend to be free of impurities and contaminants typically found in surface water systems.<sup>96</sup> Surface water supplies are treated by methods such as ozone, slow sand filtration, chlorine, soda ash, and acetic acid.<sup>97</sup>

To supply water, cities must obtain and develop water rights from the state of Oregon. Oregon's water rights for surface water is governed by the principle of prior appropriation, often described as "first in time is first in right."<sup>98</sup> The idea of prior appropriation is that those who develop water first have superior rights than those who develop water later and that water rights holder must use the water right or it is forfeited.<sup>99</sup> Water law is administered by the state of Oregon which monitors and administers water right claims.<sup>100</sup>

The Environmental Protection Agency (EPA) regulates drinking water through the Safe Drinking Water Act.<sup>101</sup> The EPA publishes water quality standards through regulations and sets legal limits on numerous contaminants in drinking water.<sup>102</sup>

Cities are responsible for regularly collecting potable water samples to be analyzed for over 123 listed potential contaminants as required by the EPA and the Oregon Department of Human Services Drinking Water Program.<sup>103</sup> Samples are analyzed for microbiological, organic,

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<sup>94</sup> *Miles v. City of Eugene*, 252 Or 528 (1969).

<sup>95</sup> See US Environmental Protection Agency, Drinking Water Distribution Systems, available at: <https://www.epa.gov/dwsixyearreview/drinking-water-distribution-systems#:~:text=Public%20water%20systems%20depend%20on,consumer%20when%20treatment%20is%20absen> (last accessed on March 28, 2024).

<sup>96</sup> See City of Klamath Falls, *Water*, available at <https://www.klamathfalls.city/229/Water> (last accessed on March 28, 2024).

<sup>97</sup> See City of Salem, Salem's Drinking Water, available at: <https://www.cityofsalem.net/community/household/water-utilities/drinking-water-treatment/salem-s-drinking-water> (last accessed on March 28, 2024).

<sup>98</sup> For more information about municipal water rights, see Richard M. Glick, *Oregon Water Rights Basics*, LOCAL FOCUS (March 2018), available at: <https://www.dwt.com/-/media/files/publications/2018/03/oregon-water-rights-basics-local-focus-league-of-o/files/oregonwaterrightsbasicsglickmarch18lf/fileattachment/oregonwaterrightsbasicsglickmarch18lf.pdf> (last accessed on March 28, 2024).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Clean Water Act, 33 USC § 1251 *et seq.*

<sup>102</sup> 40 CFR Part 141.

<sup>103</sup> See State of Oregon Department of Environmental Quality, *Water Quality Programs*, available at: <https://www.oregon.gov/deq/wq/programs/pages/dwp.aspx> (last accessed April 4, 2024).

inorganic, and radiological contaminants.<sup>104</sup> Maximum Contaminate Levels (MCL) are established for each contaminate based on the impact to human health.<sup>105</sup>

Cities may construct improvements to the water system and assess the properties that benefit from the improvements.<sup>106</sup>

Unless the city's rate setting is arbitrary and unreasonable, the city can choose how to set its water rates.<sup>107</sup> Under state law, a city may operate a water utility for profit.<sup>108</sup> It is common practice that customers are billed for a minimum amount as a service charge to capture the minimum expense of connecting to the utility.<sup>109</sup> Once the minimum quantity of water is reached, customers are billed for actual use that is measured with water meters.<sup>110</sup> Many cities are replacing manual read meters with automated meters that transmit the data to the city.<sup>111</sup>

Where a single water meter provides service to five or more units in a multifamily building or when a single water meter serves several parcels of real property owned by the same owner, if the water bill is not paid when due, the city may place a lien on the property in the local lien docket.<sup>112</sup> If, after 60 days, the lien is docketed and remains unpaid, the lien may be foreclosed in the manner provided under ORS 223.510 to 223.595.<sup>113</sup>

## **B. Wastewater Utilities**

Wastewater utilities collect and treat wastewater received from residential, commercial, and industrial uses.<sup>114</sup> The wastewater travels through a series of pipes and pump stations to arrive at a wastewater treatment facility.<sup>115</sup>

Once at the wastewater facility, the facility screens out large debris like sticks, rocks, and litter.<sup>116</sup> The remaining wastewater continues to the clarifier where the solids sink to the bottom

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<sup>104</sup> See U.S. EPA National Primary Drinking Water Regulations, available at: <https://www.epa.gov/ground-water-and-drinking-water/national-primary-drinking-water-regulations> (last accessed April 4, 2024).

<sup>105</sup> *Id.*

<sup>106</sup> ORS 225.080.

<sup>107</sup> ORS 225.020; *Kliks v. Dalles City*, 216 Or 160 (1959)

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> See City of Ashland, *Radio Frequency Meter FAQ*, available at: <https://www.ashland.or.us/Page.asp?NavID=14604> (last accessed on March 28, 2024).

<sup>112</sup> ORS 223.594.

<sup>113</sup> *Id.*

<sup>114</sup> See City of Portland, *About the Wastewater Treatment Process*, available at: <https://www.portland.gov/bes/resource-recovery/wastewater-treatment> (last accessed on March 28, 2024).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

or float to the top.<sup>117</sup> The solids are sent to the digesters and the remaining wastewater is sent to the aeration basins.<sup>118</sup>

In the aeration basins, the large, bubbling tanks are filled with microorganisms to eat the tiny particles in the water. The wastewater is then clarified for a second time.<sup>119</sup> Lastly, the wastewater is disinfected to kill more bacteria before the water is returned to the environment.<sup>120</sup> Often treated water is released into surface streams. In some cities, treated wastewater (also known as recycled water) is used to irrigate city landscaping, supply water to fire hydrants, recharge groundwater, or supply water for wetlands.<sup>121</sup>

The solids are sent to the digesters where the solids are heated, and anaerobic microorganisms are added to decompose the solids.<sup>122</sup> The solids are broken down into biosolids and biosolids can be used to return beneficial nutrients to the land.<sup>123</sup>

The state regulates several aspects of a wastewater utility including the treatment facility and the disposal of the treated water through the required Department of Environmental Quality (DEQ) permit.<sup>124</sup> Since many of Oregon’s rivers and streams fail to meet existing water quality standards, DEQ regulates the maximum capacity of the water body to receive certain pollutants, also known as the total maximum daily load (TMDL).<sup>125</sup> Since most treated wastewater is discharged into rivers and streams, cities must adjust their discharges to comply with the TMDL.<sup>126</sup> Additional treatment and management measures may also be required if wastewater discharges may have an impact on federally listed threatened or endangered species.<sup>127</sup> If the city’s discharge violates the water quality standards contained in the permit, the city is subject to third party lawsuits, where city officials may be prosecuted and the city is subject to substantial fines and/or imprisonment.<sup>128</sup>

DEQ has oversight of the city’s system of charges and rates to assure that each recipient of treatment works services within the municipality’s jurisdiction or service area will pay its

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<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> See City of Prineville, *Crooked River Wetlands Complex*, available at: <https://www.cityofprineville.com/wetlands> (last accessed on March 28, 2024); See Oregon DEQ, *Water Reuse Program*, available at: <https://www.oregon.gov/deq/wq/programs/Pages/Water-Reuse.aspx> (last accessed on March 28, 2024).

<sup>122</sup> *Id.*

<sup>123</sup> See City of Portland, *Biosolids Return Nutrients to the Soil*, available at: <https://www.portland.gov/bes/resource-recovery/biosolids> (last accessed on March 28, 2024); see Oregon DEQ, *Biosolids Program Review*, available at: <https://www.oregon.gov/deq/wq/programs/Pages/BioReview.aspx> (last accessed on March 28, 2024).

<sup>124</sup> ORS 454.020; ORS 468B.050; ORS 468B.070 (for cities having a population of 250,000 or more).

<sup>125</sup> Clean Water Act, 33 USC § 1251 *et seq.*

<sup>126</sup> The Oregon Environmental Quality Commission adopted rule amendments to allow TMDLS to be adopted by rule. See Oregon DEQ, *Total Maximum Daily Loads*, available at: <https://www.oregon.gov/deq/wq/tmdls/Pages/default.aspx> (last accessed on March 28, 2024).

<sup>127</sup> Endangered Species Act, 16 USC § 1531 *et seq.*; OAR 340-041-0004.

<sup>128</sup> 33 USC § 1319(c)(1)(2); 40 CFR Part 122.

proportionate share of the costs of operation, maintenance and replacement of any treatment works facilities or services provided by the municipality.<sup>129</sup>

For wastewater, most cities measure wastewater based on the water consumption because of the harsh water conditions and small flow rates.<sup>130</sup> Unless prohibited by its charter, a city may impose a wastewater charge based on the usage of water measured by a water meter.<sup>131</sup>

Cities may require property owners to pay to connect to the utility even if required by law but must offer an installment plan for up to ten years.<sup>132</sup> Cities may construct improvements to the wastewater system and assess the properties that benefit from the improvements.<sup>133</sup>

### C. Stormwater Drainage

As cities develop, natural drainage is replaced by impervious surfaces such as rooftops, roads, sidewalk and parking lots.<sup>134</sup> Cities develop stormwater drainage systems to mitigate flooding and to replace the natural drainage system replaced by the impervious surfaces.<sup>135</sup> The stormwater runoff often contains pollutants that could adversely affect water quality.<sup>136</sup>

Congress passed the Clean Water Act of 1972 (amended in 1987), which prohibits the discharge of pollutants into waters of the United States unless the discharge complies with a National Pollutant Discharge Elimination System (NPDES) permit.<sup>137</sup> Urbanized areas with populations over 50,000 are required to have a NPDES permit issued by DEQ for the stormwater and separated collection system.<sup>138</sup> DEQ has authority to determine if any smaller community in Oregon must obtain a permit.<sup>139</sup>

A stormwater drainage system starts at the edge of the street where the stormwater is directed into either catch basins or vegetated swales.<sup>140</sup> Bio-swales collect stormwater runoff

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<sup>129</sup> ORS 454.030.

<sup>130</sup> See e.g., City of Portland, *Sewer and Stormwater Rates and Charges*, available at: <https://www.portland.gov/bes/pay-your-utility-bill/sewer-and-stormwater-rates-and-charges> (last accessed on March 28, 2024).

<sup>131</sup> ORS 224.510.

<sup>132</sup> ORS 454.805; ORS 223.205 to 223.316.

<sup>133</sup> ORS 224.040.

<sup>134</sup> See U.S. EPA, *Urbanization and Stormwater Runoff*, available at: <https://www.epa.gov/sourcewaterprotection/urbanization-and-stormwater-runoff> (last accessed on March 28, 2024).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Clean Water Act, 33 USC § 1251 *et seq.*; see State of Oregon Department of Environmental Quality, *Preparing Stormwater Planning Documents* (2019), available at:

<sup>138</sup> EPA's Phase II Stormwater Rule, 40 CFR Part 122; OAR 660-011-0000 *et seq.* (Statewide Planning Goal requires planning development of orderly and efficient public facilities by all local governments).

<sup>139</sup> *Id.*

<sup>140</sup> See the State of Oregon Department of Environmental Quality's planning, design and construction manuals for stormwater available at: <https://www.oregon.gov/deq/wq/cwsrf/pages/cwsrf-planning.aspx> (last accessed on March 29, 2024).



from roadways and then slowly filter it through layers of soil, sand, and stone.<sup>141</sup> Most stormwater is treated and returned to the rivers.<sup>142</sup>

Although stormwater collection is not a traditional service to the property owner, stormwater is the direct result of city development. To offset the costs of stormwater collection and treatment, cities often assess stormwater fees as part of the wastewater fees.<sup>143</sup>

## D. Electric Utilities

There are 38 consumer or publicly owned electric utilities in Oregon, including 12 municipal electric utilities.<sup>144</sup> State law specifically grants cities the authority to operate an electric utility.<sup>145</sup> City-owned electric utilities are not regulated by the Public Utility Commission (PUC).<sup>146</sup>

Municipal electric utilities distribute electricity to residential, commercial, and industrial customers inside and outside of its city limits. Electric utilities are responsible for generating or purchasing power through power purchasing agreements.<sup>147</sup> Electric utilities usually purchase power on the wholesale market to balance resource output with customer needs.<sup>148</sup> Such electric utilities may have surplus wholesale electric energy to sell.<sup>149</sup>

The majority of power purchased by electric utilities is generated by hydroelectric plants. For example, Forest Grove Light and Power purchases 90% of its power from the federal non-profit agency, Bonneville Power Administration (BPA).<sup>150</sup> Nearly 80% of Eugene Water and Electric Board's power comes from hydroelectric plants with most of the power bought from the BPA.<sup>151</sup> BPA markets wholesale electrical power from 31 federal hydroelectric projects in the Northwest, one non-federal nuclear plant, and several small non-federal power plants.<sup>152</sup>

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<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

<sup>143</sup> See City of Eugene, *Stormwater Fees*, available at: <https://www.eugene-or.gov/467/Fees-and-Charges> (last accessed on March 29, 2024); City of Gresham, *Stormwater Utility Rates*, available at: <https://greshamoregon.gov/Stormwater-Utility-Rates/> (last accessed on March 29, 2024).

<sup>144</sup> See Oregon Municipal Electric Utilities Association, available at: <https://www.omeu.org/> (last accessed on March 29, 2024); State of Oregon Department of Energy, *Oregon Utilities*, available at: <https://www.oregon.gov/energy/energy-oregon/Pages/Oregon-Utilities.aspx> (last accessed on March 29, 2024).

<sup>145</sup> ORS 225.020.

<sup>146</sup> See, e.g., ORS 758.505(6) (“nonregulated utility means...a municipal utility operating under ORS chapter 225”).

<sup>147</sup> See Electric Water & Electric Board, *Where Your Power Comes From*, available at: <https://www.eweb.org/your-public-utility/power-supply> (last accessed on March 29, 2024).

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> See City of Forest Grove, *Light & Power*, available at: <https://www.forestgrove-or.gov/204/Light-Power> (last accessed on March 29, 2024).

<sup>151</sup> *Id.*

<sup>151</sup> See Electric Water & Electric Board, *Where Your Power Comes From*, available at: <https://www.eweb.org/your-public-utility/power-supply> (last accessed on March 29, 2024).

<sup>152</sup> See Bonneville Power Administration, *Power Services*, available at: <https://www.bpa.gov/energy-and-services/power> (last accessed on March 29, 2024).

In 2007, the Oregon Legislature enacted legislation that requires all electric utilities, including municipal electric utilities, to decrease the utilities reliance on fossil fuels for electric generation and increase use of renewable energy sources.<sup>153</sup>

Cities set rates based on the estimated costs for providing the electrical services and future improvements.<sup>154</sup> Cities have the sole authority to determine rates.<sup>155</sup> After all expenses are paid, if there is surplus revenue, the city may pay to itself not less than three percent of the gross operating revenue of the electric utility for general fund purposes.<sup>156</sup>

Customers are usually billed for actual use through meters.<sup>157</sup> Many cities are replacing manual read meters with automated meters that transmit the data to the city.<sup>158</sup>

#### **D. Miscellaneous Utilities – Solid Waste, Geothermal Heat, Fiber/Internet, Power Generation**

Solid Waste. Except for the Metropolitan Service District, a local government serving cities and counties in the greater Portland area, no local governments directly provide solid waste collection.<sup>159</sup> Rather, as discussed below, cities regulate solid waste collection through franchise agreements with garbage and recycling haulers. Some local governments own and operate their own solid waste disposal sites or transfer stations. These governments are responsible for compliance with DEQ for solid waste disposal operation.<sup>160</sup>

Geothermal Heat. The city of Klamath Falls is the only Oregon city operating a geothermal heating utility, providing heating services to 23 facilities.<sup>161</sup>

Telecommunications. A number of cities have registered telecommunication utilities such as the cities of Ashland, Eugene, and Sandy.<sup>162</sup> These utilities are registered with the Public Utilities Commission.<sup>163</sup> In Ashland, the city owns, manages and maintains the telecommunications infrastructure, then leases it to preferred locally owned Internet Service Providers (ISPs) so customers can choose between going with utility directly or the partner ISP

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<sup>153</sup> ORS 469A.005 to 469A.304 (Oregon Renewable Energy Act).

<sup>154</sup> ORS 225.230.

<sup>155</sup> ORS 225.240.

<sup>156</sup> ORS 225.270.

<sup>157</sup> See City of Ashland, *Radio Frequency Meter FAQ*, available at: <https://www.ashland.or.us/Page.asp?NavID=14604> (last accessed on March 28, 2024).

<sup>158</sup> *Id.*

<sup>159</sup> Metro is a municipal corporation established and existing pursuant to Section 14 of Article XI of the Oregon Constitution, ORS chapter 268, and the Metro Charter.

<sup>160</sup> ORS chapter 459.

<sup>161</sup> See City of Klamath Falls, *Geothermal*, available at: <https://www.klamathfalls.city/232/Geothermal> (last accessed on March 29, 2024).

<sup>162</sup> ORS 759.570 (cities are not restricted from acquiring telecommunication franchises).

<sup>163</sup> ORS 759.005 to 759.060.

that best fits their needs.<sup>164</sup>

Power Generation. Cities may own and operate power facilities for an electric light and power system or an electric cogeneration facility.<sup>165</sup> In Oregon, the city of Klamath Falls developed a cogeneration facility that was later sold to a third party.<sup>166</sup>

### E. Other Fees for City Services

Several cities have chosen to implement other fees for city services on the utility bills of water and sewer customers. Some of the fees are for transportation costs and may have the names of a street user fee or road maintenance fee.<sup>167</sup> Other fees added to utility bills are public safety fees.<sup>168</sup> These types of additional fees have been upheld as permissible by state courts.<sup>169</sup>

To determine whether such fees are permissible, a court looks at a city's charter to determine whether such fees are prohibited.<sup>170</sup> However, a broad grant of authority under a city's charter will allow the addition of such fees.<sup>171</sup>

## III. FRANCHISES

A city holds public property as a benefit for the citizens of the community. Cities grant permission to specific governments or corporations to allow them to have their facilities in the public right-of-way.<sup>172</sup> As discussed below, the form of the permission may be a franchise or license, but for ease, the term *franchise* is used to discuss a cities limitations and powers below.

A franchise is a “special privilege granted by the government to a person or corporation, which privilege does not belong to the citizens of a [city] generally, of common right.”<sup>173</sup> A franchise allows the grantee to exercise powers which, without the franchise, the grantee could

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<sup>164</sup> See City of Ashland, About Ashland Fiber Network, available at: <https://www.ashland.or.us/page.asp?navid=7> (last accessed on April 4, 2024).

<sup>165</sup> ORS 225.450 to 225.490.

<sup>166</sup> ORS 225.085; see State of Oregon Department of Energy, *Klamath Cogeneration Project*, available at: [State of Oregon: Facilities - Klamath Cogeneration Project](#) (last accessed on March 29, 2024).

<sup>167</sup> See League of Oregon Cities, *Water Rates Survey Report* (February 2024), available at: <https://www.orcities.org/application/files/7217/0870/9731/WaterRatesSurveyReport.pdf> (last accessed on March 29, 2024).

<sup>168</sup> *Id.*

<sup>169</sup> See *McPherson v. Coos Bay-N. Bend Water Bd.*, 318 Or App 582 (2022); *Knapp v. City of Jacksonville*, 342 Or 268 (2007).

<sup>170</sup> *McPherson*, 318 Or App at 584-85.

<sup>171</sup> *Id.*

<sup>172</sup> *Nw. Natural Gas Co. v. City of Portland*, 300 Or 291, 308 (1985) (citing 3 Dillon, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS 1766, at 1905-07 § 1210 (5<sup>th</sup> ed 1911)).

<sup>173</sup> *Id.* (citing *Whitbeck v. Funk*, 140 Or 70, 73-74 (1932)).

not exercise.<sup>174</sup> A franchise outlines the conditions of service and terms of compensation for the use of the public right-of-way.<sup>175</sup>

Franchise holders can be investor-owned or be operated by other local governments to provide public services. As discussed below, infrastructure can include phone lines, cable and data lines, power, garbage and recycling collection, and natural gas.

## A. Power to Regulate and Impose Fees

Except where preempted or limited by federal or state law, cities have the authority regulate their own right-of-way and require business and investor-owned utilities to obtain permission to locate in the city's right-of-way.<sup>176</sup> This authority to regulate their own right-of-way is due to a city's charter and by statute.<sup>177</sup>

Cities may govern all conditions associated with utility's use of the public streets.<sup>178</sup> Cities may contract or prescribe the terms of the occupation by ordinance.<sup>179</sup> In interpreting franchises, courts will look at the terms of the franchise and "if the terms of the franchise are doubtful, they are to be construed strictly against the grantee and liberally in favor of the public."<sup>180</sup>

The United States Supreme Court held that cities could charge franchise fees based on the value of the public property used.<sup>181</sup> The Court stated such fees were not a "tax," but rental for the use of the public property.<sup>182</sup> As the custodian of these public rights-of-ways, local governments receive compensation for the "intrusion into and use of the limited resources of the public domain."<sup>183</sup> Oregon cities can impose taxes and fees in the manner the city deems appropriate to provide governmental services.<sup>184</sup> More specifically, the fees represent the increased costs for right-of-way maintenance, improvements, and administration, and indirect costs for increased travel time, loss of access and trade to local business, increased noise

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<sup>174</sup> *Id.*

<sup>175</sup> See City of Corvallis, *Franchise Management*, available at:

<https://www.corvallisoregon.gov/publicworks/page/franchise-management> (last accessed on March 29, 2024).

<sup>176</sup> ORS 221.420; see *City of Idanha v. Consumers Power*, 8 Or App 551 (1972) (upholding the city of Idanha's right to require a utility to be licensed and that the charter's general grant of powers conferred upon Idanha "the sum total of intramural powers available to municipalities in Oregon.")

<sup>177</sup> *Id.*; see also *Nw. Natural Gas Co.*, 300 Or at 308.

<sup>178</sup> *Id.*

<sup>179</sup> ORS 221.420.

<sup>180</sup> *Nw. Natural Gas Co.*, 300 Or at 308 (citing *City of Joseph v. Joseph Water Works Co.*, 57 Or 586, 591, 111 P 864 (1910), 112 P 1083 (1911)).

<sup>181</sup> *St. Louis v. Western Union Tel. Co.*, 148 US 92 (1893); *Postal Tel. Cable Co. v. City of Newport*, 76 SW 159 (Ky 1903); *Western Union Tel. Co. v. City of Richmond*, 224 US 160 (1912); *Postal Tel.-Cable Co. v. City of Richmond*, 249 US 252 (1919); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 US 419 (1982).

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

<sup>184</sup> See *Jarvill v. City of Eugene*, 289 Or 157 (1980).

pollution, and visual intrusion.<sup>185</sup> Cities can grant right-of-way access to other governments and charge them franchise fees for doing so.<sup>186</sup>

Fees are typically calculated by one of the following: a percentage of the revenues of a utility company to customers in a service area; or a fee assessed per linear foot, per attachment or per pole.<sup>187</sup> Cities collect other fees such as registration, permit, application, license or construction fees.<sup>188</sup>

## **B. Differences Between Franchise Agreements and Licenses**

As discussed above, cities grant permission to other governments or companies to use the public right-of-way. The form of the permission may be either by a franchise agreement or a license.

### **i. Franchise Agreements**

For many years, permission to install and operate in city rights-of-way was primarily granted by a franchise agreement.<sup>189</sup> Agreements can be a contract negotiated by a city or an ordinance approved by a city council.<sup>190</sup>

In a franchise agreement, fees are usually much like a gross receipts tax and are typically calculated on a percentage of the revenues derived from sales of the utility company to customers in that service area or territory.<sup>191</sup> The amount is ordinarily 5-7% of the gross revenues generated from customers in the city limits.<sup>192</sup> For example, the city of Wilsonville charges a 5% franchise fee off the gross revenues for garbage haulers to customers within the city limits to operate in the city rights-of-way.<sup>193</sup> Ordinarily, the franchisees pass that fee onto the customer so there is no out of pocket cost to the franchisee.<sup>194</sup>

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<sup>185</sup> See City of Corvallis, *Franchise Management*, available at:

<https://www.corvallisoregon.gov/publicworks/page/franchise-management> (last accessed on March 29, 2024).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See League of Oregon Cities, *Right-of-way Related Fees*, available at:

[https://www.orcities.org/application/files/7016/4866/7026/ROW\\_Related\\_Fees.pdf](https://www.orcities.org/application/files/7016/4866/7026/ROW_Related_Fees.pdf) (last accessed on March 29, 2024); See League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at:

<https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf> (last accessed on March 29, 2024).

<sup>189</sup> *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> See City of Wilsonville, *Solid Waste Management Franchise and Rate Information*,

<https://www.ci.wilsonville.or.us/residents/page/solid-waste-management-franchise-and-rate-information> (last accessed on March 29, 2024).

<sup>194</sup> See e.g., CenturyLink, *Local Franchise Tax or Fees*, available at: [Local Franchise Tax or Fees | CenturyLink](#) (last accessed on March 29, 2024).

## ii. Licenses

In recent years, licenses (also known as right-of-way permits) have become more popular as the rise of wireless providers seeking to operate in city rights-of-way.<sup>195</sup> Unlike franchise agreements, licenses are unilaterally imposed by the city.<sup>196</sup>

Cities requiring licensees to pay a unilaterally imposed right-of-way fee does not create a “franchise” and thus the fee is a privilege tax.<sup>197</sup> A privilege tax is a tax that allows service providers to use the right-of-way.<sup>198</sup> For certain types of local government franchisees like a public utility district, where there is no franchise, the privilege tax is limited to the statutory amount of 5%.<sup>199</sup>

## C. Telecommunication Regulations

Telecommunication regulations once only included telephone services but now the industry includes local and long-distance telephone service, internet, broadcasting, and cable television.<sup>200</sup> A brief history of federal telecommunication regulation is provided below and is useful for cities to understand the laws and regulations impacting a city’s right to regulate the right-of-way. Second, the current telecommunication regulations are provided below with specific discussion about telephone, cable, and small cell technologies.

The discussion below is intended to complement the League of Oregon Cities Model Cable Television Franchise Agreement and the more extensive forthcoming Telecom Toolkit. The forthcoming Telecom Toolkit is meant to assist cities in the complicated issues of telecommunication regulation. The League’s Model Cable Television Franchise Agreement serves as guidance because the forthcoming Telecom Toolkit does not apply to cable providers, cable services, and non-cable services provided over cable systems.

Note that the case law and federal regulations continue to change. Local officials should consult with legal counsel when deciding how to utilize the Leagues’ Toolkit or the information contained in this section.

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<sup>195</sup> See League of Oregon Cities, Model Cable Television Franchise Agreement (July 2022), available at: [https://www.orcities.org/download\\_file/2372/1852](https://www.orcities.org/download_file/2372/1852) (last accessed on March 29, 2024).

<sup>196</sup> *Nw. Natural Gas Co. v. City of Gresham*, 359 Or 309, 327 (2016) (holding that a license fee imposed is a privilege tax for purposes of ORS 221.450, limiting the tax to 5% against another local government if a utility is operating without a franchise).

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Id.*; ORS 221.450.

<sup>200</sup> See ORS 221.510 to 221.515; League of Oregon Cities, *Telecom Toolkit* (available soon).

## **i. Brief History of Telecommunication Regulation<sup>201</sup>**

In 1910, the United States started regulating telegraph and telephone companies when it declared the companies providing the service to be common carriers.<sup>202</sup> As a common carrier, the telecommunications companies had to offer their services without discrimination to all willing customers and they had to charge reasonable rates set by the federal Interstate Commerce Commission.<sup>203</sup> A few years later, the long-distance monopoly, AT&T, agreed to allow competing local providers (now called incumbent local exchange carriers or ILECs) to interconnect with AT&T's long-distance services.<sup>204</sup>

In 1927, Congress passed legislation to address broadcasting, a physically scarce commodity with competing frequencies, times, locations, and power levels.<sup>205</sup> With more than 1,000 radio stations broadcasting in a state of anarchy, the Radio Act regulated entry into broadcasting and would grant broadcasting licenses for the for the public convenience, interest and necessity.<sup>206</sup>

In 1934, Congress passed the Communications Act, establishing the Federal Communications Commissions.<sup>207</sup> The Federal Communications Commission (“FCC”) was given authority to regulate radio, interstate, and international telegraph and telephone services.<sup>208</sup>

In the late 1940s, cable systems were designed to capture the broadcast television signals and transmit them to consumers in remote towns where the broadcasts would not have reached otherwise.<sup>209</sup> By the early 1950s, cable grew into a potential competitor to broadcast televisions and broadcasters sought to have the FCC regulate the arena because it would destroy the economic viability of free television.<sup>210</sup> In the late 1960s, the FCC limited cable growth by requiring that cable operators receive permission to enter urban markets.<sup>211</sup>

Beginning in the late 1960s, a series of FCC rulings allowed other users to attach to the telephone services as long as it did not harm either the network or others, introducing competition against AT&T.<sup>212</sup> Later, AT&T was forced to allow others to provide “information services”

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<sup>201</sup> See generally, Tim Wu, *A Brief History of American Telecommunications Regulation*, OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY, VOL. 5, p. 95, 2009 (2007), available at: [https://scholarship.law.columbia.edu/faculty\\_scholarship/1461](https://scholarship.law.columbia.edu/faculty_scholarship/1461) (last accessed on March 29, 2024).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.*

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

over its phone lines, supporting the rise of internet service providers.<sup>213</sup>

Responding to the deregulatory movement of the 1970s and 1980s, in 1974, the U.S. Justice Department began an antitrust action against AT&T, seeking a breakup of the company and divestiture of the regional bell operating companies from AT&T.<sup>214</sup> Eventually, AT&T agreed, and AT&T was split up.<sup>215</sup>

In the time of deregulation of the 1970s and 1980s, the FCC also stop enforcing the “fairness doctrine,” a regulation that required that broadcasters give notice and time for advocates on both sides of an issue to be heard.<sup>216</sup> In the 1990s, the FCC auctioned off broadcasting licenses to the highest bidder rather than the previous practice of allocating licenses to whomever would best serve the public interest.<sup>217</sup>

## ii. Current Telecommunication Regulation<sup>218</sup>

In 1996, Congress enacted the Federal Telecommunications Act of 1996.<sup>219</sup> The 1996 Act eliminated the legal boundaries between the previously distinct areas of local and long-distance telephone market, internet, broadcasting, and cable television.<sup>220</sup> The 1996 Act preempts cities that prohibit the provision of telecommunications services but preserves local authority to manage the rights-of-way and receive compensation for use of the rights-of-way.<sup>221</sup>

Since the 1996 Act, the recent industry trends have created a convergency of services so that former Incumbent Local Exchange Carrier (“ILEC”) franchisees that once only provided landline phone service, now provide voice, wireless service, internet data services and even digital television. Further, cable providers have expanded to broadband internet, telephone, and wireless services.

Oregon state law authorizes cities to “[d]etermine by contract, or prescribe by ordinance, the terms and conditions, including payment of a privilege tax to the extent authorized by ORS 221.515 and other charges and fees, upon which any telecommunications carrier may be

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<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.*

<sup>217</sup> *Id.*

<sup>218</sup> *Id.*

<sup>219</sup> The Telecom Act, 47 USC § 151 *et seq.*

<sup>220</sup> *See, e.g., City of Eugene v. FCC*, 998 F 3d 701, 714 (6th Cir 2021).

<sup>221</sup> *See* 47 USC § 253(a) (preempting any state or local law or regulation that “prohibit[s] or has the effect of prohibiting” the provision of telecommunications services).



permitted to occupy the streets, highways or other public property . . . .”<sup>222</sup> ORS 221.515 caps the privilege tax for access to the ROW at 7% of annual gross revenues (less net uncollectibles).<sup>223</sup>

### *Telecommunication Services*

Oregon has preempted cities from charging more than 7% cap on incumbent local exchange carriers (ILEC) telecom carriers limit but that limit does not include fees for “street openings, construction, inspection or maintenance of fixtures or facilities.”<sup>224</sup> There are no restrictions on franchise fees charged to competitive local exchange carriers (CLEC), who are independent and geographically specific telephone providers.<sup>225</sup> Annual registration and application fees for construction permit are not included in the seven percent limit.<sup>226</sup> Oregon law does not necessarily limit additional taxes cities might impose on all utilities—including telecommunications utilities—that operate within the city limits, so long as the additional tax(es) do not duplicate the privilege tax for the right-of-way actual use by a telecommunications carrier.<sup>227</sup>

Under Oregon law, entities that do not actually use the right-of-way may not be charged a privilege tax.<sup>228</sup> Examples of such entities that are not allowed to be taxed by cities include entities that purchase services at wholesale rates from ILECs and resell them at retail rates to subscribers or voice over internet providers (VoIP) providers.<sup>229</sup>

### *Cable Services*

Under the 1996 Act, cities may not charge more than 5% of its annual gross revenue on cable operators to provide cable services.<sup>230</sup> Incumbent cable providers, who generally did not provide telephone or broadband services as common carriers, also evolved to offer these non-cable services over the franchised cable system to compete with the ILECs. Controversies soon followed over whether the revenues from the non-cable services provided over the franchised cable system could be included in the franchise fees.

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<sup>222</sup> ORS 221.510(2)(a).

<sup>223</sup> ORS 221.515(1); *see also* ORS 221.515(2) (defining “gross revenues” by reference to exchange access services as defined in ORS 403.105, minus “net uncollectibles from such revenues”); ORS 221.515(4) (defining “telecommunications carrier” by reference to ORS 133.721).

<sup>224</sup> ORS 221.515.

<sup>225</sup> *See* League of Oregon Cities, *Franchise Agreement Survey Report* (2017), available at: [https://www.oregocities.org/application/files/5815/6115/9585/Franchise\\_Agreement\\_Survey\\_Report\\_FINAL\\_3-6-17.pdf](https://www.oregocities.org/application/files/5815/6115/9585/Franchise_Agreement_Survey_Report_FINAL_3-6-17.pdf) (last accessed on March 29, 2024).

<sup>226</sup> *See US West Communications, Inc. v. City of Eugene*, 336 Or 181, 186 (2003); *accord Qwest Corp. v. City of Portland*, 275 Or App 874, 884 (2015), *review denied* (2016).

<sup>227</sup> *See, e.g., Qwest Corp. v. City of Portland*, 275 Or App 874, 884 (2015), *rev den* (2016) (upholding city’s “utility license fee” and privilege tax as charged to the same carrier because the “utility license fee” was not imposed as a tax for the use of the right-of-way).

<sup>228</sup> *Id.* at 888–89 (2015).

<sup>229</sup> *Id.*

<sup>230</sup> Telecommunications Act of 1996, 46 USC § 542 *et seq.*

The FCC attempted to resolve these controversies with its so-called “mixed-use rule” that interpreted the 1996 Act to prohibit franchise fees on non-cable services provided over cable systems by both common carriers and non-common carriers.<sup>231</sup> The FCC justifies this rule based on a provision from the 1996 Act that prohibits regulations on information services offered by cable providers.<sup>232</sup>

The city of Eugene, among other petitioners, asked the Sixth Circuit Court of Appeals (the federal court of appeals who had considered the FCC rule), whether local governments were prohibited from imposing fees on cable operators for providing broadband service.<sup>233</sup> The Sixth Circuit explained that local governments “cannot require payment of an information-services fee as a condition of obtain a [cable] franchise,” and thus cannot “end-run” that prohibition by imposing the same kind of fee pursuant to their police power.<sup>234</sup>

Subsequent to the Sixth Circuit’s decision, Comcast brought suit against the city of Beaverton and argued that the city’s fees, 5% of gross revenue on all “utility” services provided in the public right-of-way, were preempted by the mixed-use rule.<sup>235</sup> The Oregon District Court agreed with Comcast and held that the City “has unlawfully circumvented § 544(b)(1) [of the Cable Communications Policy Act of 1984] by imposing a rights-of-way fee for broadband services via its police power.<sup>236</sup> Please see the League of Oregon Cities’ Model Cable Television Franchise Agreement for guidance on cable providers: [https://www.orcities.org/download\\_file/2372/1852](https://www.orcities.org/download_file/2372/1852).

### Wireless Facilities

In the last few years, cellular technology has transformed from just large towers to adding small wireless installations.<sup>237</sup> These small wireless facilities serve smaller geographic areas and higher data capacity called *cells*.<sup>238</sup> Users and devices are connected within the cell to the broader communications network.<sup>239</sup> When the user or wireless device moves around the service area, the facilities hand off the connection as the user and device leaves one cell and enters another.<sup>240</sup>

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<sup>231</sup> See 47 C.F.R. § 76.43; see *In re Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984*, Third Report and Order, MB Docket 05-311, 34 FCC Rcd. 6844, 6879, ¶ 64 (Aug. 2, 2019).

<sup>232</sup> See 47 U.S.C. § 544(b)(1) (“[T]he franchising authority, to the extent related to the establishment or operation of a cable system . . . may not . . . establish requirements for video programming or other information services . . .”).

<sup>233</sup> *City of Eugene v. FCC*, 998 F3d 701, 711, 715 (6th Cir 2021) (The Sixth Circuit had affirmed the “mixed use rule” promulgated by the FCC.).

<sup>234</sup> *Id.*

<sup>235</sup> *Comcast of Oregon II, Inc. v. City of Beaverton*, 609 F Supp 3d 1136 (D Or June 29, 2022).

<sup>236</sup> *Id.*

<sup>237</sup> National League of Cities, *Municipal Action Guide: Small Cell Wireless Technology in Cities* (2018), available at: [https://www.nlc.org/wp-content/uploads/2018/08/CS\\_SmallCell\\_MAG\\_FINAL.pdf](https://www.nlc.org/wp-content/uploads/2018/08/CS_SmallCell_MAG_FINAL.pdf) (last accessed on March 29, 2024); see League of Oregon Cities, Telecom Toolkit (available soon).

<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> *Id.*

Due to this evolution of cellular technology, cities have been asked to place small wireless facilities in the right-of-way. Cities may charge telecommunications providers to replace wireless attachments on utility poles in the right-of-way.

The 1996 Act addresses local authority over placement, construction and modifications to personal wireless service facilities.<sup>241</sup> Cities cannot: (1) unreasonably discriminate among functionally equivalent services; (2) prohibit or effectively prohibit personal wireless services; (3) fail to act within a reasonable time on a duly-filed request for authorization to place, construct or modify a personal wireless facility; (4) deny requests for authorization without a written decision based on substantial evidence; or (5) regulate personal wireless service facilities based on environmental effects from radio frequency emissions if those emissions comply with standards set by the FCC.<sup>242</sup>

Specifically, right-of-way access fees must be a reasonable estimate of the city's costs and no higher than fees charged to similar situated competitors.<sup>243</sup> The FCC has established presumptively reasonable fees under the Order.<sup>244</sup>

Wireless infrastructure is limited in scope and in only specific locations.<sup>245</sup> For example, a wireless company may use a cable company's fiber lines and an electric utilities power for an antenna on a city or utility pole in the right-of-way.<sup>246</sup> For these reasons, most cities require a license agreement to site wireless infrastructure within the city right-of-way.<sup>247</sup>

## **D. Natural Gas and Electric Service Franchises**

In Oregon, all natural gas utilities are investor-owned.<sup>248</sup> Most cities franchise the use of public right-of-way to distribute natural gas to properties. There is very limited competition for natural gas distribution in Oregon. The Oregon legislature attempted to induce competition in this industry but with no apparent results to date.

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<sup>241</sup> 47 USC § 332(c)(7).

<sup>242</sup> *Id.*

<sup>243</sup> *See In re Accelerating Wireline and Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, WT Docket 17-79, 33 FCC Rcd. 9088 (Sep. 27, 2018).

<sup>244</sup> *Id.*

<sup>245</sup> *See* League of Oregon Cities, Telecom Toolkit (available soon).

<sup>246</sup> *Id.*

<sup>247</sup> *Id.*

<sup>248</sup> State of Oregon Department of Energy, *Oregon Utilities*, available at: <https://www.oregon.gov/energy/energy-oregon/Pages/Oregon-Utilities.aspx> (last accessed on March 29, 2024).

In Oregon, in addition to the municipal electric utilities, the following entities provide electric service: three investor-owned utilities, six peoples utility districts and 20 member-owned, not-for-profit electric cooperatives.<sup>249</sup>

Through Oregon’s Administrative Rules, the Oregon Public Utility Commission (PUC) regulates investor-owned utilities including the rates the utilities may charge.<sup>250</sup> The regulations also provide the extent to which a city may cause electric utilities to limit use of above-ground facilities and to relocate them underground at the utility’s expense.<sup>251</sup> Local consumer-owned electric utilities (municipals, people’s utility districts and electric cooperatives) are regulated locally, not by the PUC.<sup>252</sup>

As discussed above, cities have the right to determine the conditions for the use of the public right-of-way and impose reasonable fees. For example, cities may require electric lines be placed underground in certain locations or that they be relocated underground in a street widening project.

## **E. Other Utilities – Solid Waste Collection, Water, Wastewater**

Franchises can also be granted to other government entities. These government franchises can take the form of franchise fees to other governments (cities and special districts), or franchises charged to the city itself. This latter charge (often called an in-lieu-of franchise) is most often used for city business activities as an accounting practice. While 71% of cities do not charge government franchises, larger cities and those in the Metro region are most likely to have such arrangements.<sup>253</sup> Most common in-lieu-of franchises are charged for water, wastewater, and stormwater utilities.<sup>254</sup> All these are most often owned by the city.

For some services like solid waste collection, cities have a statutory responsibility to ensure services.<sup>255</sup> Most Oregon cities license or franchise private companies to collect garbage and other solid waste and transport it to an approved site such as landfill operated either privately

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<sup>249</sup> See League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at: <https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf> (last accessed on March 29, 2024).

<sup>250</sup> ORS 756.040; ORS 757.007 *et seq.*

<sup>251</sup> OAR 860-022-0047.

<sup>252</sup> ORS 757.006.

<sup>253</sup> See League of Oregon Cities, *Franchise Agreement Survey Report* (2019), available at: <https://www.orcities.org/application/files/7615/7669/0101/2019FranchiseFeeROWSurveyReport12-13-19.pdf> (last accessed on March 29, 2024).

<sup>254</sup> *Id.*

<sup>255</sup> ORS 459A.005 (requiring cities with a population of 4,000 must provide collection at least once a month of source separated recyclable material from collection service customers within the city's urban growth boundary, or provide an alternative method that complies with the rules of the Environmental Quality Commission).

or by the county or regional government.<sup>256</sup> These franchises tend to be exclusive, at least in practical effect, to avoid duplication of service and excess truck traffic. Franchise exclusivity is usually justified on the basis of the substantial capital investment required in trucks and equipment and the hauler's need to make a return on that investment. City franchises typically limit the rates charged by franchised haulers to their customers in exchange for allowing the hauler to provide the service for a described area and to collect a certain rate of return, similar to the state's role in regulating other private utility providers.<sup>257</sup>

In a small number of cities, a licensing system exists where any number of haulers can be licensed and compete for customers.<sup>258</sup>

Cities must also provide collection services for recyclable material and an education/promotion program that encourages source separation of recyclable material and provides notice of opportunities to recycle.<sup>259</sup> State law frequently mandates certain features of solid waste disposal such as disposal of lead acid batteries, a subject typically governed by the local garbage franchise.<sup>260</sup> The law prohibits disposal of lead acid batteries in mixed municipal solid waste and requires battery retailers to accept used batteries as trade-ins.<sup>261</sup>

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<sup>256</sup> See City of Wilsonville, *Solid Waste Management Franchise and Rate Information*, <https://www.ci.wilsonville.or.us/residents/page/solid-waste-management-franchise-and-rate-information> (last accessed on March 29, 2024).

<sup>257</sup> *Id.*

<sup>258</sup> See City of Eugene, *Licensed Haulers and Rates*, available at: <https://www.eugene-or.gov/4504/Licensed-Haulers-and-Rates> (last accessed on March 29, 2024).

<sup>259</sup> ORS 459A.010.

<sup>260</sup> ORS 459.420.

<sup>261</sup> ORS 459.426.