

EXHIBIT "A"

ARTICLE XII: RIGHT-OF-WAY MANAGEMENT FOR UTILITY SERVICE

Sec. 42-701. Legislative findings

The City Council hereby finds and declares that the public rights-of-way within the City:

(a) are used and useful for the travel of persons and the transport of goods and other tangibles in the business and social life of the community by all citizens;

(b) can be partially occupied by utilities and other public service entities for facilities used in the delivery, conveyance, and transmission of utility and public services rendered for profit, to the enhancement of the health, welfare, and general economic well-being of the City and its citizens; and

(c) are physically limited so that proper management by the City is necessary to maximize the efficiency and to minimize the costs to the taxpayers of the foregoing uses, to prevent foreclosure of future uses through premature exhaustion of available right-of-way capacity and to minimize the inconvenience to the public from such facilities' construction, emplacement, relocation, and maintenance in the rights-of-way.

Sec. 42-702. Purposes

The City Council adopts this Article to better:

(a) manage a limited resource to the long-term benefit of the public;

(b) recover any additional costs of maintaining and managing the public rights-of-way resulting from utility use of the rights-of-way;

(c) minimize inconvenience of the public occasioned by the emplacement and maintenance of utility facilities in the public rights-of-way; and

(d) prevent premature exhaustion of capacity in the public rights-of-way to accommodate utility, telecommunications, cable television, open video systems and other public services.

Sec. 42-703. Reservation of Rights; Police Power

No construction permit shall estop or limit the City in the full exercise of its governmental powers to protect the health and safety of the public, and all other governmental powers may be fully exercised except as expressly provided herein. The City expressly reserves the right to amend this Article from time to time in the exercise of its legislative powers.

Sec. 42-704. Rules of Construction; Definitions

(a) Rules of Construction. For the purposes of this Article, the following terms, phrases, words, and abbreviations shall have the meanings given herein, unless otherwise expressly stated. Unless otherwise expressly stated, words not defined herein shall be given the meaning set forth in Chapter 6 of the City Code; words not defined therein shall be given the meaning set forth in Chapter 1 of the City Code; words not defined therein shall be given the

meaning set forth in Title 47 of the United States Code, as amended; and words not defined therein shall have their common and ordinary meaning.

When not inconsistent with the context, words used in the present tense include the future tense; words in the plural number include the singular number, and words in the singular number include the plural number; the masculine gender includes the feminine gender, and vice versa.

The words “shall” and “will” are mandatory, and “may” is permissive.

(b) Applicant means a person who submits an application.

(c) Application means a request for authority to construct, emplace, replace, reconstruct, operate, or maintain utility facilities within the City’s rights-of-ways. An application includes the initial request plus all subsequent written amendments or supplements to the request.

(d) Cable television system or cable system shall mean a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include:

- (1) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations;
- (2) a facility that serves subscribers without using any public right-of-way;
- (3) a facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act, except that such facility shall be considered a cable system if such facility is used in the transmission of video programming directly to subscribers;
- (4) an open video system that complies with 47 U.S.C. § 573 ; or
- (5) any facilities of any electric utility used solely for operating its electric utility system.

(e) Commissioner means the Commissioner of the Department of Public Works of the City of Wilmington, Delaware or his approved designee.

(f) Communications facility means that part of a tangible facility that occupies the public rights-of-way and is used to provide cable services, OVS services or one or more communications services or to transmit telecommunications signals. The term communications facility includes radio transmitting towers, other supporting structures, and associated facilities used to transmit telecommunications signals.

(g) Communications services means the transmission for hire by optical fiber, coaxial cable, or any other bounded, tangible means, whether or not the transmission medium is owned by the provider itself, of information in electronic or optical form, including, but not limited to, voice, video, or data. Communications service includes telephone service but does not include over-the-air broadcasts to the public-at-large licensed by the Federal Communications Commission.

(h) Construction permit is an authorization issued by the Public Works Department under this Article allowing a person to erect, hang, lay, bury, draw, emplace, construct,

reconstruct, relocate, repair, operate, disconnect, remove, or displace any facility upon, across, beneath, or over any public right-of-way in this City.

(i) Department means the Department of Public Works of the City of Wilmington, Delaware.

(j) DelDOT means the Department of Transportation for the State of Delaware (or its successor).

(k) Excavation means any work in the surface or subsurface of a right-of-way.

(l) Facility or Facilities means all appurtenances or tangible things owned, leased, operated, or licensed by a utility.

(m) Federal Communications Commission (or FCC) means the Federal Communications Commission or its successor.

(n) Franchise means the legal authorization granted by the City to a person to construct, maintain, or emplace facilities upon, across, beneath, or over any public right-of-way in this City.

The term does not include any license or permit that may be required by this Article or other laws, ordinances, or regulations of the City for the privilege of transacting and carrying on a business within the City generally or for disturbing the surface of any street, road, or public thoroughfare or otherwise erecting, constructing, or altering a structure in, on, under, over, or across a public right-of-way.

(o) Franchisee means a person that has been granted a franchise by the City.

(p) License As used in this Article, license means an agreement between the City and a utility or the owner or operator of facilities under which the provider or owner or operator is permitted to occupy space on City-owned or -controlled public rights-of-way or supporting structures to emplace and maintain a radio frequency antenna or antennas.

(q) Licensee means a person that has been granted a license by the City.

(r) Obstruction means any object or structure that blocks or impedes the construction or maintenance of public works, including private facilities that provide electricity, gas, information services, sewer service, steam, telecommunications, traffic controls, transit service, video, water, or other services to customers; shrubbery or plants of any kind; and storage materials.

(s) Open Video System (OVS) means a communications facility consisting of a set of transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service, which includes video programming, which is provided to multiple subscribers within a community, and which the Federal Communications Commission or its successor has certified as compliant with Part 76 of the Rules of the Federal Communications Commission, 47 C.F.R., Part 76, as amended from time-to-time. An open video system shall be treated as a cable system (*q.v.*) for purposes of this Article, except where the context otherwise requires.

(t) Owner means a person who owns a facility that is or is proposed to be installed or maintained in a right-of-way.

(u) Permit holder means a person who has received a permit from the City.

(v) Person includes any individual, corporation, partnership, association, joint stock company, trust, governmental entity, or any other legal entity, but not the City.

(w) Public Rights-of-Way means the surface and space above, on, and below any public highway, avenue, street, lane, alley, boulevard, concourse, driveway, bridge, tunnel, park, parkway, waterway, dock, bulkhead, wharf, pier, public easement, right-of-way or any other public ground or water within or in which the City now or hereafter holds any property interest which, consistent with the purposes for which it was dedicated or otherwise acquired, may be used for the purpose of constructing, operating, and maintaining a communications facility. No reference herein, or in any license agreement, to a public right-of-way shall be deemed to be a representation or warranty by the City that its interest or other right to control the use of such property is sufficient to permit its use for such purposes, and a licensee shall be deemed to acquire only those rights of use as the City may have the undisputed right and power to give.

(x) Transfer. The transfer of an interest in a franchise or license means the sale or transfer, directly or indirectly, of an existing or newly created equity interest in the franchisee or licensee whether or not it may result in a transfer of control of the franchisee or licensee.

(y) Underground Facilities Coordination Manual is the manual, as it may be amended from time to time, in which those regulations promulgated by the Commissioner necessary to carry out the purposes of this Article shall be consolidated.

(z) Utility or Public Utility shall have the meaning set forth in Title 26, §102(3) of the Delaware Code, as amended, provided that for purposes of this Article utility also includes operators of cable television systems, open video systems, wireless telecommunications providers as well as every individual, partnership, association, corporation, joint stock company, agency or department of the State of Delaware or any association of individuals engaged in the prosecution in common of a productive enterprise (commonly called a "cooperative"), their lessees, trustees or receivers appointed by any court whatsoever, that now operates or hereafter may operate for public use within the State of Delaware, any natural gas, electric, water, wastewater, telecommunications service, system, plant or equipment.

(aa) Wireless means transmissions through the airwaves including, but not limited to, infrared line of sight, cellular, microwave, or via radio frequencies.

(bb) Wireless telecommunications facility is the capital, equipment and property, including but not limited to the poles, pipes, mains, conduits, ducts, pedestals, and electronic equipment within the right-of-way used for the purpose of transmitting, receiving, distributing, providing, or offering wireless telecommunications.

(cc) Wireless telecommunications provider is every person that owns, controls, operates or manages a wireless telecommunication facility within the City right-of-way for the purpose of offering wireless telecommunication services (*i.e.* transmission for hire of information in electronic or optical form, including, but not limited to, voice, video, or data).

Sec. 42-705. Applicability

The provisions of this Article apply to utilities existing on the effective date of this Article and thereafter.

Sec. 42-706. Authorization Required; Permit Required

(a) Other Authorizations Required.

(1) No person shall install, erect, hang, lay, bury, draw, emplace, construct, or reconstruct any facility upon, across, beneath, or over any public right-of-way in this City without first obtaining any required authorization from the City which may include a franchise, license, lease or any other form of authorization required under federal, state or local law.

(2) A person must obtain the required authorization, for any portion of a system that occupies a portion of the public rights-of-way and for the provision of utility or video programming service, over a system located, in whole or in part, within the public right-of-way.

(b) Construction Permits Required.

(1) Except as provided in Section 42-706(b)(3), no person shall install, erect, hang, lay, bury, draw, emplace, construct, or reconstruct any facility upon, across, beneath, or over any public right-of-way in this City without first obtaining a construction permit therefor from the City.

(2) Except as provided in Section 42-706(b)(3), no person shall enter upon, across, beneath, or over any public right-of-way in this City to relocate or otherwise displace any facility that is located upon, across, beneath, or over any public right-of-way without first obtaining a construction permit therefor from the City, except to the extent otherwise permitted by applicable law.

(3) The following work may be conducted without obtaining a construction permit:

(A) Work activity that makes no material change to the footprint of a facility or to the surface or subsurface of a public street if the activity does not disrupt or impede traffic in the traveled portion of a street.

(B) Work activity where facilities are relocated or where certain maintenance and/or modifications must be accomplished in coordination with a street construction or maintenance project by the City or DeIDOT.

(C) Routine operation or maintenance activities involving underground facilities but that do not include the excavation of paved street surfaces or disrupt or impede traffic in the traveled portion of a street. Examples of this work include, but are not limited to, work in underground manholes, regulators, valves, splice vaults, regulator pits, leak survey, leak investigation and classification, pumping pits or vaults.

(c) Any person, meeting the criteria of Section 42-706(b)(3) above and therefore, not required to obtain a construction utility permit, must comply with all other relevant provisions of this Article and the Underground Facilities Coordination Manual.

(d) Utilities performing excavation on DeIDOT maintained roads in the City limits are subject to State permit requirements. City of Wilmington construction permits are also required in these circumstances, however, the City permit fees are waived.

Sec. 42-707. Prohibitions.

(a) Electric substations. The installation, replacement or alteration of electric substations, consisting of transformers and other related equipment serving individual industrial or commercial establishments upon the streets, sidewalks and public highways of the City is hereby prohibited; except, that the Commissioner may, upon a showing that the strict application of this section would cause economic hardship or would make it impractical for an individual industrial or commercial establishment to obtain electric service, waive the application of this section.

(b) Injuring, etc., public improvements in public streets. ~~Except to the extent authorized by a construction permit, it~~ shall be unlawful for any person to willfully, maliciously or negligently enter upon a street or roadway in the course of construction by means of a vehicle or otherwise, or remove, for the purpose of entering or otherwise, any barrier erected at the direction of the city on the public streets of the city, or disturb, injure or destroy the paving, material or construction composing any sidewalk, footway, roadway, grass plot, curbing, gutter, sewer drain, conduit, sewer inlet, sewer or conduit manhole, sewer lamp hole, water stop box, center stone cover, street sign, guide posts or other municipal improvement or construction, located in the public streets of the City, either by the means of fire, the use of implement or machinery, the moving of a traction engine, the building of mortar box or by any other means whatsoever.

(c) ~~Erection of fences, etc., to guard excavations~~ Excavation Warnings and Barriers. Any person who has permission from the Department of Public Works to excavate in the streets or sidewalks shall erect and maintain fences or barriers and keep sufficient ~~red lights or~~ lanterns and other warning devices thereon at night and take any other necessary precautions to effectually guard the public against all accidents from the beginning to the end of the work.

(d) Fees for certain engineering and surveying services. The fees and charges of the Department of Public Works for certain engineering and surveying services shall be paid in advance and shall be in amounts as provided by regulations of the Department.

Sec. 42-708. Administration.

- (a) The Commissioner or his or her designee shall:
- (1) issue all construction permits and inspect the work under each;
 - (2) determine and collect all fees owed under this Article;
 - (3) publish from time to time a schedule of application and hearing fees, which shall be designed to recover the City's costs in processing applications for permits hereunder and may provide specially for hearing fees in those cases where hearings are required; and
 - (4) from time to time amend the provisions of the Underground Facilities Coordination Manual, which shall include but not necessarily be limited to provisions concerning:
 - (A) Design requirements
 - (B) Permit procedure and requirements;

- (C) Forms of permits and other documents;
- (D) Insurance and other requirements for the protection of the City; and
- (E) Permit-related fees.

Sec. 42-709. Permit Procedures

(a) An application for a permit shall be submitted in the format and manner specified by the Department in Appendix B of the Underground Facilities Coordination Manual.

(b) Requests for waivers from any requirement of this Section 42-709 shall be made in writing to the Commissioner. The Commissioner may grant a request for waiver if the utility (or a contractor working for the utility) demonstrates to the Commissioner that, notwithstanding the issuance of a waiver, the Department will be provided all information necessary to understand the nature of the construction or other activity to be conducted pursuant to the permit sought.

(c) If the activity for which the permit is sought will include or require the cutting or any other manner of construction or obstruction on a City sidewalk, the applicant must file a copy of the permit application form in the offices of the Department of Licenses & Inspections in the Louis L. Redding City/County Building, 3rd Floor, 800 N. French St., Wilmington, Delaware 19801.

(d) Permit application forms that are not complete may be rejected. No deadline applicable to the Department associated with the filing of a complete permit application form shall begin to run until such time as a complete application form has been filed by applicant.

(e) If the submittal of plans or other documents is required, the plans and/or documents shall be legible and of a scale that accurately and clearly presents the detail of the proposed work. Plans or documents not meeting these requirements may be rejected.

(f) If the submittal of plans, requests or other documents is required, a utility may substitute electronic data transfer under the procedures set forth in the Underground Facilities Coordination Manual.

(g) The Commissioner may approve, conditionally approve, or deny an application for a permit.

(h) If an application is approved, the Commissioner shall issue a permit to the applicant.

(i) If an application is conditionally approved, the Commissioner may condition the permit with specified requirements that preserve and maintain the public health, safety, welfare, and convenience.

(j) If an application is denied, the Commissioner shall advise the applicant by a written, electronic, or facsimile communication of the basis for the denial.

Sec. 42-710. Permit Requirements

(a) Permit At Work Site. A copy of the approved permit [or permit reference number](#) shall be present at the site of the work during periods of actual work.

(b) Duration of Permit. The approved construction permit, ~~other than a maintenance permit,~~ will be valid for a period of ~~60~~90 days following issuance of such permit unless otherwise stipulated ~~or an extension of time is requested by the utility to the Department.~~ Once work has begun it shall continue according to acceptable industry practice.

(c) When the City in its capacity as a utility engages in any activity that includes an excavation in the paved portion of a public street, the City shall keep a record of the date, location, purpose, and size of the excavation.

~~(d) — Maintenance Permits. The Commissioner may issue a maintenance permit on an annual basis to a utility instead of issuing individual construction permits for activities in the public streets covered by the maintenance permit. A maintenance permit covers those non-emergency activities, excluding excavations in or under the paved public streets, that are specified in the permit, which may include:~~

~~(1) — an activity that makes no material change to the footprint of the facility or to the surface or subsurface of a public street but disturbs or impedes traffic on a local road;~~

~~(2) — abandoning facilities;~~

~~(3) — replacing overhead poles;~~

~~(4) — new individual services to a residence or building from existing facilities that are on the same side of the public streets, so long as the activity related to the service does not exceed 300 feet; and~~

~~(5) — directional boring under sidewalks and driveway aprons.~~

~~(d)~~ (e) Emergency Activity. A ~~permit holder~~utility may conduct emergency activity in the paved or unpaved area of the public streets that is necessary for the preservation of life, health, or property or for the restoration of interrupted service, without first obtaining a permit therefore provided that:

(1) the ~~permit holder~~utility notifies the City of the activity as soon as possible but no later than 24 hours after the activity is conducted; and

(2) within 3 business days, the ~~permit holder~~utility applies for any permit that would otherwise have been necessary for the activity.

Sec. 42-711. Permit Fees.

(a) Permit fees collected under this Article, where allowed by law and existing utility franchises, are designed to recover: processing and record keeping; research related to permit evaluation; applicable field inspections; review of traffic control and public safety issues; coordination with other City Departments; and related expenses.

(b) Construction permits shall be issued only upon payment of all applicable permit fees. Applicable permit fees are listed in Appendix A of the Underground Facilities

Coordination Manual. These fees may be adjusted from time to time to reflect applicable expenses.

Sec. 42-712. Planning and Design.

(a) In planning new utility installations in street rights-of-way, consideration must be given at all times to sound engineering principles and economic factors. Safety, the visual quality of the street, and efficiency of maintenance must be considered when locating new utilities.

(b) In addition to the items listed in subsection (a), the following items must be considered:

(1) Placement of underground utility lines in locations that will minimize the need for later adjustments or maintenance.

(2) Maintenance of underground utility lines with minimum interference to street traffic.

(3) Location of longitudinal installations on a uniform alignment as near as practicable to provide a safe environment for traffic operation and preserve space for future street improvements or other utility installations.

(4) Location of an underground utility line crossing a street shall be on a line generally perpendicular to the street alignment.

(5) Open cutting, where necessary, should be performed using methods to minimize the extent of disturbance of the ground or road surface.

(6) Location of test holes and maintaining adequate clearance from other utilities shall be considered in connection with the use of "trenchless technology", such as directional boring, or other methods to minimize road disturbance.

(7) The utility's responsibility for operation, and maintenance of all facilities that it owns and installs within the boundaries of the right-of-way.

(8) Avoiding interference with access to other pre-existing facilities.

(c) Design. For existing utilities, excavation for maintenance work, extensions of the main or installation of service connections or other work requiring excavation in the right-of-way and specifically in the paved areas of a street within the City shall be subject to review and to the following design considerations:

(1) The location of the proposed work.

(2) Method of installing and repairing the street (road) or other (sidewalk) structures.

(3) Preparation of a traffic control plan.

(4) Provision for future expansion of utility facilities should be evaluated when planning adjustments to existing facilities or preparing for new installations.

(d) Utilities are responsible for obtaining all required permits from state and federal governmental agencies including but not limited to:

- (1) Water quality permits,
- (2) Clean Water Act, Section 404 permits, and
- (3) Erosion and Sedimentation control permits.

Sec. 42-713. Construction.

(a) Placement of Facilities. All facilities placed by an owner in public streets within the City shall be so located as to minimize interference with the proper use of public streets and other public ways and places, and to minimize interference with the rights or reasonable convenience of property owners who adjoin any of these public streets or other pre-existing utilities in the right-of-way.

(b) Location. No holder of any construction permit for any facility shall erect new aerial plant in or on a public right-of-way in which one or more public utility providers has placed its lines underground or in an area where the City by ordinance has forbidden new aerial plant to be constructed or existing aerial plant to be maintained.

(c) Construction and Location Details. The City reserves the right to review the detailed location and design of all utility installations, adjustments, or relocations in the street right-of-way for compliance with these procedures and issue permits for proposed utility work pursuant to the provisions of this Article.

(d) All utilities and contractors working in the City of Wilmington shall comply with all applicable requirements of 26 Del. C ch. 8, also known as the Underground Utility Damage Prevention and Safety Act.

(e) Each holder of any construction permit for any facility shall, upon written notice from the City, reasonably in advance, promptly relocate its lines at its own expense to accommodate realignment or construction of public streets, sidewalks, curbs, drains, sewers, and public improvements of any sort.

(f) Obstructions in Public Streets.

(1) A person who places or maintains an obstruction in, on, over, under or through a City public street shall promptly shift, adjust, accommodate, or remove the obstruction on reasonable notice from the City.

(2) If a person fails or refuses to shift, adjust, accommodate, or remove an obstruction after reasonable notice, the Commissioner may charge the person having or maintaining the obstruction for the cost of performing the work.

(3) Any opening or obstruction in the public streets made by an owner in the course of its operation shall be guarded and protected at all times by the placement of adequate barriers, fences or boardings, the bounds of which, during periods of dusk and darkness, shall be clearly designated by warning lights.

(g) Restoration.

(1) In case of any disturbance of pavement, sidewalk, driveway or other surfacing, or any public or private property, the owner or permit holder shall, in a manner acceptable to the City, replace, repair, and restore all paving, sidewalk, driveway

or surface of any public street or alley disturbed, or public or private property to as good condition as existed prior to the commencement of such work.

(2) Such restoration shall be at the owner's or permit holder's cost and expense, except to the extent otherwise required by applicable law.

(3) Warranty of Work. All paving restoration work must be guaranteed and maintained for a period of 3 years following notice of completion (unless such lesser time period shall be specifically stated in the permit holder's franchise agreement with the City). Such warranty shall cease immediately upon disturbance of the work by others including, but not limited to, other Utilities, City of Wilmington and/or State of Delaware agencies, including agents and contractors of these entities.

(4) In the event that the owner or permit holder fails to complete any work required for the repair, protection, or restoration of the public ~~ways or private property rights of way~~, or any other work required by law or ordinance, within the time specified by and to the reasonable satisfaction of the City, the City, following notice and an opportunity to cure, may cause such work to be done. In such a case, the owner or permit holder shall reimburse the City the cost thereof within thirty (30) days after receipt of an itemized list of such costs, or the City may recover such costs through any bond or other security instrument provided by the owner or permit holder, except to the extent otherwise required by applicable law.

(h) Notice.

(1) The permit holder shall not render any road impassable without previous notification to the City of Wilmington Police Department in accordance with the requirements and time frames established in the Underground Facilities Coordination Manual and the Application.

(2) The permit holder shall notify the Department within 5 business days upon completion or upon cancellation of the permitted work.

(3) Failure to provide such notice shall be grounds for suspension of the work until such notice is provided. The utility or contractor shall sufficiently address concerns of emergency personnel such that public safety is not compromised.

(i) Special Considerations.

(1) New Surface Considerations. Utility excavation work that requires disturbance of City street surfaces that have been resurfaced during the past 5 years shall be limited to emergencies, installation of facilities to serve new customers or increased customer need, work required by regulation, ~~or~~ work required in the interest of public safety or environmental protection or work that utilizes construction methods approved by the Department of Public Works that will minimize the damage to the street surface.

(2) Winter Considerations. It is desirable to minimize excavation of City streets between December 1st and March 1st due to the possibility that proper restoration material availability may be limited. Work that requires disturbance of such surfaces shall be limited to emergencies, installation of facilities to serve new customers or increased customer need, work required by regulation, work in advance of paving or

work required in the interest of public safety or environmental protection. If weather conditions prevent the surface repair to be accomplished in accordance with the requirements of the Underground Facilities Coordination Manual, a temporary repair shall be made, and periodically maintained, using acceptable cold weather patching material. This temporary repair shall be completely removed when weather conditions permit and "hot mix" material as specified in the Underground Facilities Coordination Manual is available for the installation of a permanent surface repair.

(j) Utility installations in the right-of-way area of City streets are to meet or exceed all of the requirements listed in the Underground Facilities Coordination Manual.

(k) Clearances between utilities. Vertical and horizontal clearances between utilities must conform to the utility codes set forth in the Underground Facilities Coordination Manual.

(l) Exceptions to Requirements.

(1) Any request for deviation from the requirements described in this Article due to extreme hardship shall be submitted in writing to the Department. The request should include full justification supporting the claimed hardship condition. The Department will promptly review the claim and provide a recommendation that will be forwarded to the Commissioner for final action.

(2) The City recognizes and encourages innovative techniques and new technologies in the removal and restoration of street pavements and rights-of-way. To that end, the Commissioner may waive or revise certain specific requirements of this policy, when such action would effectively advance a new technology and/or state of knowledge. The burden of testing or otherwise demonstrating that a new technique is likely to be effective rests with the requestor.

(m) Other Related Regulations.

(1) All utilities shall comply with the street safety, marking, and other requirements of the City's "Underground Facilities Coordination Manual."

(2) Underground utilities must consider safe trenching practices when preparing their designs and constructing their facilities. Both utilities and their contractors must comply with all OSHA (Occupational Safety and Health Administration) requirements while working in rights-of-way.

(3) Contractors must insure that work or equipment placed in proximity to overhead high voltage lines complies with the State of Delaware Overhead High-Voltage Line Safety Act.

(4) Communications Act of 1934, as amended, 47 USC 151 *et seq.*

Sec. 42-714. Inspection, Reports, And Notice.

(a) Inspection of Facilities.

(1) The City may inspect all facilities and conduct any tests that the City finds necessary to ensure compliance with the terms of this Article and any other applicable law or agreements.

(2) If such a test is to be conducted at a location other than a customer's premises, then the City shall first provide the owner with an opportunity to approve the test or type of test in question, which approval shall not unreasonably be withheld, conditioned, or delayed.

(3) An owner shall allow the City to make such inspections at any time on at least ten days' notice or, in case of an emergency, on demand without prior notice.

(b) **Prior Notice to Department.** For emergency activity, a permit holder shall notify the Department during or within 24 hours after the activity. For non-emergency activities, the permit holder shall notify the Department at least 48 hours before the activity takes place. For emergency and non-emergency activities, the utility shall provide information about the activity as required by the Department.

(c) **Notice to Public.**

(1) This Section 42-714(c) applies to non-emergency activity in the City's public streets when the activity adjoins residentially zoned and developed property and will not be completed and restored in a period of 30 days or less.

(2) A permit holder shall either:

(A) At least 72 hours before commencement of the activity, (i) post and maintain a notice that is located at the beginning and end points of the activity, and (ii) deliver notice to each address in the area of the activity and within 175 feet of its boundaries; or

(B) At least 15 calendar days before commencement of the activity, provide written notice to each address in the area of the excavation and within 175 feet of its boundaries.

(3) For good cause, the Commissioner may require a permit holder to employ a combination of the notices required by Section 42-714(c)(2).

(4) The notices required by this Section 42-714 shall include the name, telephone number, and address of the owner and permit holder, a description of the work to be performed, the duration of the work, and the name, address, and telephone number of a person who will provide information to and receive complaints from any member of the public concerning the work. Posted notices shall be in a format and size acceptable to the Department. [In conjunction with the distribution of any notice required by this Section 42-714\(c\), permit holder shall provide the Department with a copy of such notice.](#)

(d) *Facilities Survey Reports.* All utility companies with underground facilities located within the City of Wilmington's right-of-ways shall submit a five-year plan, updated annually, showing street locations of all proposed construction. The Department will maintain these plans in confidence. Such plans shall be considered privileged and not to be public records for purposes of 29 Del. C. ch. 100, unless the City is directed otherwise by a court of competent jurisdiction or other authority.

Sec. 42-715. Complaints.

A utility shall establish and file with the Department written procedures for receiving, acting on and resolving complaints [relating to activities within the public rights-of-way.](#) The

utility shall investigate a complaint and notify the resident in writing within ten days after receipt of the complaint of the results of the investigation and of any proposed action or resolution.

Sec. 42-716. Bonding; Insurance; Indemnity.

(a) Bonding. No construction permit shall be valid until the applicant shall have filed with the Commissioner the required cash deposit, bonds or letters of credit, in acceptable form, running in favor of the City to guarantee the applicant's obligations under this Article. A single cash deposit, bond or letter of credit, in an amount determined by the Department, may be provided to fulfill the obligations of this section if a utility will require multiple construction permits in any calendar year.

(1) Road Surface Repairs. A utility shall provide a cash deposit, performance bond or letter of credit to be held by the City for the duration of the construction permit.

(A) The bond or letter of credit shall be issued in such manner that in the event of noncompliance with the requirements of this Article or the Underground Facilities Coordination Manual for road surface repair, the City shall have access to funds from the bond or letter of credit in order to perform the repair of the street surface as required by the Underground Facilities Coordination Manual.

(B) The bond or letter of credit may not be cancelled without either (i) the submission of a replacement bond that satisfies the requirements of the Underground Facilities Coordination Manual or (ii) the written approval of the Commissioner of Public Works.

(C) The amount of the bond or letter of credit shall be as specifically provided in the utility franchise or, if ~~there is no~~ not specified in the franchise, in the Underground Facilities Coordination Manual.

(2) Facility Removal. A utility shall provide a bond or letter of credit to be held by the City to cover the cost of removing any facilities installed by the utility from the public right-of-way. The amount of the bond or letter of credit shall be ~~20 percent of the cost of construction for the proposed facility, provided that if the applicant can demonstrate that the cost of removal of those facilities is less than this amount, the applicant need only provide a bond in the amount of the cost of removal, to remain in effect throughout the operation and use of the facility as security for removal of the facility or any part thereof~~ as specifically provided in the utility franchise or, if not specified in the franchise, in the Underground Facilities Coordination Manual.

(b) Insurance. The Utility shall file with the City evidence of workers compensation and liability insurance with an insurance company licensed to do business in Delaware. The amount of liability coverage shall be not less than one million dollars (\$1,000,000) per occurrence and two million dollars (\$2,000,000) in the aggregate. The insurance will protect the City from and against all claims by any person whatsoever for loss or damage from personal injury, bodily injury, death, or property damage to the extent caused or alleged to have been caused by the acts or omissions of the utility. If the utility is self insured, it shall provide the City with proof of compliance regarding its ability to self-insure and proof of its ability to provide coverage in the above amounts. All insurance policies shall contain suitable stipulations providing for blasting operations if and when required.

(c) Indemnity. Except as otherwise provided for in a utility franchise, the utility shall at all times defend, indemnify and save harmless the City of Wilmington, its employees and agents, from any and all actions, claims, suits, demands or costs (including reasonable attorneys' fees) that may be made by any person or persons, company or corporation, for or by reason of any injury or injuries (including death) or damage to any person or thing or property whatever on account of the construction, reconstruction, repairs, alterations, operation and maintenance of the utility or its facilities. The utility shall also be liable to the City for all damages caused and sustained by the City for and by reason of such construction, reconstruction, repairs, alteration, operation and maintenance, unless said action, claim, suit, demand or loss is caused by the negligence or willful misconduct of the City, its agents, contractors, or employees.

Sec. 42-717. Transfers and assignments.

A permit holder shall notify the City within thirty (30) days of the closing of any transfer or other transaction whereby ownership or control of the facilities sought to be constructed in the rights-of-way which are the subject of a permit issued under this Article is transferred by sale, lease or otherwise, and upon the City's request shall file with the City an executed copy of the complete closing documents and any other information required in the permit application in Appendix B of the Underground Utility Coordination Manual.

Sec. 42-718. Enforcement.

(a) Enforcement Procedures and Remedies.

(1) If the City determines that a person or permit holder has failed to perform any obligation under this Article or has failed to perform in a timely manner, the City may:

- (A) make a written demand on the owner or permit holder that it remedy the violation;
- (B) issue a stop work order pursuant to Section 42-718(b); and/or
- (C) issue an order to cure pursuant to Section 42-718(c).

(2) If the violation is not remedied or in the process of being remedied to the satisfaction of the City within a reasonable time period following a written demand or order to cure, the City may:

- (A) enforce the provisions of this Article through injunctive proceedings, an action for specific performance, or any other appropriate proceedings;
- (B) issue a civil citation and impose a penalty not to exceed ~~\$1,000~~1,000 per day.
- (C) assess against the owner or permit holder any monetary damages provided for such violation in any agreement between the owner or permit holder and the City;
- (D) assess and withdraw the amounts specified above from the owner's or permit holder's performance bond or other applicable security instrument;

(E) revoke any permit held by the owner or permit holder as provided in its permit; or

(F) pursue any legal or equitable remedy available under any applicable law or under any agreement between the owner or permit holder and the City.

(3) Remedies available to the City for violations under this Article and under any franchise, license, or lease agreement shall be construed, except as otherwise provided in this Article, as cumulative and not alternative.

(4) If civil penalties are assessed against an owner or permit holder under this section, the owner or permit holder is not subject to liquidated damages payable to the City for the same violation. If liquidated damages payable to the City are assessed against an owner or permit holder, the owner or permit holder is not subject to civil penalties under this section for the same violation. If the City seeks actual damages for any violation, any civil penalties or liquidated damages recovered by the City for the same violation, including civil penalties or liquidated damages for partial time periods included in a longer time period for which actual damages are sought, shall be offset against any actual damages recovered by the City.

(5) An owner or permit holder shall pay civil penalties or liquidated damages within 30 days after receipt of notice from the City.

(6) The filing of an appeal to any regulatory body or court does not stay or release the obligations of an owner or permit holder under the franchise agreement and applicable law.

(7) An assessment of liquidated damages or civil penalties does not constitute a waiver by the City of any other right or remedy they may have under the franchise or applicable law, including the right to recover from the owner or permit holder any additional damages, losses, costs, and expenses, including actual attorney fees, that were incurred by the City by reason of or arising out of the violation. However, the City's election of liquidated damages under the franchise agreement shall take the place of any right to obtain actual damages over and above the payment of any amounts otherwise due. This provision may not be construed to prevent the City from electing to seek actual damages for a continuing violation if it has imposed civil penalties or liquidated damages for an earlier partial time period for the same violation, subject to the offset specified in Section 42-718(a)(4).

(b) Stop Work Order.

(1) The Commissioner may issue a stop work order, impose conditions on a permit, or suspend or revoke a permit if the Commissioner determines that:

(A) a person has violated applicable law or regulations, or any term, condition, or limitation of a permit;

(B) activity in the public streets poses a hazardous situation or constitutes a public nuisance, public emergency, or other threat to the public health, safety, or welfare; or

(C) there is a paramount public purpose.

(2) The Commissioner shall notify the permit holder of action taken under Section 42-718(b)(1) by a written, electronic, or facsimile communication, and the permit holder shall comply immediately after receipt of the notice.

(3) A stop work order shall state the conditions under which work may be resumed and shall be posted at the site.

(c) Order to Cure

(1) The Commissioner may order an owner or permit holder who has violated applicable law, regulations, or any term, condition, or limitation of a permit, to cure the violation within the time specified in the order.

(2) An order issued under this section shall warn the person that a failure to comply within the time specified makes the person subject to the imposition of a civil fine under Section 42-718 and to liability for any costs incurred by the Department to effectuate compliance.

(3) If the owner or permit holder fails, neglects, or refuses to comply with an order issued under this Section 42-718(c), the Commissioner may complete the excavation or other work in the public streets in any manner the Commissioner deems appropriate, and the owner or permit holder shall compensate the Department for all costs incurred, including costs for administration, construction, consultants, equipment, inspection, notification, remediation, repair, and restoration. The cost of the work may be deducted from any bond or other security instrument of the owner or permit holder. The Department's completion of an excavation or other work in the public streets does not relieve the owner or permit holder from the warranty and liability provisions of this Article the indemnification provisions of Section 42-716(c), or any other term or condition of this Article.

(d) Injunctive relief. In addition to the foregoing remedies, the City may seek an injunction to mitigate or terminate the violation, or employ any other remedy available at law or equity.

(e) Termination. Where, after notice and after a hearing, if timely requested by an applicant, the City finds (i) that applicant, after written notice and an opportunity to cure, has failed to cure a violation of the terms of construction permit or of this Article, or (ii) that, after written notice, the applicant has been operating in repeated or continuing violation of one or more material terms of the construction permit, the City may terminate the construction permit as of a date certain, and the applicant shall cease all construction or other activities authorized by the subject construction permit on that date.

(f) No Waiver. The failure of the City to insist on timely performance or compliance by any person holding a construction permit shall not constitute a waiver of the City's right to later insist on timely performance or compliance by that person or any other person holding such a construction permit.

Sec. 42-719. Revocation or termination of Permits.

(a) The Commissioner may require suspension of work or revoke the permit at any time for failure to comply with the provisions of this Article.

(b) If a permit is revoked, the work will cease. No work will continue until the Commissioner is satisfied the situation that caused the revocation has been rectified.

(c) If while the work is suspended, the work site is left in an unsafe condition, or becomes unsafe and the Utility fails to promptly rectify the situation, the Department may take necessary steps to return the site to a safe condition. Such work shall be at the Utility's expense. If necessary, the City may proceed to contact the bonding company for collection costs incurred.

Sec. 42-720. Severability

In the event that the courts should find any section of this Article to be unconstitutional or otherwise unlawful, the remainder of the Article shall be construed in a way that will effect the Council's purpose to the greatest extent possible.

Sec. 42-721. Cable communications

To the extent that any of the provisions of this Article conflict with the provisions of Chapter 6 of the City Code, the provisions of Chapter 6 shall apply.

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